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A TREATISE

ON THE

LAW OF TORTS

OR THE

WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT

BY THOMAS M. COOLEY, LL. D.

STUDENTS' EDITION

BY JOHN LEWIS

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PREFACE.

Judge Cooley's work on torts has been a standard text book for law schools and students since its first appearance in 1878. The preface to the first edition is as follows:

"In preparing the following pages the purpose has been to set forth with reasonable clearness the general principles under which tangible and intangible rights may be claimed, and their disturbance remedied in the law. The book has been written quite as much for students as for practitioners, and if some portions of it are more elementary than is usual in similar works this fact will supply the explanation."

In preparing the present volume the original purpose of Judge Cooley has been kept in view and the endeavor has been "to set forth with reasonable clearness the general principles" of torts and to illustrate these principles by an abundant reference to the decided cases. The work has been greatly expanded along the line of negligence, in order to give adequate treatment to this most prolific source of litigation. About one-third of the volume, comprising chapters XI, XVI, XVIII and XIX, is devoted to this subject.

JOHN LEWIS.

Oak Park, Illinois, 1907.

TABLE OF CONTENTS.

CHAPTER I.

General Principles.

		Page.
§ 1.	As to the definition of a tort	1
2.	General characteristics of a tort	2
3.	Of rights in general	3
4.	Growth of rights	3
5.	Moral and legal wrong	9
6.	Private and public rights—Crimes and torts	10
7.	Contracts and torts	12
8.	Acts merely intended	17
9.	Threats and words	18
10.	Accidental injuries	18
11.	Damage from the lawful exercise of rights	21
12.	Concurrence of wrong and damage	22
13.	Mental anguish	24
14.	Fright or mental anguish producing sickness or other physical effects	26
15.	Proximate cause	30
16.	Proximate cause—Illustrations	35
17.	Malice as a source of liability	43
18.	Injury sustained in wrong-doing	48
19.	Torts by relation	52

CHAPTER II.

The Parties Who May be Held Responsible for Torts.

§ 20.	Liability of infants and incompetents for contracts and crimes	54
21.	Torts by lunatics and persons of unsound mind	54
22.	Torts by infants	57
23.	Parents' liability for torts of child	62
24.	Torts by drunkards	63
25.	Torts by married women	63
26.	Torts by private corporations	67
27.	Liability of charitable corporations for torts	71
28.	Liability of public corporations for torts	72
29.	Liability of the state	82

CHAPTER III.

WRONGS IN WHICH TWO OR MORE PERSONS PARTICIPATE.

		Page.
§ 30.	What constitutes a joint wrong generally	83
31.	Conspiracy	85
32.	Adoption or ratification of wrong	87
33.	Joint liability of officer and party	88
34.	Participation by attorneys	90
35.	Joint liability of officer and deputy	90
36.	Joint liability for slander	91
37.	Joint liability in case of negligent injuries	92
38.	In case of nuisances	95
39.	In case of master and servant	96
40.	Joint liability in other cases	97
41.	General consequences of joint liability	98
42.	Effect of judgment against less than all	100
43.	Effect of release or other settlement with one joint wrong-doer	102
44.	Contribution in indemnity as between wrong-doers	104

CHAPTER IV.

OF THE REMEDIES FOR TORTS.

§ 45.	Redress by the party's own act	108
46.	Abatement of nuisance	108
47.	Recaption or reprisal	112
48.	Recaption in case of confusion of goods	115
49.	Recaption in case of transformation of the property	117
50.	Entry upon lands to re-possess them	119
51.	Distress of cattle damage feasant	119
52.	Distress of goods to compel performance of duty	120
53.	Redress by action	121
54.	Remedy in equity	121
55.	Remedy in admiralty	122
56.	The action for damages—General and special damages	123
57.	Nominal damages	124
58.	Compensatory damages	126
59.	Punitive damages	126
60.	Avoidable consequences	127
61.	Allowance of interest in tort actions	128
62.	Waiving a tort and suing in contract	129
63.	Locality of wrongs—Conflict of laws	133
64.	Defenses	136
65.	Assent of plaintiff	137
66.	Release or agreement after injury	139
67.	Statute of limitations	140
68.	Parties	142
69.	Remedy for violation of statutory duties	144

CHAPTER V.

Wrongs Affecting Personal Security.

Page.
§ 70 Scope of chapter 149

Assault and Battery.

71. Assaults 149
72. Batteries 150
73. Batteries assented to 151
74. Intent in batteries 153
75. Battery in self-protection 153
76. In defense of family 155
77. In defense of possessions 155
78. In case of teacher and pupil 157
79. In case of parent and child 157
80. Use of excessive force in making defense 158

False Imprisonment.

81. Nature of the wrong 158
82. Lawful restrains in certain relation 159
83. Arrest by virtue of legal process 161
84. Arrest without warrant 163
85. Restraint of the insane 165
86. What constitutes false imprisonment—Illustrative cases ... 166

Malicious Prosecution; Criminal Proceedings.

87. Nature of the wrong 170
88. Probable cause 170
89. Advice of counsel 173
90. Proof of probable cause or the want of it 176
91. Malice 179
92. What is an end of the proceeding 180
93. Who liable 182

Malicious Prosecution; Civil Proceedings.

94. When there is an interference with person or property 183
95. When no interference with person or property 185
96. The same rules apply to actions for malicious civil suits as for criminal prosecutions 187

Other Wrongs to the Person.

97. Malicious abuse of process 188
98. Arrests for an ulterior purpose 189
99. Officer serving his own process 191
100. Arrest of privileged persons 192
101. Violating the right of privacy 192

CHAPTER VI.

The Wrongs of Slander and Libel.

		Page.
§ 102.	Nature of the wrong	196
103.	Publication	196
104.	Words actionable *per se*	200
105.	Classification of slanderous words	200
106.	Words which impute an indictable offense	201
107.	Words which impute a contagious or infectious disease	205
108.	Words damaging as respects office or profession	205
109.	Words which tend to injure one in his business or trade	207
110.	Words not actionable *per se*	210
111.	Libel compared with slander	211
112.	What constitutes libel	212
113.	Meaning and construction of words used—Questions for court and jury	216
114.	The colloquium and innuendo	219
115.	Truth as a defense	221
116.	Malice	223
117.	Privilege in general	224
118.	Cases of absolute privilege—Judicial proceedings	225
119.	Same—Legislative proceedings	229
120.	Same—Executive acts	230
121.	Qualified or conditional privilege	231
122.	Cases conditionally privileged—Examples	236
123.	Cases privileged on individual reasons	238
124.	Liberty of the press—Its privilege and responsibilities	240
125.	Repeating slanders and libels	246
126.	Slander of property	247
127.	Slander of title	247
128.	Damages	248
129.	Slander of the dead and other points	249

CHAPTER VII.

Injuries to Family Rights.

§ 130.	The family, as such, has no rights	251
131.	Wrongs to the husband	251
132.	Husband's remedy for injury to the wife	253
133.	Wrongs to the wife	254
134.	Action by wife for alienation of husband's affections	257
135.	Action by parent	258
136.	Parent's action for seduction of daughter	260
137.	Wrongs to a child	264
138.	Actions by guardians	264
139.	Action for fraudulent marriage	265
140.	Burial rights and rights in dead bodies	266
141.	Master and servant	270

CHAPTER VIII.

Action for Death by Wrongful Act.

Page.

§ 142. No action at common law for causing the death of a person 271
143. Statutes giving an action for wrongful death..... 271
144. Construction of statutes generally 272
145. Whether remedy local 274
146. Who liable 276
147. The plaintiff 276
148. The beneficiaries 277
149. What is wrongful act, neglect or default..... 279
150. Defenses 280
151. Damages recoverable 283

CHAPTER IX.

Wrongs in Respect to Certain Civil and Political Rights.

§ 152. Right to form business relations—Preventing employment. 289
153. Procuring discharge of employee 291
154. Action for inducing breach of contract 292
155. Combinations to prevent or interfere with the employment of labor 293
156. Injury to trade or business 296
157. Right to the service of common carriers and to other *quasi*-public services 302
158. Right to the privileges and accommodations of inns, restaurants and the like—Civil rights acts..... 305
159. Right to instruction in the public schools..... 307
160. Right of suffrage 309

CHAPTER X.

Injury to Real Property.

§ 161. Scope of chapter 311
162. Unlawful entry upon land—Trespass 311
163. Trespasses in hunting..... 313
164. Trespasses in fishing 313
165. Trespass by means of inanimate objects..... 315
166. Possession and the right of possession 316
167. Remedy of those having estates not in possession..... 321
168. Justifiable entries—License 322
169. Implied license 322
170. Express license 324
171. Revocation of license after expense incurred..... 326
172. License given by law 328
173. Abuse of license—Trespasser *ab initio*..... 331

Page.

§ 174. Trespass upon abutting owners 332
175. Tenants in common 333
176. Injuries to land, other than trespass 335
177. Waste 335

CHAPTER XI.

Injuries by Animals.

§ 178. Common-law rule as to trespassing animals 338
179. Modifications of the common law—Fencing statutes 341
180. Cattle escaping when being driven on highway 342
181. Injuries by vicious animals 343
182. The notice 346
183. Who liable 347
184. Effect of plaintiff's contributory negligence or other fault .. 348
185. Right to kill vicious animals 349
186. Injuries by wild beasts 350

CHAPTER XII.

Injuries to Incorporeal Rights.

§ 187. Nature of incorporeal rights 351
188. Copyrights and patents 351
189. Inventions not patented 352
190. Literary and artistic productions not copyrighted 353
191. Private letters 354
192. Wrongs in respect to trade-marks 354
193. What may be a trade-mark 356
194. What is an infringement 360
195. Unfair competition 361
196. Easements in general 362
197. Right of way 362
198. Easements in respect to water 364
199. Easement of support 364
200. Party walls 367
201. Light and air 369
202. Rights of abutting owners 370
203. Rights of riparian owners 370
204. Action for interfering with easement 371

CHAPTER XIII.

Violations of Official Duty.

§ 205. Liability in general 373
206. Rules applicable to all officers 374
207. Executive officers 375

Page.

§ 208. Legislative officers 376
209. Judicial officers 377
210. Jurisdiction essential 379
211. Judge interested 382
212. Ministerial action by judicial officers 382
213. Quasi-judicial officers 383
214. Ministerial officers 386
215. Election officers 387
216. Recorder of deeds 389
217. Inspectors 391
218. Postmasters 392
219. Sheriffs 393
220. Notaries public 399
221. Taxing officers 400
222. Highway officers 400
223. Clerks of courts and other officers 401
224. Want of means to perform duty 402
225. *De facto* officers 403

CHAPTER XIV.

Wrongs in Respect to Personal Property.

§ 226. Personal property defined 405
227. Fixtures 405
228. Right to crops 411
229. Right to trees 413
230. Right to wild animals 413
231. Trespass to personalty 414
232. Indirect injuries to personal property 417
233. Trover and conversion 417
234. The plaintiff's right or title 419
235. What may be converted 421
236. What constitutes conversion 423
237. Demand and refusal 430
238. Conversion by tenant in common 432
239. Return of property 434
240. Damages 435
241. Effect of judgment on title to the property 437
242. Justification under process 438

CHAPTER XV.

Frauds or Wrongs Accomplished by Deception.

§ 243. Definition of fraud 441
244. How representations may be made 442
245. When silence is fraudulent 442

Page.

§ 246. Matters of opinion—Representations as to value, condition, cost, quality, etc. ... 446
247. Representations as to matters of law ... 452
248. Fraudulent promises ... 452
249. Representations as to title ... 453
250. Materiality of representations ... 454
251. Duty of self-protection ... 455
252. Who may rely upon the representations—Representations to the public ... 457
253. Knowledge by the wrong-doer of the falsity ... 460
254. Representations must have been acted on ... 463
255. Burden of proof ... 466
256. Rescinding contract for fraud ... 467
257. Affirming contract ... 469
258. Remedy ... 469

CHAPTER XVI.

Master and Servant.

§ 259. Who is a servant ... 471
260. Independent contractors ... 477
261. The master's liability to third persons for the acts or omissions of his servants—General rule ... 485
262. Master's liability for the wilful, malicious or intentional acts of his servants ... 486
263. Master's liability for the unintentional or negligent acts of his servants ... 490
264. Disobedience of orders immaterial ... 492
265. Scope of employment ... 493
266. Master's liability to the servant—General principles ... 499
267. Master's duty and liability as to place ... 502
268. Duty and liability of master as to tools, appliances, materials, etc. ... 508
269. Duty of master in employing and retaining fellow-servants 515
270. General duty of master to protect servant from latent and unnecessary dangers ... 518
271. Duty of master as to supervision and regulation ... 519
272. Duty to warn and instruct the young and inexperienced ... 521
273. Degree of care required of master in performance of duties 524
274. Master cannot delegate his duties ... 527
275. Assumption of risk by servant ... 528
276. Effect of master's orders upon assumption of risk ... 539
277. Risk of fellow-servants' negligence—General rule ... 541
278. Whether rule applies when negligent servant is of superior grade or rank ... 544

Page.

§ 279. Servants in different department 546
280. Negligence of servant in distinct business 550
281. Test of who are fellow-servants 551
282. Effect of master's promise to repair or remove defect or danger 555
283. Negligence of master and fellow-servant combined 558
284. Contributory negligence of servant 559
285. Burden of proof 561
286. Liability of servant 562
287. Relation of master and servant modified by statute 564

CHAPTER XVII.

NUISANCES.

§ 288. Definition of nuisance 565
289. Nuisance *per se* 566
290. Annoyances without fault 566
291. Classification of nuisances—Public and private nuisances. 567
292. Lawful use of property as respects the question of nuisance 568
293. Degree of annoyance necessary to constitute a nuisance.. 571
294. Effect upon ordinary people the criterion 574
295. Things which produce mental disquietude or offend the taste 575
296. Care and intent in general immaterial 577
297. Improvements upon land 577
298. Things kept or produced upon land which escape to adjoining land 578
299. Interfering with surface water 582
300. Subterranean waters 586
301. Nuisances in the use of water courses—General rules..... 591
302. Diversion 592
303. Detention of the water 593
304. Flooding lands by damming or obstructing stream 595
305. Pollution of stream 596
306. Reasonable use of stream 597
307. Smoke, dust, gases, offensive odors, etc. 601
308. Noise, jarring, vibrations 604
309. Nuisances which threaten calamity 606
310. Private injury from public nuisance 609
311. Effect of legislative authority 611
312. Continuity of the wrong 616
313. Who responsible 617
314. Joint liability 623
315. Who may complain 624
316. Remedy 627

CHAPTER XVIII

Wrongs from Non-performance of Conventional and Statutory Duties.

		Page.
§ 317.	Scope of chapter	631
318.	Bailment in general	631
319.	Bailments for the benefit of the bailor	631
320.	Bailments for the benefit of the bailee	634
321.	Bailments for mutual benefit	635
322.	Safe deposit companies	639
323.	Innkeepers	640
324.	Common carriers	646
325.	Carriers of persons	653
326.	Liability for baggage	659
327.	Street railways	661
328.	Passenger elevators	663
329.	Sleeping car companies	664
330.	Telegraph companies	665
331.	Skilled workmen	668
332.	Professional services in general	669
333.	Attorneys	670
334.	Physicians	671
335.	Voluntary services	674
336.	Neglect or violation of statutory duty	675

CHAPTER XIX.

Negligence.

§ 337.	Nature and definition	681
338.	Negligence involves breach of duty	683
339.	Standard of care	687
340.	Negligence as dependent upon ability to foresee harm	688
341.	Degrees of negligence	688
342.	Proof of negligence—*Res ipsa loquitur*	689
343.	When negligence is a question of law and when of fact	696
344.	Contributory negligence	700
345.	Rule in admiralty	703
346.	Burden of proof	703
347.	Plaintiff's negligence must have been proximate to the injury	704
348.	When defendant's conduct is reckless or wilful—Doctrine of last clear chance	706
349.	Taking risks to save life of property	709
350.	Mistake in sudden peril	710
351.	Comparative negligence	711
352.	Contributory negligence of children and other incompetents	713
353.	Contributory negligence subsequent to injury	715

Page.

§ 354. Imputed negligence—Parent and child 715
355. Imputed negligence generally 717
356. Contracts against liability for negligence—Common carriers 721
357. Same—Telegraph companies 728
358. Same—Other cases 730
359. Liability for dangerous premises to persons invited 731
360. Liability of licensees and trespassers 734
361. Liability to trespassing children 736
362. Liability of landlord for dangerous premises 739
363. Hazardous undertakings—Setting fires 741
364. Fires communicated by machinery 743
365. Injuries by fire-arms and explosives 746
366. Poisons and like dangerous commodities 750
367. Electricity 750
368. Gas works 755
369. Principal classes of negligence cases 758
370. Injuries to persons on or near railroad track 758
371. Street railways 763
372. Defects in highways 766
373. Liability of maker, vendor or furnisher of an article to persons not in privity of contract 773

TABLE OF CASES.

[REFERENCES ARE TO PAGES.]

Abbott v. Abbott, 255.
v. Allen, 468.
v. Hancock, 263.
v. Kansas City, etc., R. R. Co., 583.
v. Kimball, 89, 395.
v. Nat. Bank, 225, 229.
Abbotts v. Barry, 130.
Abel v. Delaware, etc., Canal Co., 520.
v. Minneapolis, 147.
v. Pres., etc., Del., Co., 520.
Abercrombie v. Baldwin, 334.
Able v. Southern Ry. Co., 96.
Abraham v. Nunn, 431.
Abrahams v. California Powder Works, 476.
Abrams v. Milwaukee, etc., Ry. Co., 723.
Abrath v. Northeastern Ry. Co., 177.
Absey v. Detroit, 582.
Absor v. French, 329.
Abt v. Burgheim, 155.
Academy of Music v. Hackett, 38.
Acheson v. Miller, 99, 106.
Achey v. Hull, 316.
Acker v. Ledyard, 399.
Ackworth v. Kempe, 91.
Acre v. Starkweather, 226.
Acton v. Blundell, 21.
v. Coffman, 173, 175.
Adams v. Barney, 372.
v. Barry, 124.
v. Beach, 610.
v. Benton, 413.
v. Bicknell, 176, 177.
Adams v. Broughton, 437.
v. Castle, 430.
v. Chicago, etc., R. R. Co., 370.
v. Clem, 645.
v. Emerson, 332, 333.
v. Freeman, 87, 90.
v. Hall, 345.
v. Iron Cliffs Co., 704.
v. Lisher, 172.
v. Leip, 412.
v. Main, 252.
v. Modesto, 604.
v. Myers, 117.
v. N. J. Steamboat Co., 661.
v. Pease, 313.
v. Popham, 567, 604.
v. Richardson, 146.
v. Rivers, 333.
v. Schiffer, 453, 464.
v. Spangler, 394.
v. Thornton, 467.
v. Waggoner, 137, 138.
v. Walker, 584, 586.
v. Wiggins Ferry Co., 701.
Adams Exp. Co. v. Hoeing, 725.
v. Jackson, 646.
v. Stettaners, 722.
Adamson v. Jarvis, 104, 107.
Addington v. Allen, 464.
Addison v. Hack, 327.
Adkin v. Pillen, 175.
Adler v. Fenton, 86.
Adriance v. Lagrave, 191.
Adsit v. Brady, 403.
Aetna Fire Ins. Co. v. Mabbett, 446.
Afflick v. Bates, 748.

[REFERENCES ARE TO PAGES.]

Agnew v. Corunna, 770.
v. Johnson, 124.
Agulino v. New York, etc., R. R. Co., 708.
Ahearn v. Connell, 90, 396.
Ahern v. Ore. Tel. Co., 694.
Ahrens, etc., Mfg. Co. v. Hoeher, 170, 171, 176.
Aiken v. Penn. R. R. Co., 711, 762.
v. Telegraph Co., 666, 729, 730.
Ainsworth v. Lakin, 129.
Ajello v. Worsley, 301.
Akers v. George, 341.
Akerson v. Dennison, 506.
Akridge v. Noble, 671.
Alabama, etc., Co. v. Pettway, 467.
Alabama, etc., Ry. Co. v. Barrett, 36.
v. Davis, 719.
v. Fried, 745.
v. Harris, 339.
v. Waller, 278, 516, 517.
v. Williams, 279.
Alabama Gt. So. R. R. Co. v. Arnold, 655.
v. Frazier, 659.
v. Thomas, 722.
v. Vail, 518, 553.
Alabama Mineral R. R. Co. v. Jones, 283.
Alabama Sipsey Riv. Nav. Co. v. Ga. Pac. Ry. Co., 611.
Alabama State L. Co. v. Reed, 497.
Alair v. No. Pac. R. R. Co., 724.
A. Landreth Co. v. Schevenel, 453, 467, 468.
Alaska Min. Co. v. Whelan, 546, 552.
Alaska Treadwell Gold Min. Co. v. Whelan, 555.
Albany v. Cunliff, 775.
v. Sikes, 584.
v. Watervliet, etc., R. R. Co., 753.
Albee v. Chappaqua S. M. Co., 605.
Alberson v. Elk Creek M. Co., 405.
Albert v. State, 618.
Albert Dumois, The, 122.
Albion v. Hetrick, 719.
Albion Milling Co. v. First Nat. Bank, 447, 450.
Albitz v. Minneapolis, etc., Ry. Co., 453.
Albrecht v. Milwaukee, etc., R. R. Co., 140.
Aldine Mfg. Co. v. Barnard, 405.
Aldred's Case, 21.
Aldred v. Constable, 397.
Aldrich v. Aldrich, 192.
v. Howard, 148, 602.
v. Husband, 409.
v. Parnell, 103, 104.
v. Printing Co., 240.
v. Wetmore, 610, 613.
v. Wright, 156.
Alexander v. Chicago, 127.
v. Church, 441, 457.
v. Morse, 360.
v. Nanticoke Lt. Co., 694, 755.
v. Pennsylvania Co., 134.
v. Swackhamer, 426.
v. Tennessee, etc., Min. Co., 532.
v. Vicksburg, 76, 474.
Alff v. Radam, 357.
Alfson v. Bush Co., 279.
Alger v. Lowell, 769.
Alkali Co. v. Johnson, 647.
Allen v. Am. B. & L. Ass'n., 434.
v. Ancher, 403.
v. Barrett, 420.
v. Carter, 334.
v. Codman, 174.
v. Crary, 89.
v. Crofoot, 228.
v. Feland, 113.
v. Fiske, 325.
v. Flood, 44, 294, 295.
v. Gibson, 143.
v. Goodwin, 546, 554.
v. Hancock, 699, 773.
v. Hart, 450, 462.

[REFERENCES ARE TO PAGES.]

Allen v. Hillman, 207.
v. Hixon, 683.
v. Kinyon, 435.
v. Logan City, 507
v. London, etc., R. R. Co., 70.
v. Lyon, 610.
v. Me. Cent. R. R. Co., 701.
v. McCoy, 336.
v. St. Louis Transit Co., 691.
v. Smith, 620.
v. South Boston R. R. Co., 70.
v. Thayer, 319.
v. Union Pac. Ry. Co., 509, 525.
v. Voje, 672.
v. Wheatley, 101.
v. Willard, 484.
v. Wortham, 197, 213.
v. Worthy, 616.
Allegheny v. Zimmerman, 30.
Allegretti Chocolate Cream Co. v. Rubel, 250.
Alley v. Adams, 116, 117.
Allin v. Conn. Riv. Lumber Co., 134.
Alling v. Boston, etc. Co., 660.
Allison v. Bank of Va., 12.
v. Chandler, 126.
v. Connor, 103.
v. Hobbs, 83, 99, 169, 400.
v. Little, 53.
v. Ward, 447, 464.
Allison Mfg. Co. v. McCormick, 19, 20.
Aldred v. Bray, 87.
Almy v. Harris, 147, 148.
Alpern v. Churchill, 706.
Alsept v. Eyles, 395.
Alsop v. Lidden, 183, 184.
Alta, etc., Co. v. Benson, etc., Co., 437.
Alter v. Stockham, 466, 467.
Althorf v. Wolfe, 472.
Altvater v. Baltimore, 75.
Alwin v. Liesch, 213.
Alwood v. Ruckman, 412.
Amann v. Damm, 239.
Ambler v. Church, 377.
American A. & D. P. Co., 738.
American Casualty Co. v. Lea, 69.
American Clay Mfg. Co. v. Am. C. M. Co., 359.
American District Tel. Co. v. Walker, 490.
American Exp. Co. v. Patterson, 70.
v. Risley, 31.
v. Second Nat. Bank, 651.
American Nat. Bank v. Hammond, 70, 447, 450.
American Print Works v. Lawrence, 328.
American Pub. Co. v. Gamble, 242, 243.
American S. & T. Co. v. Lyon, 582.
American Strawboard Co. v. Chicago, etc., R. R. Co., 744, 745.
American T. Co. v. Polisco, 713.
American Tobacco Co. v. Strickling, 522.
American Union Tel. v. Doughtery, 728.
v. Middleton, 134.
American W. W. Co. v. U. S. Watch Co., 360.
Americus, etc., R. R. Co. v. Luckie, 712.
Ameriscoggin Bridge v. Bragg, 325, 327.
Ames v. Howard, 352.
v. Shaw, 364.
v. Union Ry. Co., 270.
Amey v. Winchester, 641.
Amick v. Tharp, 372.
Amole's Appeal, 142.
Amory v. Dalamire, 419.
v. Flynn, 413.
Amory Mfg. Co. v. Gulf, etc., Ry. Co., 724.
Amoskeag Mfg. Co. v. Goodale, 109, 595.
v. Spear, 356.

[REFERENCES ARE TO PAGES.]

Amperse v. Winslow, 376, 384.
Amy v. Supervisors, 377, 387, 400.
v. Watertown, 141.
Anders v. Anders, 334.
Anderson, In re, 356.
Anderson v. Agnew, 419, 430.
v. Albion, 772.
v. Beck, 165, 167.
v. Bennett, 527.
v. Besser, 119, 436.
v. Burrows, 166.
v. Cape Fear S. Co., 744.
v. Central R. R. Co., 714.
v. Chicago, etc., R. R. Co., 283, 285, 705.
v. Cincinnati So. R. R. Co., 591, 593.
v. City Ry. Co., 663.
v. Clark, 533.
v. Daly Min. Co., 524.
v. East, 74, 75.
v. Friend, 174, 178.
v. Hays Mfg. Co., 749.
v. Johett, 402.
v. McPike, 447.
v. Milliken, 388.
v. Milwaukee R. R. Co., 543.
v. Northern Pacific Ry. Co., 736.
v. Park, 374, 387.
v. Riggs, 261.
v. Scholey, 691.
v. Seropian, 555, 703.
v. Smith, 349.
v. State, 112, 309.
v. Turbeville, 370, 613.
Anderson & Nelson Distilleries Co. v. Hair, 734.
Andrae v. Haseltine, 368.
Andre v. Johnson, 112.
Andres v. Wells, 199.
Andrew v. Deshler, 248.
Andrews v. Bodecker, 490.
v. Green, 743.
v. Hartford, etc., R. R. Co., 278, 282.
Androscoggin Water Power Co. v. Metcalf, 131.
Andrus v. Howard, 491.
Angel v. Jellico Coal Min. Co., 550.
v. Penn. R. R. Co., 625.
Angle v. Chicago, etc., Ry. Co., 292.
Angus v. Radin, 338.
Anheuser-Busch B. Ass'n v. Hammond, 374.
v. Peterson, 579.
Ankeny v. Moffett, 107.
Annapolis, etc., R. R. Co. v. Gantt, 36.
Ann Arbor R. R. Co. v. Kinz, 739.
Anonymous, 200, 265.
Anthony v. Haney, 115.
v. Lapham, 592.
v. Leeret, 535.
v. Norton, 262.
Anthony W. L. Co. v. McIlquam, 21, 45.
Antisdel v. Chicago, etc., R. R. Co., 676.
Antle v. Sexton, 451.
Antomachi v. Russell, 369.
Antoni v. Belknap, 410.
Antonio, etc., Ry. Co. v. Bennett, 705.
Aortson v. Ridgeway, 446.
Apgar v. Woolston, 182.
Apolinaire v. Roca, 197.
Apollinaris Co. v. Scherer, 356.
Appleby v. Obert, 317.
v. Percy, 346.
Appleton v. Welch, 638.
Apsden v. Seddon, 366.
Arcade Hotel Co. v. Wiatt, 643.
Archer v. Blalock, 731, 733.
v. Union Pac. R. R. Co., 733.
Argabright v. Jones, 219.
Argent v. Durrant, 119.
Arimond v. Green Bay, etc., Co., 595, 612.
Arizona L. & T. Co. v. Mooney, 508, 512, 522.

[REFERENCES ARE TO PAGES.]

Arkadelphia Lumber Co. v. Bethen, 512, 531.
Arkansas Tel. Co. v. Ratteree, 692, 693.
Armington v. Palmer, 359.
Armistead v. Marks, 91.
Armitage v. Widoe, 62.
Armour v. Golkowska, 558.
Armstrong v. Beadle, 275.
v. Cooley, 743.
v. Garrow, 399.
v. Lancashire, etc., R. R. Co., 718.
v. Luco, 579.
v. Mayer, 147.
v. Oregon Short Line, etc., Co., 544.
Armstrong Co. v. Clarion Co., 104, 107.
Arnd v. Cullman, 77.
Arnold v. Fee, 364.
v. Foot, 591, 593.
v. Ill. Cent. R. R. Co., 727.
v. Norton, 346.
v. St. Louis, 739, 768.
v. St. Louis, etc., R. R. Co., 259.
v. San Jose, 474.
v. Savings Co., 237.
Arnott v. Standard Ass'n, 218.
Aronson v. Baker, 353.
v. Fleckenstein, 353.
Artz v. Chicago, etc., R. R. Co., 699.
Arundel v. McCulloch, 109, 610, 613, 626.
Ash v. Baltimore, etc., R. R. Co., 275.
v. Marlow, 174, 176.
v. Zwietusch, 229.
Ashborn v. Waterbury, 31.
Ashbrook v. Comth., 604.
Ashby v. White, 8, 22, 23, 125.
Ashcraft v. Knoblock, 102.
Asher v. Whitlock, 319.
Ashland Coal & I. Ry. Co. v. Wallace, 504.
Ashley v. Ashley, 579.
v. Harrison, 38.
v. Port Huron, 77, 80.
Ashlock v. Vivell, 61.
Ashman v. Flint, etc., R. R. Co., 527, 679, 685.
Ashmead v. Kellogg, 428.
Ashuelot Savings Bank v. Albee, 457, 460.
Astley v. Younge, 228.
Atchison v. King, 772.
v. Peterson, 590.
Atchison, etc., R. R. Co. v. Armstrong, 615.
v. Bales, 699.
v. Boener, 611.
v. Dennis, 742.
v. Elder, 675.
v. Hammer, 583.
v. Henry, 657, 712.
v. Lawler, 723.
v. McGinnis, 256.
v. Morgan, 408, 712, 760.
v. Rice, 123, 124.
v. Ryan, 278, 284, 285.
v. Sadler, 556.
v. Seeley, 548, 553.
v. Shean, 653, 657.
v. Sledge, 555, 558.
v. Stanford, 36.
v. Townsend, 763.
v. Weber, 283, 658.
v. Winston, 525.
Athens Manuf. Co. v. Rucker, 595.
Atkins v. Bordman, 364.
v. Colby, 653.
v. Field, 562.
v. Womeldorf, 412.
Atkinson v. Atlanta, 584.
v. Atlanta, etc., R. R. Co., 129.
v. Detroit, etc. Co., 245.
v. Doherty, 195.
v. Goodrich Tr. Co., 32, 36.
v. Heer, 394.
Atlanta Cotton S. O. Mills v. Coffey, 695, 731, 733.

[REFERENCES ARE TO PAGES.]

Atlanta, etc., Co. v. Wyly, 712.
Atlanta, etc., Ry. Co. v. Gravitt, 717.
v. Kimberly, 479.
v. West, 471.
Atlanta Journal v. Mayson, 222.
Atlantic Coast Elec. R. R. Co. v. Rennard, 763.
Atlantic Coast Line R. R. Co. v. Baker, 419.
Atlantic, etc., R. R. Co. v. Iron Monger, 256, 720.
v. Laird, 100.
Atlantic Transport Co. v. Coneys, 475, 483.
Atlas Eng. Works v. Randall, 522.
Atlee v. Packet Co., 122, 123, 703.
Attack v. Bramwell, 330.
Attaway v. Cartersville, 76.
Attersoll v. Stevens, 337.
Attorney General v. Evart, 568.
v. Lunatic Asylum, 597.
v. Metropolitan R. R. Co., 615.
Atwater v. Bodfish, 362.
v. Delaware, etc., Co., 655.
v. Lowe, 340.
v. Morning News Co., 225, 231, 235, 241.
v. Sawyer, 641.
v. Tupper, 437.
Atwill v. Mackintosh, 212, 238, 239.
Atwood v. Atwater, 161, 378.
Auburn, etc., P. R. Co. v. Douglass, 45.
Auchmuty v. Ham, 346.
Audenried v. Philadelphia, etc., R. R. Co., 647.
Auditor v. Atchison, etc., R. R. Co., 384.
Augerstein v. Jones, 512, 525.
Augur v. Smith, 456.
Augusta v. Thorpe, 78, 766, 768.
Augusta, etc., R. R. Co. v. McElmurry, 677, 712.
v. Randall, 662.
Augusta Evening News v. Radford, 207.
Augusta Factory v. Davis, 259.
Augusta Ry. Co. v. Glover, 279.
Augus v. Smith, 451.
Ault v. Meager, 317.
Aurora Br. R. R. Co. v. Grimes, 712.
Austin v. Appling, 97, 508
v. Burlington, 396.
v. Bailey, 320.
v. Cox, 66.
v. Debnam, 183, 188.
v. Hall, 143.
v. Vrooman, 378, 381.
Austin, etc., R. R. Co. v. Anderson, 585.
Avakian v. Noble, 417.
Averill v. Chadwick, 51.
v. Williams, 89, 90.
Averitt v. Murrell, 742.
Avery v. Cheslyn, 408.
v. Galveston, etc., Ry. Co., 714.
v. Halsey, 107.
v. Maxwell, 333, 338, 341, 342.
Avinger v. South Carolina Ry. Co., 303.
Avitt v. Farrell, 317, 411.
Aycock v. Wilmington, etc., R. R Co., 678.
Aycrigg v. New York & Erie R R. Co., 491.
Ayer v. Ashmead, 101, 102.
v. Norwich, 770.
v. Starkey 743.
v. Western Union Tel. Co., 729.
Ayers v. Grider, 205.
v. Russell, 166, 377.
Aylesworth v. Herrington, 342.
v. St. John, 231.
Ayre v. Craven, 205, 206.
Ayres v. Birtch, 155.
v. Delaware, etc., R. R. Co., 655.
v. French, 444.

[REFERENCES ARE TO PAGES.]

B.

Babcock v. Case, 468, 469.
v. Gill, 84.
v. Lamb, 333.
Babb v. Mackey, 146.
Bachelder v. Chaves, 394.
v. Heagon, 742.
Bachman v. Fenstermacher, 394.
Backhouse v. Bonomi, 365.
Backentos v. Speicher, 444.
Bacon v. Bacon, 166.
v. Benchley, 388.
v. Boston, 573, 614, 771
v. Bullard, 322.
v. Kimmel, 52, 437.
v. Towne, 170, 180.
v. Walker, 576.
Backus v. Richardson, 209.
Bader v. Southern Pac. Co., 128.
Badger v. Badger, 468.
v. Batavia Mfg. Co., 420, 431.
v. Hatch, 424.
v. Phinney, 61.
Badgley v. Dickson, 669.
Bagott v. Orr, 314.
Bailey v. Bailey, 96, 224.
v. Bussing, 106.
v. Cascade Timber Co., 544.
v. Centerville, 773.
v. Fulton County, 72, 474.
v. Gray, 365, 366, 369.
v. Jourdan, 720.
v. Kreutzmann, 671.
v. New York, 73, 81.
v. Rome, etc., R. R. Co., 511, 528.
v. Smock, 453.
v. Troy, etc., Co., 478.
v. Wiggins, 377, 386.
v. Wright, 330.
Bain v. Clark, 411.
v. Northern Pac. R. R. Co., 133, 134.
Bainard v. Newton, 597.
Baird v. Boehner, 263.
Baird v. Howard, 427, 430.
v. Pettit, 552.
v. Shipman, 96, 563.
Bajus v. Syracuse, etc., R. R. Co., 512.
Baker's Case, 579.
Baker v. Bicknell, 447.
v. Borello, 343.
v. Brown, 593.
v. Cory, 131.
v. Drake, 126, 436.
v. Fales, 439.
v. Hagey, 608.
v. Hallam, 459.
v. Hannibal, etc., R. R. Co., 146.
v. Holdeman, 62.
v. Hornick, 179.
v. Mutual Life Ins. Co., 294, 299.
v. Morris, 58, 62.
v. Otis Elevator Co., 735.
v. Portland, 50.
v. Shephard, 333.
v. State, 376, 385.
v. Wales, 190.
v. Westmoreland, etc., Gas Co., 700, 705.
v. Young, 63.
Balch v. Haas, 546.
Baldwin v. Atlantic City, etc., R. R. Co., 562.
v. Buckland, 466.
v. Calkins, 626.
v. Casella, 347.
v. Collins, 648.
v. Hayden, 112.
v. Marshall, 390.
v. Second St. Cable R. R. Co., 256.
v. Smith, 109.
v. St. Louis, etc., Ry. Co., 544.
v. U. S. Tel. Co., 668.
v. Western R. R. Co., 123.
Ball, Ex parte, 11.
Ball v. Bennett, 63.

[REFERENCES ARE TO PAGES.]

Ball v. Loomis, 89.
v. Nye, 578, 579.
v. Rawles, 170, 171, 172, 175.
v. Ray, 605.
v. Siegel, 357.
v. Woodbine, 75.
Ballard v. Butler, 372.
v. Noaks, 332.
v. Tomlinson, 579.
Balle v. Detroit L. Co., 530.
Ballentine v. Joplin, 433.
v. Webb, 628.
Ballerino v. Mason, 384.
Ballew v. Alexander, 12.
Ballou v. Earle, 725.
Balme v. Hutton, 52.
Baltimore v. Fairfield Imp. Co., 614, 616, 625, 626.
v. Marriott, 772.
Baltimore Boot & Shoe Mfg. Co. v. Jamar, 476, 503.
Baltimore City Pass. Ry. Co. v. McDonnell, 714.
Baltimore, etc., Exp. Co. v. Cooper, 722.
Baltimore, etc., R. R. Co. v. Adams 719.
v. Bateman, 773.
v. Baugh, 501, 551, 554.
v. Blocher, 69, 486.
v. Boteler, 686.
v. Brady, 648.
v. Cain, 164, 165.
v. Carr, 304, 658.
v. Cox, 684.
v. Fifth Baptist Church, 67, 602, 605, 614.
v. Glenn, 254.
v. Golway, 285, 288.
v. Griffith, 760.
v. Henthorne, 516, 517.
v. Hubbard, 725.
v. Kean, 702.
v. Kemp, 13.
v. Mackey, 513.
v. Mali, 762.
v. McClellan, 762.
Baltimore, etc., R. R. Co. v. McKenzie, 705.
v. Miller, 654, 656.
v. Neal, 517.
v. Owings, 760.
v. Pumphrey, 13.
v. Reany, 40, 365, 366.
v. Rowan, 535.
v. Schumacher, 651.
v. Shipley, 746.
v. State, 288, 529, 655, 708, 719.
v. Stumpf, 703, 704.
v. Sulphur Springs Dist., 649.
v. Then, 284.
v. Weeden, 401.
v. Wightman, 287.
v. Worthington, 656.
Baltimore, etc., T. Road v. Green, 68, 183.
Baltimore Sugar Ref. Co. v. Campbell & Zell Co., 467.
Baltimore Traction Co. v. Appel, 763, 765.
v. Helms, 765.
Baltzeger v. Carolina M. Ry. Co., 583.
Bamberger v. Citizens St. Ry. Co., 716.
Bamford v. Turnley, 572.
Bancroft v. Boston, etc., R. R. Co. 280.
Bandfield v. Bandfield, 255.
Bane v. Irwin, 539.
Banfield v. Whipple, 429.
Bangor v. Lansil, 584.
Bangus v. Atlanta, 772.
Banister v. Wakemann, 378, 381.
Bank v. Brainard School District 72, 77.
Bank v. Murfey, 399.
Bankard v. Baltimore, etc., R. R. Co., 647.
Banker v. Caldwell, 395.
Bank of Commerce v. Goos, 210.
Bank of Hartford v. Waterman, 141.

[REFERENCES ARE TO PAGES.]

Bank of Little Rock v. Fisher, 420.
Bank of Mobile v. Marston, 399.
Bank of Miller v. Richman, 171.
Bank of Orange County v. Fink, 466.
Bank of Rome v. Mott, 395.
Banks v. Highland St. Ry. Co. 707.
v. Judah, 468.
Banning v. Chicago, etc., Ry. Co., 701, 712.
Barbe v. Armstead, 251.
Barber v. Essex, 681, 699.
v. Gould, 178.
v. Scott, 176, 177.
v. Trustees of Schools, 316.
Barbour v. Ellsworth, 80.
Barclay v. Abraham, 46, 571, 588.
v. Comth., 111.
v. Howell, 332.
Bard v. Yohn, 84, 491.
Barden v. Felch, 98, 493.
Barfield v. Barfield, 397.
Barfoot v. Reynolds, 155.
Barhight v. Tammany, 174, 178.
Barholt v. Wright, 138, 152.
Barker v. Anderson, 159.
v. Boston Electric Light Co., 734.
v. Braham, 88.
v. Green, 22.
v. Hannibal, etc., R. R. Co., 736, 758.
v. Prizer, 224.
v. St. Louis, etc., Co., 243.
Barkley v. Wilcox, 583, 584.
Barlass v. Brash, 435.
Barlow v. Hall, 190.
v. Stalworth, 131.
Barmore v. Vicksburg, etc., R. R. Co., 496, 707.
Barnard v. Campau, 390.
v. Poor, 742.
v. Shirley, 571, 599, 600.
Barnardistone v. Chapman, 433.
Barnes v. Allen, 253.
Barnes v. Barnes, 325, 326.
v. Campbell, 243.
v. Crawford, 205.
v. Dean, 119.
v. Foley, 393.
v. Hathorn, 604.
v. Martin, 112.
v. McCrate, 226.
v. Means, 670.
v. Sabron, 590.
v. Shreveport City Ry. Co., 713, 716.
v. Ward, 686, 769.
Barnett v. Dalton, 395.
v. Lynch, 14.
v. Matagorda, etc., Co., 583.
v. Reed, 188.
v. Ward, 203.
Barney v. Dewey, 470.
v. Pinkham, 673.
Barns v. Webb, 221.
Barnum v. Chicago, etc., R. R. Co., 283.
v. Terpening, 345.
Barowski v. Schulz, 731.
Barr v. Beikner, 218, 246.
v. Essex Trades Council, 297.
v. Hoffman, 129.
v. Moore, 127, 206, 224.
v. Post, 112, 157.
v. Railroad Co., 702.
Barrett Chem. Co. v. Stern, 358.
Barrett v. Dolan, 274.
v. Fish, 354.
v. Kearns, 227.
v. Lake Ontario Beach Imp. Co., 618.
v. Manufacturing Co., 774.
v. Oechsner, 498.
v. Southern Pac. Co., 737.
v. Third Ave. R. R. Co., 31.
v. White, 395.
Barrick v. Schifferdecker, 581.
Barrington v. Turner, 349.
Barrister v. Wakeman, 378.
Barron v. Dent, 380.

[REFERENCES ARE TO PAGES.]

Barron v. Mason, 180.
Barrows v. Bell, 242, 246.
v. Knight, 357.
v. Trieber, 642.
Barry v. Arnaud, 402.
v. Hannibal, etc., R. R. Co., 698.
v. Lancy, 145.
v. Peterson, 316, 580.
v. Smith, 384.
Barstow v. Old Colony R. R. Co., 473.
Bartholomew v. Bentley, 470.
Bartlett v. Christhilf, 188, 229.
v. Churchill, 51, 154.
v. Cicero L. H. & P. Co., 68.
v. Crittenden, 353.
v. Crozier, 373, 387, 401.
v. Hawley, 180.
v. Hoyt, 419.
v. Perkin, 312.
v. Reifsnider, 228.
v. West U. Tel. Co., 729.
v. Wells, 60.
Bartlett, etc., Co. v. Roach, 678.
Bartley v. Rechtmyer, 261.
Bartolomeo v. McKnight, 540.
Barton v. Burton, 433.
v. Syracuse, 403.
Barton Coal Co. v. Cox, 436.
Bartonshill Coal Co. v. McGuire, 523.
v. Reid, 281, 543, 552.
Bascom v. Dempsey, 312, 320.
Basnight v. Atlantic, etc., R. R. Co., 650.
Bass v. Cantor, 638.
v. Emery, 8.
v. Norfolk Ry. & Lt. Co., 764, 765.
v. Pierce, 415.
Bassett v. Salisbury Mfg. Co., 569, 570, 579.
Bassil v. Elmore, 211.
Basten v. Carew, 377.
Batchelder v. Hibbard, 325.
Batchelor v. Fortescue, 324.
Bateman v. Bluck, 109.
Bates v. Horner, 401.
v. Old Colony R. R. Co., 726.
v. Railway Co., 738.
v. Rutland, 80, 474.
v. Stanton, 430.
v. Westborough, 78.
Bath v, Metcalf, 83.
Bathrick v. Detroit, etc., Co., 242.
Batterson v. Vogel, 646.
Batterfield v. Forester, 702.
Battishill v. Humphreys, 707.
v. Reed, 371.
Battle v. Columbia, etc., R. R. Co., 660.
Bauer v. Lyons, 346.
Baulec v. New York, etc., R. R. Co., 525.
Baumler v. N. Brewing Co., 528.
Baxter v. Bush, 57.
v. Coughlin, 675, 679.
v. Dominion Tel. Co., 728.
v. Louisville, etc., Ry. Co., 721.
v. Roberts, 503.
Bay City, etc., R. R. Co. v. Austin, 676.
Bayles v. Cronkhite, 433.
Baylies v. Curry, 306.
Baylor v. Balt. & Ohio R. R. Co., 339.
Beach v. Brown, 257, 258.
v. Gaylord, 579, 580.
v. Hancock, 150.
v. Morgan, 313, 314.
v. Ranney, 211.
v. Schmultz, 116.
v. Sterling I. Co., 597.
Beadleston v. Cooke B. Co., 358.
Beal v. So. Devon Ry. Co., 689.
Beale v. Posey, 641.
Beall v. Folhnar, 428.
Beals v. Guernsey, 128.
Beaman v. Martha W. Min. Co., 284.
Bean v. Herrick, 456.

[REFERENCES ARE TO PAGES.]

Beard v. Bliley, 441.
v. Murphy, 365, 583, 584.
Beardslee v. Richardson, 675.
Beardsley v. Bridgman, 221, 247.
v. Duntley, 451.
Bear Camp Riv. Co. v. Woodman, 148.
Bearce v. Bass, 220, 240, 244.
v. Fossett, 403.
Bearss v. Preston, 422.
Beasley v. San Jose Fruit Packing Co., 517.
Beaton v. Milwaukee, 771.
Beatrice Gas Co. v. Thomas, 579.
Beatty v. Gilmore, 633.
Beatty L. Co. v. Western U. Tel. Co., 729.
Beauchamp v. Saginaw Mining Co., 280, 316.
Beaudette v. Gague, 261.
Beavers v. Trimer, 622.
Beck v. Carter, 686.
v. Railway Teamsters' Pro. Union, 297.
v. Thompson, 151.
v. Vancouver Ry. Co., 678, 685.
Becke v. Missouri Pacific Ry. Co., 719.
Bechel v. Pacific Express Co., 177.
Becker v. Dunham, 435.
v. Lincoln, etc., Co., 663.
v. Mason, 57.
v. Smith, 414.
v. Western Union Tel. Co., 729.
Beckerle v. Weiman, 50.
Beckford v. Hood, 147, 352.
Beckley v. Newcomb, 57.
Beckman v. Kreamer, 313.
v. McKay, 431.
Beckwith v. Griswold, 616.
v. Oatman, 491.
v. Shordike, 313.
Bedall v. Bailey, 382.
Bedenbaugh v. Southern Ry. Co., 563.
Bedford v. Hunt, 352.
Beebe v. Knapp, 462.
v. Latimer, 421.
Beecher v. Crouse, 415.
Beehler v. Daniels, 735.
Beekman v. Frost, 390.
v. Van Dolsen, 337.
Beel v. Robeson, 174.
Beeler v. Jackson, 233.
v. Turnpike Co., 147.
Bee Pub. Co. v. Shields, 241.
v. World Pub. Co., 209.
Beers v. Board of Health, 374.
v. Boston, etc., R. R. Co., 661.
v. McGinnis, 332.
v. St. John, 336.
Begeard v. Consol. Tr. Co., 714.
Behler v. Drury, 428.
Behling v. S. W. Penn. Pipe Lines, 33.
Behre v. National Cash Register Co., 217.
Behrens v. McKenzie, 55.
Beidler v. Branshaw, 663.
v. King, 368, 607.
Beier v. Cooke, 601.
Beihofer v. Loeffert, 174.
Beinhorn v. Griswold, 340.
Beiser v. Scripps, etc., Co., 243.
Bekkeland v. Lyons, 178, 180.
Belair v. Chicago, etc., R. R. Co., 530, 560, 699.
Belding v. Black Hills, etc., R. R. Co., 272, 277.
Belger v. Dinsmore, 725.
Belknap v. Ball, 240, 241, 244.
v. Trimble, 362.
Bell v. Central R. R. Co., 271.
v. Ellis, 444.
v. Hansley, 51, 138, 152.
v. Humphrey, 53.
v. Keepers, 171, 467, 488.
v. Locke, 357, 361.
v. Matthews, 181.
v. McClintock, 595.
v. Morrison, 99.
v. North, 439.

[REFERENCES ARE TO PAGES.]

Bell v. Pearcy, 172, 178.
v. Perry, 437.
v. Rawson, 367.
v. West Point, 772.
Bellamy v. Burch, 207.
Bellefontaine, etc., R. R. Co. v. Snyder, 716.
Beller v. Schultz, 635.
Belleville v. Hoffman, 37.
Belleville Stone Co. v. Mooney, 521.
Bellinger v. N. Y. Cent. R. R. Co., 595.
Bellune v. Wallace, 420.
Bellows v. McGinnis, 337.
v. Sackett, 579.
Belo v. Fuller, 199.
Belser v. Youngblood, 412, 428.
Belt. R. R. etc., Co. v. Mann, 707.
Bemis v. Connecticut, etc., R. R. Co., 676.
Benbridge v. Day, 104.
Beneway v. Thorpe, 217.
Benoit v. Troy, etc., R. R. Co., 346, 711.
Benham v. Vernon, 167.
Benner v. Atlantic Dredge Co., 608.
Bennett v. Alcott, 260, 262.
v. Bennett, 257.
v. Boggs, 315.
v. Bullick, 334.
v. Deacon, 238.
v. Dutton, 648, 656.
v. Fifield, 770.
v. Ford, 19.
v. Fuller, 192.
v. Fulmer, 386.
v. Judson, 461.
v. Marion, 127.
v. McKinley, 358.
v. McMillan, 446.
v. New Jersey R. R. Co., 719.
v. Railroad Co., 731, 733.
v. Smith, 253.
v. True, 478.
Bennett v. Whitney, 401.
Benson v. Baltimore Traction Co., 735.
v. Eli, 422.
v. Goodwin, 545.
v. New York, etc., R. R. Co., 513, 528, 538.
Benton v. Beattie, 88, 478, 483.
Berberich v. Beach, 482.
Beresford v. Am. Coal Co., 553.
Berg v. Atchison, etc., R. R. Co., 651.
v. Boston, etc., Min. Co., 698.
v. Gt. Nor. Ry. Co., 39, 710.
v. Milwaukee, 711.
v. Parsons, 478, 480, 481.
Bergen County Traction Co. v. Demarest, 690, 765.
Berger v. Jacobs, 66, 253.
v. Minneapolis G. L. Co., 581.
Bergin v. Southern New Eng. Tel. Co., 504.
Bergman v. Hendrickson, 488, 499.
Berkely v. Chesapeake, etc., Ry. Co., 762.
v. Wilson, 93.
Berkner v. Dannenberg, 155.
Berkshire Woolen Co. v. Proctor, 643, 644.
Berkson v. Kansas City Cable Ry. Co., 99, 100.
Berley v. Taylor, 130.
Bernar v. Dunlap, 177.
Bernheimer v. Becker, 498.
Bernhorn v. Griswold, 339.
Bernina, The, 719.
Bernish v. Roberts, 529.
Berns v. Gaston Coal Co., 543.
Bernstein v. Roth, 477.
Berry v. Carter, 203.
v. Donovan, 291, 293.
v. Fletcher, 84, 100.
v. Southern Ry. Co., 650.
v. St. Louis, etc., R. R. Co., 676.
v. W. Va., etc., R. R. Co., 652.

[REFERENCES ARE TO PAGES.]

Bertha Zinc Co. v. Martin, 525, 687.
Bertonneau v. Directors, 307.
Beseman v. Penn. R. R. Co., 605, 615.
Besenecker v. Sale, 281.
Besozzi v. Harris, 350.
Bessemer L. & I. Co. v. Campbell, 561.
v. Jenkins, 267.
Bessette v. People, 289.
Bessex v. Chicago, etc., R. R. Co., 503.
Best v. Kingston, 282.
Beswick v. Cander, 620.
Bethel v. Otis, 64, 66.
Betser v. Betser, 257.
Betts v. Gibbons, 107.
v. Ratliff, 412.
Bevans v. Briscoe, 411.
Bevard v. Hoffman, 388.
Beveridge v. Rawson, 87, 89.
Beville v. State, 164.
Beyel v. Newport News, etc., R. R. Co., 762.
Beyer v. Bush, 420.
v. Consolidated Gas Co., 757.
Bezer v. Hall Signal Co., 352.
Bianconi v. Smith, 454.
Bibb's Adm'r v. Norfolk, etc., R. R. Co., 478.
Bicker v. Chrisman, 141.
Bickford v. Richards, 780.
Bickmore Gall Cure Co. v. Karns, 361.
Biddall v. Moitland, 321.
Biddle v. Bond, 430.
Bielman v. Chicago, etc., R. R. Co., 614.
Bieswanger v. Am. B. & T. Co., 70.
Bigaouette v. Paulet, 252.
Bigby v. United States, 82.
Bigelow v. Randolph, 73, 80.
v. Reed, 704.
v. Rising, 143.
v. Sickles, 178.
Bigelow Co. v. Heintz, 423, 431, 435.
Bigney v. Fisher, 672.
Bilbee v. London, etc., R. R. Co., 678.
Bilen v. Paisley, 339, 563.
Billet v. Times-D. Pub. Co., 237.
Billing v. Brooklyn, 770.
Billings v. Lafferty, 386, 402.
Billingsley v. Maas, 175.
v. State, 403.
Billiter v. Young, 426.
Binford v. Johnston, 32.
v. Young, 204.
Bingham v. Lipman, 70, 159.
Birch v. Amory Mfg. Co., 9.
v. Prodger, 190.
Bird v. Anderson, 120.
v. Everard, 638.
v. Holbrook, 52, 139, 156.
v. Jones, 158, 159.
v. Perkins, 439, 440.
Birdsall v. Rose, 315.
Birkett v. Western Union Tel. Co., 728.
Birmingham v. Land, 597.
v. Lewis, 766.
v. McCary, 480.
v. Starr, 766.
v. Tayloe, 772.
Birmingham Ry. & Elec. Co. v. Baird, 656.
Birmingham R. & E. Co. v. Baker, 719, 765.
v. Mason, 487.
v. Ward, 151.
Birmingham Ry. L. & P. Co. v. Bynum, 662.
Birmingham Southern Ry. Co. v. Lintner, 254.
Birmingham Vinegar B. Co. v. Powell, 361.
Birmingham W. W. Co. v. Hubbard, 490.
Birney v. New York, etc., Tel. Co., 729.

[REFERENCES ARE TO PAGES.]

Bishop v. Banks, 603, 605.
v. Blair, 334.
v. Ely, 99.
v. Fahay, 349.
v. Journal Newspaper Co., 249.
v. Schneider, 391.
v. Small, 449.
v. Weber, 775.
v. Williamson, 393.
Bissell v. Booker, 681, 747.
v. Cornell, 203.
v. N. Y. Cent. R. R. Co., 727.
Bitner v. Utah Central Ry. Co., 677.
Bitting v. Ten Eyck, 172, 178, 180.
Bittner v. Crosstown Ry. Co., 699.
Bitz v. Meyer, 186.
Bizer v. Ottumwa, 620.
Black v. Chicago, etc., R. R. Co., 649.
v. Goodrich Trans. Co., 726.
v. Grant, 320.
v. Lewiston, 49.
v. Milwaukee, 32.
v. Va. Portland C. Co., 537.
Blackett v. Bradley, 367.
Blackman v. Simmons, 348.
Blackston v. Chelmsford Foundry Co., 736.
Blackwell v. Lynchburg, etc., R. R. Co., 608.
Blades v. Higgs, 112, 113, 114, 414.
Blaeser v. Milwaukee, etc., Ins. Co. 222.
Blage v. Ilsley, 261.
Blagen v. Smith, 566, 576.
Blaikie v. Chandless, 670.
Blaine v. Ches. & Ohio R. R. Co., 681, 706.
Blair v. Grand Rapids, etc., Co., 473.
Blaisdell v. Portland, 769.
v. Stephens, 624.
Blake v. Barnard, 150.
v. Johnson, 115, 397, 439.
v. Me. Cent. R. R. Co., 516.
Blake v. Midland Ry. Co., 273, 279, 285.
v. Smith, 91, 204.
Blakely v. Sousa, 358.
Blakemore v. Railway Co., 774.
Blakeslee v. Carroll, 225, 228, 231.
Blanchard v. Baker, 23, 335, 591, 592, 593.
v. Ilsley, 261, 265.
v. Steamboat Co., 50.
v. Stearns, 388.
v. West. U. Tel. Co., 678.
Bland v. Shreveport Belt Ry. Co., 503.
v. Womack, 633.
Blann v. Crocheron, 101, 102.
Blanton v. Dold, 535, 730.
Blassingame v. Glaves, 12.
Blatt v. McBarron, 736.
Blaymire v. Haley, 260.
Blazenic v. Iowa & Wis. Coal Co., 527.
Bleil v. Detroit St. Ry. Co., 37.
Blen v. Bear River Co., 469.
Bligh v. Biddeford, etc., R. R. Co., 260, 271.
Blight v. Fisher, 192.
Bliss v. Ball, 333.
v. Grayson, 566, 569.
v. Greeley, 587.
v. Hall, 625.
v. Johnson, 112, 319.
v. Kennedy, 590, 593.
v. New York, etc., R. R. Co., 139, 140.
v. Wyman, 174.
Bliven v. Hudson R. R. R. Co., 430.
Block v. Milwaukee St. Ry. Co., 753.
Blocker v. Schoff, 222, 246.
Blodgett v. Boston, 768.
v. Stone, 23.
Blofield v. Payne, 22, 361.
Blood v. Erie Dime S. & L. Co., 425.
v. Milland, 371.

[REFERENCES ARE TO PAGES.]

Blood v. Sayre, 423.
Blood Balm Co. v. Cooper, 775.
Bloodgood v. Ayers, 587.
v. Mohawk, etc., R. R. Co., 329.
Bloomfield v. Burlington, etc., Ry. Co., 699.
Bloomhuff v. State, 604.
Bloomington v. Annett, 256.
Bloss v. Plymale, 103.
Blossom v. Barrett, 265.
Blotch v. Sweeney, 435.
Blount v. W. U. Tel. Co., 25.
Blovelt v. Sawyer, 505.
Bloxam v. Hubbard, 430.
Blucher v. Zonker, 177.
Blue v. Aberdeen, etc., R. R. Co., 744.
v. Christ, 84.
Blumenthal v. Brainerd, 652.
v. Greenberg, 448.
Blumhardt v. Rohr, 209.
Blunt v. Akin, 620.
v. Sheppard, 91.
Bly v. Edison Elec. Ill. Co., 627.
Blyhl v. Waterville, 79.
Blyth v. Birmingham Waterworks, 681.
v. Proprietors, etc., 580.
v. Denver, etc., R. R. Co., 649.
Board v. Holton, 209.
Boardman v. Acer, 101.
v. Creighton, 683.
v. Gore, 12.
Board of Com'rs v. Allman, 766.
v. Arnett, 766.
v. Daily, 72.
v. Mutchler, 37, 773.
v. Pearson, 141.
Board of Education v. Tiernan, 308.
v. Folk, 366.
Board of Health v. Lederer, 614.
Board of Liquidation v. McComb, 374.
Bobb v. Bosworth, 112.
Bobe v. Frowner, 64.
Boddy v. Conover, 451.
v. Henry, 455, 462.
Bodge v. Philadelphia, 81.
Bodie v. Charleston, etc., Ry. Co., 515, 556.
Bodwell v. Bragg, 645.
v. Osgood, 236.
Boeger v. Langenberg, 170, 178, 182.
Boehl v. Chicago, etc., R. R. Co., 650, 725.
Boehmer v. Detroit Free Press Co., 202, 219.
Boehr v. Downey, 421.
Boelter v. Ross Lumber Co., 509.
Boetcher v. Staples, 127.
Bogan v. Wilburn, 437.
Boganschutz v. Smith, 529, 703.
Bogert v. Indianapolis, 268.
Bohan v. Avoca, 585.
v. Port Jervis G. L. Co., 569, 573, 574, 577, 603, 614, 616.
Bohannan v. Hammond, 648.
Bohen v. Waseca, 767, 770.
Bohn v. Chicago, etc., Ry. Co., 508.
Bohn Mfg. Co. v. Hollis, 299.
Bohri v. Barnet, 168, 381.
Bohtlingk v. Inglis, 652.
Bolan v. Williamson, 393.
Boland v. Mo. R. R. Co., 716.
Bolden v. Southern Ry. Co., 698.
Boldewahn v. Schmidt, 424.
Boling v. St. Louis, etc., R. R. Co., 659.
Bolivar Mfg. Co. v. Neponset Mfg. Co, 626.
Bolling v. Kirby, 423.
Bolton v. Calkins, 742.
v. Cuthbert, 421.
v. Georgia Pac. Ry. Co., 514.
v. Miller, 261.
Bonaparte v. Clagett, 117.
v. Wiseman, 365, 480, 482.
Bond v. Griffin, 119, 436.
v. Smith, 623.

[REFERENCES ARE TO PAGES.]

Bond v. Ward, 105, 395.
Bonham v. Loeb, 317.
Bonnel v. Dunn, 89.
Bonnell v. Smith, 565, 577.
Bonner v. Wilborn, 622.
Bonney v. King, 188.
Bonomi v. Backhouse, 366, 367.
Bonte v. Postel, 95.
Boogher v. Hough, 176.
v. Knapp, 242.
v. Life Ass'n, 69.
Booker's Ex'rs v. McRoberts, 145.
Boomer v. French, 141.
v. Wilbur, 478, 481.
Boone v. East Norwegian Tp., 38.
Boorman v. Brown, 14.
Booth v. Boston, etc., R. R. Co., 518, 558.
v. Hodgson, 99.
v. Kurrus, 167, 378, 381.
v. Merriam, 740.
v. Rome, etc., R. R. Co., 569, 570, 608.
v. Storrs, 446.
Booth ads. Wanderly, 458.
Boothby v. Androscoggin, etc., R. R. Co., 364, 366.
Bordeaux v. Greene, 21, 45.
Borden v. Houston, 403.
Borders v. Kattleman, 451, 456, 461.
Borland v. Barrett, 126.
Bornholdt v. Souillard, 178.
Bornmann v. Star Co., 206.
Bourreseau v. Detroit Evening Jour. Co., 207.
Bosburg v. Putney, 151.
Boscowitz v. Adams Exp. Co., 725.
Bostock-Ferari Amusement Co. v. Brocksmith, 350.
Boston v. Simmons, 85, 86.
Boston Diatite Co. v. Florence Mfg. Co., 250.
Boston, etc., R. R. Co. v. Carney, 748.
v. Dana, 12, 130.
Boston, etc., R. R. Co. v. McDuffy, 275.
v. Proctor, 658.
Boston Woven Hose & R. Co. v. Kendall, 780.
Bostwick v. Minneapolis, etc., Ry. Co., 40, 338.
Boswell v. Laird, 478.
Bosworth v. Union R. R. Co., 654.
v. Swansey, 48.
Bottoms v. Seaboard, etc., R. R. Co., 717.
Boucicault v. Fox, 353.
Boulden v. Penn. R. R. Co., 275.
Boulier v. Macauley, 293.
Boulter v. Clark, 51, 138.
v. Webster, 283.
Boulton v. Shields, 248.
Bourland v. Eidson, 221.
Bourreseau v. Detroit Evening Journal Co., 207, 220.
Boush v. Fidelity & Dep. Co., 171.
Boutiller v. The Milwaukee, 276.
Boutwell v. Marr, 299.
Boutwell v. Parker, 430, 436.
Bouwmeester v. Grand Rapids, etc., Co., 759.
Bovee v. Danville, 704.
Bowden v. Bailes, 204.
v. Bowden, 466.
v. Derby, 401, 475.
Bower v. Peate, 483.
Bowell v. De Wald, 643.
Bowen v. Hall, 292, 294.
v. School Dist., 131.
v. Wendt, 597.
Bowar v. Hill, 23.
Bowers v. Miss. & Rum Riv. Boom Co., 627.
v. Union Pac. R. R. Co., 514.
Bowler v. O'Connell, 491, 495.
Bowlin v. Lyon, 305.
v. Nye, 424.
Bowling v. Arthur, 399.
Bowling v. Kirby, 423.
Bowlsby v. Speer, 583, 584.

[REFERENCES ARE TO PAGES.]

Bowman v. Am. Exp. Co., 725.
v. Brown, 112.
v. Chicago, etc., R. R. Co., 678.
v. Davis, 102.
v. Humphrey, 95, 597, 623.
Bowyer v. Cook, 616.
Box v. Kelso, 706.
Boyce v. Brockway, 423.
v. Brown, 329.
v. California Stage Co., 691.
v. Johnson, 530.
v. Union Pac. Ry. Co., 732.
v. Williams, 419.
Boyd v. Bloom, 364.
v. Brent, 203.
v. Conklin, 583.
v. Cross, 177, 180.
v. Estis, 634.
v. Hawkins, 469.
v. Mendenhall, 173.
v. Portland Elec. Co., 693, 694, 751, 752.
v. State, 157.
v. Watt, 346.
v. Wabash West. Ry. Co., 759.
v. Woolwine, 371.
Boyden v. Fitchburg R. R. Co., 721.
Boyer v. Barr, 127.
v. Bolender, 104.
v. Eastern Ry. Co., 528.
Boyington v. Squires, 317.
Boykin v. Edwards, 191.
Boyle v. McLaughlin, 648.
v. Union Pac. R. R. Co., 501, 509, 513, 520.
Boynton v. Gilman, 586.
v. Remington, 207.
v. Shaw, etc., Co., 209, 217.
Boyson v. Thorn, 43, 293.
Boyssett v. Hire, 238.
Brabham v. Am. Tel. & Tel. Co., 546.
Brace v. Yale, 594.
Braceville Coal Co. v. People, 289.
Bracket v. Norcross, 334.
Brackett v. Griswold, 86, 87.
v. Hoitt, 53.
v. Lubke, 490.
v. Vining, 439.
Bradbee v. Christ's Hospital, 369.
Bradbury v. Gilford, 342.
v. Goodwin, 513.
v. Haines, 450.
Bradford v. Anniston, 78, 766.
v. Clark, 230.
v. Downs, 715.
v. Pickles, 44, 46, 577, 587.
Bradford Glycerine Co. v. St. Mary's W. M. Co., 607.
Bradley v. Beeth, 169.
v. Buffalo, etc., R. R. Co., 676.
v. Chase, 469.
v. Chicago, etc., Ry. Co., 507.
v. Cramer, 213.
v. Cunningham, 639.
v. Davis, 414.
v. Fisher, 377, 380, 381.
v. Heath, 236, 239.
v. Gill, 605.
v. Norton, 360.
v. Railway Co., 682.
v. Sattler, 284.
Bradley Livery Co. v. Snook, 645.
Bradshaw v. Emory, 320.
v. Frazier, 189.
v. Jones, 263.
Bradstreet v. Clarke, 142.
Bradstreet Co. v. Gill, 239.
Bradt v. New Nonpareil Co., 195, 249.
Bradwell v. Pittsburgh, etc., Pass. Ry. Co., 703, 705.
Brady v. Ball, 338, 341.
v. Chicago, etc., Ry. Co., 475.
v. Detroit Steel, etc., Co., 578.
v. Finn, 452, 456.
v. Lowell, 771.
v. Weeks, 603.
v. Whitney, 101, 438.
Bragdon v. Perkins-Campbell, 774.
Bragg v. Bangor, 772.

[REFERENCES ARE TO PAGES.]

Braham v. Nassau Elec. R. R. Co., 693.
Brainard v. Head, 439, 440.
Brainerd v. Dunning, 87.
Braithwaite v. Skinner, 8.
Brakken v. Minn., etc., Ry. Co., 610, 611.
Branaman v. Hinkle, 385.
Branch v. International, etc., Ry. Co., 491, 495.
Brand v. Hinchman, 184, 185.
Brandenberg v. Zeigler, 586.
Brandon v. Huntsville Bank, 416.
v. Planters, etc., Bank, 419.
Brannan v. Silvernail, 127.
Brannen v. Kokomo, etc., Co., 707, 719, 720.
Branner v. Stormont, 670.
Brannigan v. Union, etc., Co., 279.
Brannock v. Elmore, 481, 608, 679, 685.
Bransteller v. Dorrough, 246.
Brant v. McMahon, 633.
Brash v. St. Louis, 31.
Brashear v. Phila. Traction Co., 32.
Brasher v. Kennedy, 490.
Brasington v. South Bound Rd. Co., 126.
Braun v. Craven, 28.
v. Sauerwein, 141.
Braveboy v. Cockfield, 171.
Brayton v. Cleveland S. P. Co., 210.
v. Fall River, 609.
Brazil v. Moran, 63.
Brazil Block Coal Co. v. Gaffney, 523.
Brazil, etc., Co. v. Cain, 522.
Brebach v. Johnson, 119, 319.
Breckenridge Co. v. Hicks, 531, 555.
Breed v. Conley, 391.
Breen v. New York Central, etc., R. R. Co., 691.
Breese v. U. S. Tel. Co., 606, 728.
Brehme v. Adams Exp. Co., 724.
Brehmer v. Lyman, 736.
Breitenbach v. Trowbridge, 156, 322.
Bremer v. Pleiss, 702.
Brenan v. Merchant, 498
Brennan v. Berlin Iron Bridge Co., 553.
v. Gordon, 524, 527.
Brent v. Kimball, 125, 349.
Breslin v. Peck, 102.
Bresnahan v. Mich. Cent. R. R. Co., 686.
Bretz v. Diehl, 637.
Brewers' Case, 380.
Brewer v. Chase, 240.
v. Flint, etc., Ry. Co., 559.
Brewster v. Miller's Sons, 44, 289, 299.
v. Silliman, 434.
Brezimski v. Tierney, 149.
Brice v. Bauer, 344, 347.
v. Randall, 363.
Brickell v. New York, etc., R. R. Co., 720, 762.
Brick Presb. Church, Matter of, 269.
Bride v. Ledoux, 231.
Bridge v. Grand Junction R. R Co., 718.
Bridges v. Asheville, etc., R. R. Co., 714.
v. Bridges, 13, 49.
Briegel v. Philadelphia, 604.
Briggs, Ex parte, 468, 469.
Briggs v. Byrd, 228.
v. Gleason, 396.
v. Klosse, 367, 368.
v. New York, etc., R. R. Co., 424.
v. Thompson, 412.
Bright v. Barnett & R. Co., 778.
v. Bell, 83.
v. Patton, 165, 169.
Brightman v. Bristol, 111.
Brill v. Brill, 364.

[REFERENCES ARE TO PAGES.]

Brill v. Flagler, 349, 604.
Brink v. Wabash R. R. Co., 260.
Brinkerhoff v. Starkin, 315.
Brinkley Car Co. v. Cooper, 738.
Brinkmeyer v. Evansville, 29 Ind. 75, 187, 374.
Brinsley v. Schultz, 174.
Brinsmead v. Harrison, 101, 437.
Brintnall v. Smith, 424.
Briscoe v. Alfrey, 345, 679.
Bristol v. Braidwood, 447.
v. Walsmore, 427.
Bristol D. & L. Co. v. Bristol, 111.
Bristor v. Burr, 119, 156, 318.
Bristow v. Eastman, 57, 62.
Brittain v. Kinnard, 162.
v. Payne, 130.
Britton v. Atlanta, etc., Ry. Co., 657.
v. Gt. West. C. Co., 536, 679.
Broad v. Ham, 171.
Broadbent v. Ramsbotham, 586.
Broaddus v. Smith, 407, 409.
Broadwell v. Kansas, 80.
Brobst v. Ruff, 174.
Broburg v. Des Moines, 770.
Brock v. Copeland, 348.
v. Dole, 336.
Brockett v. Fair Haven, etc., R. R. Co., 704.
Brockway v. Crawford, 163.
Broddus v. Call, 469.
Broder v. Saillard, 605.
Broderick v. St. Paul City Ry. Co., 504.
Brodeur v. Valley Falls Co., 550.
Brodie v. Rutledge, 377.
Brohl v. Lingeman, 62.
Brokaw v. New Jersey, etc., R. R. Co., 69.
Brooder v. Salliard, 603.
Brook v. Montague, 227.
Brooke v. Grand Trunk R. Co., 658.
v. West. U. Tel. Co., 667.
Brooker v. Coffin, 201, 203.
Brooks v. Consolidated Gas Co., 754.
v. Curtis, 368.
v. Lowenstein, 116.
v. Mangan, 168.
v. Rogers, 423.
v. St. John, 383.
v. Sawyer, 61.
v. Schwerin, 67.
v. Taylor, 343, 345, 348.
v. Western U. Tel. Co., 666.
Brookshaw v. Hopkins, 165.
Bromage v. Prosser, 224.
Bronnenburg v. Charman, 633.
Bronson v. Bruce, 244.
v. Fitzhugh, 103.
Broschart v. Tuttle, 50.
Brosnan v. Sweetser, 733.
Brostrom v. Lauppe, 45.
Brother v. Cannon, 438.
Brothers v. Morris, 44.
Brotherton v. Manhattan Beach Imp. Co., 682, 732.
Broughel v. South. N. E. Tel. Co., 271, 273, 274.
Broughton v. Atchison, 420.
Brow v. Boston, etc., R. R. Co., 473.
v. Hathaway, 227.
Brown v. Am. Freehold Land Mgt Co., 299, 301.
v. Ann Arbor R. R. Co., 539.
v. Beatty, 329.
v. Best, 125.
v. Boston Ice Co., 499.
v. Bowen, 371, 595.
v. Brown, 257, 258.
v. Buffalo, etc., R. R. Co., 273
v. Cambridge, 101.
v. Campbell, 428.
v. Campbell Co., 420, 424.
v. Carpenter, 349.
v. Cayuga, etc., R R. Co., 622.
v. Chicago, etc., Ry. Co., 39, 272, 711.
v. Clegg, 647.

[REFERENCES ARE TO PAGES.]

Brown v. Collins, 19.
v. Congress, etc., St. R. Co., 682.
v. Cram, 112.
v. Cummings, 124.
v. Dean, 613.
v. De Groff, 109, 314.
v. Doscher, 361.
v. Dunham, 60.
v. Eastern R. Co., 648.
v. Edison Elec. Co., 753.
v. Ela, 423.
v. Electric Ry. Co., 273, 280.
v. European, etc., R. R. Co., 715.
v. Freeman, 461.
v. Giles, 341.
v. Gordon, 51, 154.
v. Hannibal, etc., R. R. Co., 708.
v. Hoburger, 565.
v. Howard, 161.
v. Illius, 589.
v. Irwin, 134.
v. Jacobs P. Co., 297.
v. Jarvis Eng. Co., 494.
v. Kendall, 18, 19.
v. Laurens Co., 37.
v. Leach, 443, 455.
v. Lent, 623.
v. Lester, 386, 401.
v. Levy, 555.
v. Manter, 311, 312.
v. Marsh, 103.
v. Marshall, 22.
v. Master, 184.
v. McCune, 61.
v. Memphis, etc, Co., 304.
v. Milwaukee, etc., R. R. Co., 762.
v. Myers, 205.
v. Nickerson, 202.
v. Perkins, 98, 109, 111.
v. Postal Tel. Co, 729.
v. Providence Tel. Pub. Co., 221.
Brown v. Randall, 180, 181.
v. Seattle, 611.
v. Smith, 208, 475.
v. St. Charles, 421.
v. Stevens, 731.
v. Sullivan, 705.
v. Swineford, 127.
v. Texas, etc., Ry. Co., 760, 761.
v. Tribune Ass'n, 216, 221.
v. Turner, 407, 411.
v. Viltur, 178.
v. Vinalhaven, 77.
v. Webster City, 88.
v. Werner, 365, 484.
v. Winona, etc., Ry. Co., 585.
v. Wootton, 101.
Brownback v. Frailey, 27.
Brown Chem. Co. v. Meyer, 357, 358.
Brown Co. v. Butt, 394.
Browne v. Dawson, 319.
v. Dinsmore, 321.
v. Kennedy, 313.
Brownell v. Manchester, 415.
Brown H. Co. v. Ind. Stove Works, 292, 296.
Brown Hotel Co. v. Burckhart, 645.
Browning v. Jones, 252.
v. National Capital Bank, 450.
v. Van Rensselaer, 245, 247.
v. Rittenhouse, 394.
v. Skillman, 415.
Brown Paper Co. v. Dean, 623.
Brownstein v. Sahlein, 185.
Broyles v. Prisock, 751, 753.
Bruce v. Bombeck, 63.
v. Bruce, 255.
v. Soule, 205.
Brugher v. Buchtenkirch, 741.
Brunell v. Southern Pac. Co., 554.
Brunswick v. Harmer, 197.
Brunswick, etc., R. R. Co. v. Bostwick, 659.
v. Hardy, 610, 613.

[REFERENCES ARE TO PAGES.]

Brunswick, etc., R. R. Co. v. Moore, 657.
v. Smith, 701.
Brunswick Grocery Co. v. Brunswick, etc., R. R. Co., 478.
Brusberg v. Milw., etc., Ry. Co., 744.
Brushaber v. Stegemann, 159.
Brush Elec. Lt. & P. Co. v. Lefevre, 754.
v. Wells, 520.
Bryan v. Adler, 306, 488.
v. W. U. Tel. Co., 25.
Bryan-Brown Shoe Co. v. Block, 467.
Bryant v. Jackson, 56.
v. Merritt, 583.
v. Randolph, 401.
v. Ransom, 117.
v. Sparrow, 320.
v. St. Paul, 77.
v. Ware, 116.
Brydon v. Campell, 390.
Brymer v. Southern Pacific Co, 526.
Buch v. Amory Mfg. Co., 683, 736.
Buchanan v. Foster, 257, 258.
v. Kerr, 300.
Buchel v. Gray, 699.
Buchenau v. Horney, 469.
Bucher v. Fitchburg R. R. Co., 49.
Buchner v. Chicago, etc., Ry. Co., 370.
Buck v. Ashley, 91.
v. Biddeford, 49.
v. Kent, 421.
v. Moore, 341.
v. N. J. Zinc Co., 549.
v. Sherman, 467.
Buckl v. Cone, 321.
Buckland v. Adams Express Co., 648.
v. Johnson, 101.
v. New York, etc., R. R. Co., 654.
Buckley v. Furniss, 652.
v. Gray, 671.
Buckley v. Knapp, 199.
v. Mulville, 86, 350.
v. New Bedford, 77.
Buckman v. Gt. Nor. Ry. Co., 28, 29.
Buckstaff v. Hicks, 230, 234, 239.
v. Viall, 213, 214.
Buehner v. Creamery Package Co., 503, 531, 558.
Buehner Chair Co. v. Feulner, 536, 698.
Buell v. Ball, 376.
Buena Vista Co. v. Billmyer, 453.
Buesching v. St. Louis, etc. Co., 622, 623, 686.
Budd v. Hiler, 131.
v. Multnomah, etc., Co., 422.
v. United Carriage Co., 691.
Buddenburg v. Benner, 643.
Budder v. Spangler, 438.
Buddington v. Shearer, 345.
Buffalo, etc., Co. v. Standard Oil Co., 71.
Buffington v. Clarke, 432.
Buffum v. Harris, 586.
Buisson v. Huard, 225.
Bulfit v. Matthews, 338.
Bulkley v. Dolbeare, 414, 415.
v. Leonard, 346.
v. Naumkeag, etc., Co., 649.
Bullard v. Harrison, 329.
Bullitt v. Farrar, 461.
Bunderson v. Burlington, etc. R. R. Co., 583.
Bundy v. Dodson, 259.
v. Maginess, 127.
Bunger v. Roddy, 430.
Bunker v. Tufts, 143.
Bunnell v. Berlin Iron Bridge Co., 699.
v. Railway Co., 703, 705.
v. Stern, 638.
Buntin v. Pritchett, 430.
Bunting v. Hogsett, 32, 34, 35, 720.
v. Penn. R. R. Co., 654.
Burbank v. Bethel, etc., 619.
v. Chapin, 644.

[REFERENCES ARE TO PAGES.]

Burbanks v. Leporsky, 173, 175.
Burch v. Carter, 416.
Burdette v. Argile, 229
Burdick v. Cheadle, 739, 775.
v. Freeman, 133.
Burdict v. Missouri Pac. Ry. Co., 133, 134.
Burditt v. Hunt, 429.
Burford v. Grand Rapids, 75.
Burgess v. Clements, 642, 644.
v Gray, 621, 731.
v. Salt Lake City R. R. Co., 765.
v. Sims Drug Co., 491, 750.
v. Stowe, 664.
Burgett v. Burgett, 174.
Burham v. St. Louis, etc., R. R. Co., 708.
Burhans v. Sanford, 183.
Burk v. Arcata, etc., R. R. Co., 283.
v. Creamery Package Mfg. Co., 31, 679.
v. Dempter, 632.
v. Foster, 672.
v. Howley, 169.
v. Hollis, 409.
v. Walsh, 733.
Burke v. Cassin, 357, 360.
v. Davis, 540.
v. Ellis, 491, 495.
v. Ireland, 478, 482.
v Refining Co., 776.
v. Ryan, 228.
v. Savage, 419.
v. Smith, 44, 45.
v. Witheribee, 526.
Burkett v. Griffith, 248.
v. Lanata, 181.
Burks v. Bosso, 305, 306.
Burleigh v. Hines, 340, 345.
Burlew v. Hunter, 363.
Burley v. Russell, 61.
Burling v. Read, 110.
Burlington, etc., R. R. Co. v. Reinhackle, 613.
Burnap v. Albert, 185.
Burnap v. Marsh, 90.
Burnard v. Haggis, 57, 59, 64.
Burnett v. Atlantic Coast Line R. R. Co., 710.
Burney v. Children's Hospital, 268
Burnham v. Boston, 769.
v. Collateral Loan Co., 182.
v. Hotchkiss, 109.
v. Jenness, 115.
v. Kempton, 627.
v. Marshall, 423.
v. Roberts, 228.
v. Seaverns, 62.
Burns v. Boston, etc., R. R. Co., 559.
v. Bradford, 772.
v. Chicago, etc., R. R. Co., 512.
v. Delaware, etc., Tel. Co., 503, 533, 554.
v. Dockray, 454.
v. Erben, 163.
v. Gallagher, 363.
v. Grand Rapids, etc., R. R. Co., 275.
v. Hill, 61.
v. Johnson, 113.
v. Lane, 395, 396.
v. Pethcal, 563.
v. Sennett, 500, 514.
Burnside v. Twitchell, 431.
Buron v. Denman, 133.
Burrell Tp. v. Uncapher, 38, 78, 767, 773.
Burridge v. Nicholetts, 114.
Burrill v. Augusta, 76.
v. Stevens, 444.
Burris v. Johnson, 118.
Burroughes v. Bayne, 418.
v. Housatonic, etc., R. R. Co., 743.
v. Saterlee, 589.
v Whitman, 314.
Burrows v. Erie, etc., R. Co., 657.
v. Trieber, 643.
Burt v. Advertiser Newspaper Co., 222, 223, 246, 247.

[REFERENCES ARE TO PAGES.]

Burt v. Bowles, 452.
v. Dutcher. 436.
v. Mason, 446.
v. McBain, 66.
v. Smith, 185.
v. Tucker, 356.
Burtch v. Nickerson, 208.
Burton v. Fulton, 374.
v. Galveston, 475.
v. Kennedy, 439.
v. McClellan, 743.
v. Scherff, 326.
Busch v. Wilcox, 442, 462.
Bush v. Barnett, 691.
v. McMann, 211.
v. Pettibone, 55.
v. Sprague, 86.
v. Steinman, 621, 731.
v. Wathen, 348.
Bushnell v. Robeson, 625.
Buss v. Pierce, 515.
Bussey v. Mississippi, etc., Co., 647.
Bussian v. Milwaukee, etc., Ry. Co., 140.
Busst v. Gibbons, 171.
Buster v. Newkirk, 413.
Butcher v. Butcher, 321.
v. Providence Gas Co., 756.
Butchers, etc., Co. v. Crescent City, etc., Co., 185.
Butchers' Ice & C. Co. v. Philadelphia, 609.
Bute v. Potts, 670.
Butelli v. Jersey City, etc., Elec. Ry. Co., 763.
Butler v. Ashworth, 401.
v. Butler, 269.
v. Collins, 414.
v. Frazee, 525, 531.
v. Haskell, 469.
v. Kent, 38, 375.
v. Jones, 432.
v. Lewman, 478, 735.
v. News-Leader Co., 205.
v. Peck, 583, 586.
v. Railroad Co., 139.
Butner v. W. U. Tel. Co., 26, 667.
Butte v. Pleasant Val. Coal Co., 504.
Butte Canal, etc., Co. v. Vaughn, 690.
Butterfield v. Western R. R. Co., 762.
Butterman v. McClintic-Marshall Con. Co., 503.
Button v. Frink, 689.
v. Hudson R. R. Co., 704.
Buttrick v. Lowell, 88.
Buttride v. Lowell, 76.
Butts v. Long, 248.
Butz v. Cavanagh, 75.
Buxton v. Jones, 464.
Buzzell v. Emerton, 169.
Byam v. Collins, 232, 234, 235, 238.
Byard v. Hopes, 468.
v. Holmes, 441.
Byasse v. Reese, 413.
Byerly v. Anamosa, 37, 78, 767, 773.
Byersdorf v. Sump, 184.
Byler v. Jones, 190.
Byrd v. English, 775.
v. Hudson, 235.
Byrne v. Boadle, 694.
v. Eastmans Co., 508, 511.
v. Funk, 241.
v. Minn., etc., Ry. Co., 616.
Byrnes v. New York, etc., R. R. Co., 520, 548.

C.

Cabot v. Christie, 462.
Cade v. Redditt, 247.
Cadwalleder v. Railway Co., 761.
Cadwell v. Arnheim, 687.
Cady v. Brooklyn Union Pub. Co., 214.
v. Schultz, 355.
Cafehout v. Foster, 406.
Cafferty v. Pennsylvania R. R. Co., 281.

[REFERENCES ARE TO PAGES.]

Cagney v. Cuson, 456.
Cahill v. Applegate, 461, 462, 463.
v. Chicago, etc., R. R. Co., 737.
v. Eastman, 581, 620, 716.
v. Murphy, 249.
Cain v. Chicago, etc., Co., 617.
Cairo, etc., R. R. Co. v. Murray, 676.
v. Stevens, 583.
Calder v. Walla Walla, 771.
Calderon v. Atlas S. S. Co., 725.
Caldwell v. Cowan, 419.
v. Gale, 372, 622.
v. Hall, 633.
v. Hawkins, 438.
v. Henry, 456, 457, 461.
v. N. J. Steamboat Co., 649, 654, 689.
v. Prunnelle, 80.
v. Story, 231, 238.
Calhoun v. Little, 377, 381.
California Cured Fruit Co. v. Ainsworth, 435.
California F. S. Co. v. Putnam, 356.
v. Stearns & Co., 356.
California Powder Works v. Atlantic & Pac. R. R. Co., 722, 724.
Calking v. Baldwin, 146.
Calkins v. Barger, 742.
v. Lockewood, 426.
v. Sumner, 226.
Call v. Hayes, 218.
Callan v. Bull, 500, 506, 553, 555.
Calland v. Nichols, 669.
Callahan v. Bank, 210.
v. Bean, 715.
v. Burlington, etc., R. R. Co., 484.
v. Eel River, etc., R. R. Co., 737.
v. Gilman, 610.
v. Hyland, 498.
v. Ingram, 230.
v. Searles, 159.
Calvo v. Railroad Co., 547.
Calwell v. Boone, 76.
Calye's Case, 641.
Camden, etc., Ry. Co. v. Preston, 708, 764.
Cameron v. Great Northern Ry. Co., 509, 511.
v. Kenyon, etc. Co., 607.
v. New Eng. T. & T. Co., 27.
v. New York, etc., R. R. Co., 517.
v. Nystrom, 549.
v. Pacific Express Co., 169.
v. Reynolds, 91.
v. Vandergriff, 135, 608.
Cameron M. & E. Co. v. Anderson, 482.
Camp v. Glidden, 419.
v. Hall, 500, 522, 523.
v. Martin, 206.
v. West. U. Tel. Co., 728.
Campbell v. Arnold, 312, 313.
v. Baltimore, etc., R. R. Co., 171.
v. Bannister, 238.
v. Bridwell, 339.
v. Carter, 253.
v. Eveleth, 524, 537, 698.
v. Fleming, 468.
v. Gillespie Co., 515, 558.
v. Indiana, etc., R. R. Co., 327.
v. Lunsford, 484.
v. Mesier, 367, 369.
v. Perkins, 60.
v. Phelps, 91, 99.
v. Pullman Pal. Car Co., 665.
v. Race, 329.
v. Seaman, 569, 571, 573, 602.
v. Spears, 454.
v. Stakes, 57.
v. Sugar Co., 739.
Campbell & Zell Co. v. Roediger, 518.
Canadian Pac. Ry. Co. v. Clark, 705.
Canal Co. v. Clark, 359.
Candee v. Deere, 357, 358, 359.
v. Hayward, 144.

[REFERENCES ARE TO PAGES.]

Candee v. Western Union Tel. Co., 729.
Candrian v. Miller, 250.
Canefox v. Crenshaw, 350.
Canfield v. Andrew, 597.
Caniff v. Blanchard, 545, 735.
Canman v. St. Louis, 611.
Cann v. Cann, 469.
Canning v. Owen, 405, 406.
Cannon v. Lewis, 609.
Canton Cotton Warehouse Co. v. Pool, 489, 496.
Capasso v. Woolfolk, 507.
Capehart v. Granite Mills, 650.
Capel v. Powell, 63, 64.
Capen v. Foster, 388.
v. Hall, 741.
Caperson v. Sproule, 178.
Capper v. Louisville, etc. R. R. Co., 547.
Carbin's Adm'r v. Bennington, etc., R. R. Co., 528, 532.
Carbondale Inv. Co. v. Burdick, 185, 187.
Carbrey v. Willis, 364.
Card v. Columbia Tp., 38.
v. Wilkins, 514.
Carden v. Louisville, etc., R. R. Co., 141, 282.
Cardington v. Fredericks, 566, 568.
Cardival v. Smith, 181, 182.
Cardon v. McConnell, 248.
Carew v. Rutherford, 293.
Carey v. Berkshire R. R. Co., 280.
v. Bright, 432.
v. Sellars, 532.
Carhart v. Wainman, 645.
Carleton v. Redington, 324, 622, 623.
Carleton M. & M. Co. v. Ryan, 503, 553.
Carli v. Stillwater St. R. & T. Co., 371.
Carlislie v. Benley, 53.
v. Burley, 437.
v. Wallace, 637.
Carlson v. N. W. Tel. Exch. Co., 520, 539, 540, 544, 560.
v. Ore. Short Line, 285.
v. Phoenix Bridge Co., 510, 525.
v. Stocking, 480, 483.
Carlyon v. Fitzhenry, 633.
v. Lannan, 435.
v. Lovering, 626.
Carman v. Steubenville, etc., R. R. Co., 96.
Carmody v. Boston Gas Co., 757.
Carney v. Marseilles, 78, 767.
Carpenter v. Am. B. & L. Ass'n, 434.
v. Ashley, 235.
v. Bailey, 222, 247.
v. Carpenter, 61.
v. Commonwealth, 255.
v. Eastern Ry. Co., 722.
v. Gold, 591, 592.
v. Latta, 348.
v. Lee, 100.
v. Lippitt, 349.
v. New York, etc., R. R. Co., 664, 665.
v. Spooner, 190.
v. Tarrant, 203.
v. Wright, 454.
Carpenter Paper Co. v. News Pub. Co., 22.
Carpue v. London, etc. R. Co., 690.
Carr v. Am. Locomotive Co., 512.
v. Dodge, 412.
v. United States, 82.
Carrico v. W. Va. Cent., etc., Ry. Co., 480, 656.
Carrier v. Chicago, etc., Ry. Co., 141.
v. Dorrance, 636.
v. Esbaugh, 397.
Carrigan v. Stillwell, 280, 678, 679.
Carrington v. Ficklin, 633.
v. St. Louis, 73.
v. Taylor, 47.
Carroll v. Marcoux, 348.

[REFERENCES ARE TO PAGES.]

Carroll v. Mo. Pac. R. R. Co., 287, 726.
v. Staten Island R. R. Co., 13, 49.
v. Tide Water Oil Co., 560.
v. Wis. Cent. R. R. Co., 615.
Carruth v. Harris, 448.
Carslake v. Mapledoram, 205.
Carson v. Desau, 83.
v. Edgeworth, 179.
v. Genessee, 766.
v. Godley, 780.
v. Mining Co., 145.
v. Southern Ry. Co., 563.
Carstairs v. Taylor, 580.
Carte v. Evans, 353.
Carter v. Bennett, 419.
v. Berlin Mills Co., 478.
v. Columbia, etc., R. R. Co., 682.
v. Dubach Lumber Co., 518, 519, 524.
v. Du Pre, 436.
v. Glass, 14.
v. Harden, 774.
v. Harlan, 324.
v. Harrison, 388.
v. Hobbs, 640.
v. Howe Machine Co., 70.
v. Kingman, 420.
v. Lehman, 421.
v. Oliver Oil Co., 509, 511, 528, 536, 560.
v. Sutherland, 113.
v. Towne, 748.
v. Worcester, 72.
Carterville v. Cook, 42.
Cartlidge v. Sloan, 424, 434.
Carvill v. Jacks, 457.
Cary v. Allen, 212.
v. Webster, 96.
Case v. De Goer, 52.
v. Hulsebush, 91.
Casebeer v. Rice, 181.
Case Mfg. Co. v. Garven, 409.
Casey v. Hulgom, 224.
Casey v. Louisville, etc., R. R. Co., 542.
v. Mason, 317.
v. Pa. Asphalt Pav. Co., 539, 554.
v. Smith, 716.
Casher v. Peterson, 415.
Cashill v. Wright, 644.
Cashion v. W. U. Tel. Co., 25.
Cash Register Co. v. Townsend, 447.
Caspany v. Portland, 474.
Casper v. Prosdame, 155.
Cass v. Dicks, 583.
Cassem v. Galvin, 250.
Cassin v. Delany, 63, 64.
Castile v. Ford, 89, 396.
Castle v. Duryee, 747.
Castleberry v. Kelly, 203.
Caswell v. Davis, 356, 357.
v. Hazard, 358.
v. Hunton, 455.
v. Parker, 58.
v. Worth, 678.
Cate v. Cate, 162, 342.
Cates v. Kellogg, 247.
Catlin v. Valentine, 603.
Caton v. Rumney, 647.
Catterton v. Secretary of State, 237.
Cau v. Texas, etc., Ry. Co., 722.
Caughey v. Smith, 259.
Cauley v. Pittsburg, etc. R. R. Co., 717, 758.
Causey v. Empire P. Mills, 405.
Cavanaugh v. Austin, 222.
Cave v. Mountain, 381.
Caven v. Bolwell Granite Co., 508, 511, 536, 560.
Cavey v. Leadbitter, 572.
Cavis v. Beckford, 406.
Cawley v. Winifrede R. R. Co., 702.
Cawston v. Sturges, 450, 461.
Caye v. Poole's Assigner, 646.
Cayford v. Wilbur, 671.
Cayzer v. Taylor, 514, 687.

[REFERENCES ARE TO PAGES.]

Cecil v. Green, 305, 306.
v. Spurger, 443.
Cedar Lake Hotel Co. v. Cedar Lake H. Co., 594.
Center v. Spring, 178, 180.
Central Coal & Coke Co. v. John Henry Shoe Co., 118, 423, 426.
Central, etc., R. R. Co. v. Fritz, 408.
Centralia v. Wright, 595.
Central of Ga. Ry. Co. v. Brown, 68, 69, 96, 487.
v. Lippman, 653, 722.
v. Price, 39.
v. Sheftall, 220.
v. Tribble, 712.
v. Windham, 583.
v. Wood, 97.
Central R. R. & B. Co. v. Smithe, 650, 685, 721.
Central R. R. Co. v. Crosby, 709.
v. Davis, 359.
v. Kisch, 458.
v. Peacock, 489.
v. Rouse, 287.
v. Smalley, 762.
v. Tronstine, 650.
v. Van Horn, 657.
Central R. R., etc., Co. v. Campley, 646.
v. Rylee, 713.
Central U. Tel. Co. v. Bradbury, 666.
Cerillos Coal R. R. Co. v. Deserant, 543.
Cernahan v. Chrisler, 423, 429, 434.
Cerveny v. Chicago Daily News Co., 212, 214.
Cesar v. Karutz, 607.
Chacey v. Fargo, 31, 772, 773.
Chaddock v. Briggs, 206.
v. Plummer, 747.
Chadeayne v. Robinson, 583, 584.
Chadwick v. Davis, 332.
Chaffin v. Lynch, 231, 235, 240.
Chalifoux v. Potter, 409, 410.
Chalker v. Dickinson, 315.
Challis v. Wylie, 131.
Chalmers v. Shackell, 222.
v. Smith, 337.
Chamberlain v. Bell, 390.
v. Beller, 105.
v. Clayton, 386.
v. Clemence, 420.
v. Douglas, 628.
v. Goodwin, 91.
v. Masterson, 640, 641.
v. Murphy, 103.
v. Porter, 123.
v. West, 420, 632, 646.
v. Willmore, 91.
Chambers v. Baldwin, 293.
v. Bedell, 113, 115.
v. Oehler, 378, 439.
v. Matthews, 342.
v. Thomas, 191.
Chambliss v. Blau, 182, 225.
Champer v. State, 152.
Champion v. Doughty, 134.
v. Woods, 452.
Chandler v. De Graff, 116.
v. Lazarus, 579.
v. Howland, 591, 601.
v. Walker, 312.
Channon v. Sandford Co., 504.
Chapel v. Smith, 583.
Chaperon v. Portland Elec. Co., 694, 752.
Chapin v. Holyoke Y. M. C. A., 72.
Chapman v. Atlantic, etc., R. R. Co., 746.
v. Calder, 221, 237.
v. Cawrey, 178.
v. Chapman, 670.
v. Chicago, etc., Ry. Co., 128, 129.
v. Copeland, 23.
v. Morgan, 134.
v. New Haven, etc., R. R. Co., 31, 719.
v. Pickersgill, 183.
v. Rochester, 122, 597.

[REFERENCES ARE TO PAGES.]

Chapman v. Rothwell, 733.
v. Southern Pac. Co., 503, 528, 561.
v. State, 150.
v. Thumblethorp, 113.
v. W. U. Tel. Co., 25.
Chappell v. Boosey, 353.
v. Bradshaw, 122.
v. Schmidt, 156.
v. State, 350.
Charbonnel v. Seabury, 450.
Charles River Bridge v. Warren Bridge, 21.
Charless v. Rankin, 364.
Charlevois v. Gogebic, etc., R. R. Co., 285.
Charlotte Trouser Co. v. Railroad Co., 660.
Charnock v. Texas, etc., Ry. Co., 722.
Chase v. American Steamship Co., 122.
v. Cleveland, 771.
v. Hazeltine, 336.
v. Jefferson, 115.
v. Lowell, 770.
v. Maine Central R. R. Co., 763.
v. Mayberry, 633.
v. Silverstone, 587.
v. Spartenburg Ry. Co., 491.
v. Washburn, 637.
v. Weston, 382.
Chasemore v. Richards, 21, 586, 589, 593, 598.
Chas. S. Higgins Co. v. Higgins Soap Co., 359.
Chastain v. Johns, 62.
Chataigne v. Bergeron, 746.
Chatfield v. Wilson, 21, 46, 587, 588.
Chatham v. Brainerd, 332.
Chattahoochee, etc., R. R. Co. v. Behrman, 478.
Chattanooga v. Reid, 75.
Chattanooga, etc., Co. v. Hodges, 39, 710.
Chattanooga Machinery Co. v. Hargraves, 513.
Chattanooga Rapid Transit Co. v. Venable, 690.
Cheatham v. Shearon, 607.
Cheeney v. Ocean S. S. Co., 518.
Cheetham v. Hampon, 620.
Chegaray v. Jenkins, 439.
Chenall v. Palmer Brick Co., 683, 692, 695.
Chenango Bridge Co. v. Lewis, 617.
Cheney v. Boston, etc., R. R. Co., 658.
Cherokee, etc., Co. v. Limb, 283, 285.
Cherry v. Arthur, 409.
v. Newson, 469.
v. Stein, 369, 578.
Chesapeake, etc., Co. v. Balt., etc., Co., 666.
Chesapeake, etc., Ry. Co. v. Bensley, 724.
v. Dixon, 273.
v. Jennings, 50.
v. Rodgers, 41, 708.
Chesebro v. Powers, 248.
Chesley v. King, 46, 588.
v. Thompson, 335.
Chess v. Keley, 115.
Chesson v. Roper Lumber Co., 504.
Chester v. Comstock, 462.
Chestnut v. Chestnut, 255.
Chetwood v. Cal. Nat. Bank, 102.
Chicago v. Allcock, 128.
v. Babcock, 103.
v. Dermody, 80.
v. Joney, 79.
v. Keefe, 768.
v. Kelly, 127.
v. Major, 272, 273, 276, 278, 285.
v. McGiven, 770.
v. Murdock, 482.
v. O'Brennan, 124.
v. Robbins, 105, 480, 767.
v. Seben, 77, 79.
v. Selz, 81.

[REFERENCES ARE TO PAGES.]

Chicago v. Starr, 276.
v. Union Bldg. Association, 611.
Chicago Anderson P. B. Co. v. Reineiger, 521, 522.
Chicago City Ry. Co. v. Hackendahl, 278.
v. Leach, 549, 555.
v. Tuohy, 713.
v. Wilcox, 716.
Chicago Economic Fuel Gas Co. v. Myers, 482.
Chicago, etc., Co. v. Hoyt, 547.
v. Linard, 412.
v. Loeb, 612.
v. Moranda, 547.
v. Ross, 547.
v. Van Dam, 555.
Chicago, etc., R. R. Co. v. Abels, 725.
v. Avery, 535.
v. Barnard, 697.
v. Becker, 714.
v. Bell, 140.
v. Bockhoven, 739.
v. Boggs, 677, 685.
v. Bragonier, 559.
v. Bryant, 492, 494.
v. Carey, 699.
v. Chapman, 724.
v. Crisman, 677.
v. Crose, 678, 685.
v. Dickson, 66.
v. Donahue, 707, 712.
v. Doyle, 139, 275, 547.
v. Driscoll, 282, 288.
v. Dunn, 66, 256.
v. Eininger, 686.
v. Flexman, 487.
v. Gardnier, 725.
v. Geary, 531.
v. Glenney, 95.
v. Goyette, 679, 685.
v. Grablin, 677.
v. Harrington, 93.
v. Harwood, 285, 712.
v. Hatch, 712.
Chicago, etc., R. R. Co. v. Hawk, 727.
v. Hayfield, 523.
v. Hedges, 701.
v. Heerey, 438.
v. Hines, 103.
v. Hoyt, 548, 549.
v. Hutchinson, 699, 761.
v. Jennings, 655.
v. Keefe, 545.
v. Kellogg, 508.
v. Kneirim, 535.
v. Krayenbuhl, 737.
v. Kuckkuck, 347.
v. Logerkrans, 282, 288.
v. Landauer, 701, 711.
v. Lane, 699.
v. Lee, 699, 760, 761.
v. Lewis, 139.
v. Maroney, 535, 553, 560.
v. Meech, 97.
v. McCahill, 746.
v. McCarty, 540.
v. Mochell, 719.
v. Morris, 272.
v. Nuney, 703.
v. People, 647.
v. Pillsbury, 653.
v. Platt, 510.
v. Ptacek, 284.
v. Randolph, 713.
v. Reilly, 693.
v. Rouse, 134, 275.
v. Sanders, 761.
v. Sawyer, 649.
v. Scanlon, 527, 553.
v. Schaffer, 617.
v. Schmitz, 97.
v. Shannon, 284.
v. Solan, 723.
v. Swan, 555.
v. Swett, 284.
v. Taylor, 513.
v. Thomas, 283.
v. Triplett, 677.
v. Utley, 676.
v. Watkins, 83.

[REFERENCES ARE TO PAGES.]

Chicago, etc., R. R. Co. v. West, 488.
v. Willard, 35.
v. Williams, 304, 743, 744.
v. Winfrey, 700.
v. Witty, 724.
v. Woolridge, 283, 284, 285.
v. Wymore, 140.
v. Young, 690.
Chicago Exchange Building Co. v. Nelson, 663.
Chicago Forge & Belt Co. v. Rose, 176.
Chicago Gt. Western Ry. Co. v. First M. E. Church, 614.
Chicago House Wrecking Co. v. Birney, 544.
Chicago N. S. St. Ry. Co. v. Payne, 606.
Chicago & P. B. Co. v. Sobkowiak, 540.
Chicago Terminal Transfer R. R. Co. v. Kotoski, 709.
v. Tchmelling, 657.
Chicago Transit Co. v. Campbell, 275.
Chicago Union Traction Co. v. Browdy, 765.
v. Leach, 719.
v. Sawasch, 527, 553.
Chicago West Div. Ry. Co. v. Ryan, 708, 713.
Chick v. Newberry County, 72.
Chickering v. Robinson, 385.
Chicora Fertilizer Co. v. Dunan, 446.
Chikey v. Seattle Elec. Co., 654.
Child v. Boston, 77, 403.
v. Hearn, 718.
Childers v. Mercury P. & P. Co., 202, 248, 249.
Childs v. Bank of Mo., 69.
v. Muckler, 257.
Chiles v. Drake, 127, 287.
Chilton v. St. Louis, etc., R. R. Co., 304.
Chipley v. Atkinson, 43, 291.
China, The, 134.
China v. Southwick, 580.
Chipman v. Cook, 206.
v. Palmer, 95, 624.
Chisholm v. Atlantic Gas Co., 756.
Chittenden v. Pratt, 131, 420, 428.
Chloupek v. Perotka, 371.
Choctaw, etc., R. R. Co. v. Jones, 533.
Choen v. Porter, 66.
Chope v. Eureka, 80.
Chopin v. Badger Paper Co., 523.
Chouteau v. Broughton, 53.
Choynski v. Cohen, 357.
Chretien v. Northern Rys. Co. 711.
Chrisman v. Bruce, 388, 389.
Christensen v. Thompson, 251
Christian v. Hoover, 101.
Christianson v. Chicago, etc., Ry. Co., 33, 35, 688.
v. Pacific Bridge Co., 540.
Christie v. Griggs, 654, 691.
Christienson v. Rio Grande W. Ry. Co., 507.
Christopherson v. Bare, 152.
Christy v. Scott, 319.
v. Smith, 393.
Church v. Anti-Kalsomine Co., 17
v. Chicago, etc., Ry. Co., 471 698.
v. Lee, 118.
v. McLeod, 427.
Churchill v. Baumann, 137.
v. Burlington Water Co., 614
v. Churchill, 162.
v. Holt, 104.
v. Siggers, 188.
v. White, 57, 59.
Chynoweth v. Tenney, 325.
Cigar Makers' Protective Union v. Conham, 355.
Cincinnati v. Stone, 478, 484.
Cincinnati Daily T. Co. v. Bruck, 187.
Cincinnati, etc., Co. v. Eaton, 39.

[REFERENCES ARE TO PAGES.]

Cincinnati, etc., R. R. Co. v. Baker, 36, 743, 744.
v. Cole, 656.
v. Cook, 96.
v. Roberts, 542.
v. Roesch, 503.
v. Smith, 491.
v. Finnell, 472.
Cincinnati St. Ry. Co. v. Altemeier, 285, 287.
v. Snell, 765.
v. Wright, 720.
Circleville v. Sohn, 78, 79, 767.
Ciriack v. Merchants' Woolen Co., 522.
Cisney v. Pa. Sewer P. Co., 507.
Citizens' Bank v. Nantucket Steamboat Co., 646.
v. Tiger Tail, etc., Co., 419.
Citizens' Banking Co. v. Peacock, 420.
Citizens' Loan Fund & S. Ass'n v. Friedley, 671.
Citizens' Street Ry. Co. v. Cooper, 279.
v. Willoeby, 260, 279, 487, 498, 656.
City Council v. Payne, 164.
City Delivery Co. v. Henry, 496.
City Electric St. Ry. Co. v. Conery, 94, 752, 753.
City Ry. Co. v. Lee, 663.
City & Suburban Ry. Co. v. Morris, 478.
Claflin v. Carpenter, 413.
v. Continental Jersey Works, 116.
v. Gurney, 425, 430.
Claggett v. Crall, 453.
Clairain v. Western Union Tel. Co., 503.
Clancy v. Barker, 645.
v. Byrne, 618, 621.
v. New York, etc., Ry. Co., 752.
Clapp v. La Grill, 731, 736.
v. Mear, 733.
Clapp v. Stanton, 647.
Clare v. New York, etc., R. R. Co., 281.
v. Sacramento Elec. P. & L. Co., 752.
Clark v. Allaman, 598.
v. Axford, 438.
v. Baird, 451.
v. Barrington, 773.
v. Bennett, 763.
v. Binney, 213.
v. Board of Directors, 307, 308.
v. Buckmobile Co., 494.
v. Cambridge, etc., Co., 591.
v. Chicago, etc., Ry. Co., 610, 654, 690.
v. Cleveland, 182.
v. Conroe, 587.
v. Dasso, 333.
v. Downing, 149.
v. Draper, 419.
v. Dustin, 324.
v. Eastern R. R. Co., 634.
v. Famous Shoe, etc., Co., 709.
v. Fitch, 260, 262.
v. Foot, 742.
v. Fry, 480.
v. Griffith, 434.
v. Harvey, 411.
v. Keliher, 321, 350.
v. Lancy, 145.
v. London General Omnibus Co., 260.
v. May, 162, 379, 380.
v. Miller, 389, 402.
v. Maloney, 416, 419.
v. Molyneux, 234.
v. Nordholt, 183, 188.
v. North Am. Co., 219.
v. Oregon Short Line, etc., R. R. Co., 703, 705.
v. Peckham, 609.
v. Pennsylvania R. R. Co 591.
v. Richmond, 78, 767, 769.
v. Rideout, 420.
v. Rockland W. Co., 594.

[REFERENCES ARE TO PAGES.]

Clark v. San Francisco, etc., Ry. Co., 742.
v. Thompson, 182.
v. Whittaker, 128.
v. Wilmington, etc., R. R. Co., 708.
v. Winn, 168.
Clarke v. Carleton, 414.
v. Dickson, 458, 464, 469.
v. Holmes, 678.
Clary v. Willey, 643.
Classen v. Leopold, 643.
Clavering v. Clavering, 336.
Clawson v. Primrose, 369.
Claxton's Adm'r v. Railroad Co., 707.
Clay v. Central R. & B. Co., 287.
v. Pittsburg, etc., Ry. Co., 583.
v. Willan, 700.
Claybrook v. Owensboro, 307.
Claypool v. Claypool, 204.
Clayton v. Scott, 162.
Clealand v. Thornton, 742.
Clegg v. Waterbury, 181.
Cleghorn v. Thompson, 697, 746.
Cleland v. Anderson, 299.
v. Thornton, 742.
Clem v. Newcastle, etc., R. R. Co., 452.
Clemence v. Steere, 336.
Clemens v. Hannibal, etc., R. R. Co., 36.
v. Speed, 365, 366.
Clement v. La. Elec. Lt. Co., 685.
v. Spear, 129.
v. West. U. Tel. Co., 668, 728.
Clements v. La. Elec. Lt. Co., 679.
v. Ohrly, 182.
Clemmitt v. Watson, 295.
Clemmons v. Danforth, 226.
Clerc v. Morgan's La., etc., Co., 653, 703.
Cleveland v. Bangor, 49, 92, 93, 101, 102, 104, 769, 773.
v. Citizens' Gas Co., 575.
v. Gas Lt. Co., 603, 604.
Cleveland v. Stillwell, 83.
Cleveland, etc., Ry. Co. v. Ballentine, 776.
v. Crawford, 717.
v. Curran, 726.
v. Drumm, 284.
v. Jenkins, 2, 290.
v. Keary, 544.
v. Lindsay, 43.
v. Marsh, 747.
v. Martin, 505.
v. Rowan, 288.
v. Scantland, 745.
v. Stephens, 745.
v. Stewart, 26.
v. Terry, 717.
v. Wynant, 31.
Clifford v. Atlantic Cotton Mills 609.
v. Cochrane, 207.
v. Hoare, 371.
v. Press Pub. Co., 67, 200.
Clifton v. Hooper, 23.
v. Lange, 241.
Clifton Iron Co. v. Dye, 596, 628, 760.
Cline v. Crescent City R. R. Co., 93, 767, 773.
Clinton v. Henry Co., 147.
v. Meyers, 44, 594.
Cloon v. Gerry, 178.
Closson v. Staples, 185.
Cloughessey v. Waterbury, 771, 772.
Clove v. McIntire, 688.
Clow v. Chapman, 257.
Clowdis v. Fresno Hume, etc., Co., 344, 345, 347, 490.
Clower v. Maynard, 119, 319.
Clugstone v. Garretson, 202.
Clune v. Ristine, 287.
Clute v. Carr, 325.
v. Clute, 217.
v. Wiggins, 643.
Clyde S. S. Co. v. Burrows, 648.
Coal Co. v. Estievenard, 680, 685.

[REFERENCES ARE TO PAGES.]

Coal Creek Min. Co. v. Davis, 550.
Coates v. Wallace, 241.
Coats v. Mrrick T. Co., 361.
Cobb v. Bennett, 111, 315.
v. Davenport, 313, 314.
v. Simon, 488, 498.
v. Standish, 769.
Cobb Chocolate Co. v. Knudson, 540.
Coburn v. Watson, 434.
Cochran v. Flint, 408.
v. Frostburg, 75, 76.
v. Sess, 683.
v. Shanahan, 562.
Cochrane v. Little, 670.
Cock v. Weatherby, 413.
Cocke v. Greene, 265, 266.
Cocker v. Cowper, 326.
Cockersham v. Nixon, 346.
Cockroft v. Smith, 154, 155.
Codman v. Evans, 333.
Cody v. New York, etc., R. R. Co., 711.
Coe v. Platt, 678.
Coffeen v. Brunton, 355.
Coffin v. Anderson, 419, 431.
v. Brown, 222.
v. Coffin, 230.
v. Field, 162.
Coffing v. Dodge, 669.
Coffins v. Jefferson, 687.
Coger v. N. W. Union Packet Co., 306.
Coggs v. Bernard, 648.
Coggswell v. Baldwin, 344, 565.
v. Lexington, 769.
v. New York, etc., R. R. Co., 602, 605.
Coghill v. Boring, 468.
Cogswell v. Murphy, 346.
v. West St., etc., Elec. Ry. Co., 98.
Cohen v. Manuel, 51, 643.
v. Philadelphia, etc., R. R. Co., 698.
Cohn v. May, 42.
Cohn v. Saidel, 184.
Cointement v. Cropper, 170.
Coker v. Birge, 602.
Colbert v. Hicks, 174.
Colburn v. Mason, 334.
v. Patmore, 104.
v. Simms, 352.
Colby v. Sampson, 394.
v. W. W. Kimball Co., 428.
Colchester v. Brook, 109, 702.
Colden v. Eldred, 145, 341.
Cole v. Cassidy, 461, 462.
v. Curtis, 176.
v. Drew, 332.
v. Edwards, 84, 397.
v. Fisher, 747.
v. Gibbons, 469.
v. High, 470.
v. McKey, 684.
v. Muscatine, 146, 147.
v. Neustadter, 212, 216, 220.
v. Parker, 752.
v. St. Louis Transit Co., 533, 535, 558.
v. Tucker, 126, 127.
v. Turner, 151.
v. Warren Mfg. Co., 511.
v. West. U. Tel. Co., 668.
Colegrove v. New York, etc., R. R. Co., 31, 93, 720.
Coleman v. Allen, 170.
v. Bennett, 100.
v. Frazier, 393.
v. Lyne, 468.
v. New York, etc. R. R. Co., 487, 493.
v. Roberts, 377.
Coles v. Clark, 420.
v. Thompson, 206.
Cole Silver M. Co. v. Virginia, etc., W. Co., 589.
Colgrove v. Smith, 482.
Colley v. Southern Cotton Oil Co., 542, 550, 551, 558.
v. Westbrook, 772.
Collier v. Thompson, 468.

[REFERENCES ARE TO PAGES.]

Collingwood v. Ill. & Ia. Fuel Co., 518, 527, 553.
Collins v. Ala. Great So. R. R. Co., 652.
v. Benbury, 314, 317.
v. Butter, 151, 498.
v. Chartiers Val. Gas Co., 589.
v. Council Bluffs, 771.
v. Dispatch Pub. Co., 213, 215, 220, 221.
v. Dorchester, 769.
v. East Tenn., etc., R. R. Co., 285.
v. George, 744.
v. Harrison, 556, 557.
v. Hayte, 172, 183.
v. Jackson, 455.
v. McDaniell, 401.
v. Medical School, 71.
v. Mellen, 207.
v. Toledo, etc., Ry. Co., 655.
v. Waggoner, 87.
Collinson v. New Castle, etc., R. R. Co., 148.
Collins Park, etc., R. R. Co. v. Ware, 253.
Collis v. Selden, 774.
Collyer v. Collyer, 201.
Coleman v. Anderson, 439.
Colony v. Farrow, 202.
Colorado, etc., Ry. Co. v. Martin, 699.
Colorado, etc., R. R. Co. v. Thomas, 719, 762.
Colorado M. & I. Co. v. Rees, 31, 663.
Colorado Mid. Ry. Co. v. O'Brien, 528, 537, 540.
Colrick v. Swinburne, 617.
Colton v. Cleveland, etc., R. R. Co., 723.
v. Onderdonk, 608.
Colulla v. Kerr, 218.
Columbia D. B. Co. v. Geisse, 143.
Columbia Mill Co. v. Alcorn, 359.
Columbus v. Anglin, 768, 772.
Columbus v. Howard, 637.
v. Jaques, 610.
Columbus, etc., R. R. v. Arnold, 513, 542, 545.
v. Bradford, 559.
v. Bridges, 559.
v. Ludden, 652.
v. Froesch, 509, 516.
Columbus Gas Co. v. Freeland, 575, 578, 602.
Colvard v. Black, 213, 219.
Colwell v. Waterbury, 474.
Colyer v. Taylor, 633.
Comben v. Belleville Stone Co., 501.
Comer v. Knowles, 159.
Commercial Bank v. Varnum, 399.
Commercial Elec. L. & P. Co. v. Tacoma, 474.
Commercial Union Ass'n Co. v. Shoemaker, 22, 86.
Commercial Union Tel. Co. v. New Eng. Tel. & Tel. Co., 303.
Comminge v. Stevenson, 124, 607, 624.
Commissioners v. Babcock, 390.
v. Bank, 147.
v. Beckwith, 333.
v. Duckett, 389, 679.
v. Stubbs, 408.
Commonwealth v. Alburger, 626.
v. Barry, 255.
v. Blanding, 240.
v. Boston, etc., R. R. Co., 281, 703.
v. Burke, 152.
v. Bush, 158.
v. Chace, 413.
v. Cheney, 164.
v. Colberg, 138, 152.
v. Comrey, 394.
v. Deacon, 163.
v. Donohue, 112.
v. Erie & N. E. R. R. Co., 612.
v. Haines, 400.
v. Haley, 157.

[REFERENCES ARE TO PAGES.]

Commonwealth v. Hess, 6.
v. Hunt, 294.
v. Kennard, 113.
v. Kirkbride, 166.
v. Malone, 155.
v. Mann, 158.
v. McAfee, 255.
v. McDonald, 626.
v. Morgan, 199.
v. Old Colony, etc., R. R. Co., 612.
v. Parks, 616.
v. Perry, 604.
v. Randall, 160.
v. Reed, 612.
v. Richter, 587.
v. Stratton, 152.
v. Sylvester, 306.
v. Tobin, 330.
v. Upton, 626.
v. Van Dyke, 105.
v. Vermont, etc., R. R. Co., 280.
v. Weatherhead, 315.
v. Wright, 156.
Comp v. Carlisle, etc., Bank, 633.
Compton v. Wilder, 190.
Computing Scale Co. v. Standard C. S. Co., 358.
Conant v. Leslie, 224.
Concanan v. Boynton, 156, 318.
Concord Mfg. Co. v. Robertson, 594.
Condict v. Grand Trunk R. R. Co., 38, 724.
v. Jersey City, 74, 77.
Condiff v. Kansas City, etc., R. R. Co., 709.
Condon v. Miss., etc., Co., 547.
Cone v. Delaware, etc., Co., 558
v. Forest, 439.
Conelly v. Nashville, 79.
Cones v. Board of Com'rs, 766.
Confer v. New York, etc., R. R. Co., 745.
Congdon v. Marquette, etc., R. R. Co., 651.
Congress, etc., Spring Co. v. Edgar, 350.
v. Highrock, etc., Spring Co., 355, 357, 360.
Conhoctan Stone Road v. Buffalo, etc., R. R. Co., 616, 622.
Conklin v. Staats, 775.
v. Thompson, 57, 747, 748.
Conkling v. Erie R. R. Co., 700, 762.
Conlan v. Roemer, 449.
Conley v. Key, 229.
v. Me. Cent. R. R. Co., 708.
v. Portland Gas Lt. Co., 274.
Connally v. Hall, 583.
Connell v. Chesapeake, etc., R. R. Co., 654, 657.
v. W. U. Tel. Co., 26.
Connelly v. Faith, 475.
v. Minn., etc., R. R. Co., 547.
v. W. U. Tel. Co., 26.
v. White, 174, 187.
Conner v. Coffin, 410.
v. Shepherd, 336.
v. Winton, 675.
v. Woodfill, 316, 580
Conners v. Burlington, etc., Co., 273.
Connolly v. Boston, 49.
v. White, 184.
v. Woods, 381.
Connor v. Squires, 409.
v. Standard Pub. Co., 242.
Connors v. Morton, 539, 540.
Conover v. Gatewood, 394.
Conowingo Bridge Co v. Hedrick, 93.
Conrad v. Elizabeth, etc., Ry. Co., 763.
v. Fisher, 84.
Conroy v. Pittsburg Times, 22., 235.
v. Vulcan Iron Works, 557, 699
Consolidated Coal Co. v. Hoenni 528, 537.
v. Maekl, 285.

[REFERENCES ARE TO PAGES.]

Consolidated Coal Co. v. Wombacker, 535, 539.
Consolidated E. L. & P. Co. v. Healy, 737.
Consolidated Fire Works Co. v. Koehl, 476.
Consolidated Gas Co. v. Crocker, 756.
v. Getty, 718, 756.
Consolidated Ice Machine Co. v. Kiefer, 93.
Consolidated Stone Co. v. Morgan, 282, 288.
Consolidated Traction Co. v. Haight, 708, 763, 764.
Constant v. Lehman, 446.
Consumers' Brew. Co. v. Doyle, 19.
Consumers' Elec., etc., Co. v. Pryor, 699.
Consumers' Gas Co. v. Perreyo, 756.
Continental Imp. Co. v. Stead, 760, 761.
Continental Nat. Bank v. Bowdre. Bros., 200, 209, 221.
Conway v. Grant, 343, 348.
v. Lewiston, etc., H. R. R. Co., 43, 662.
v. Nicol, 252.
v. Russell, 475.
Conwell v. Hagerstown Canal Co., 146.
v. Voorhees, 393.
Coogler v. Rhodes, 232, 234, 235, 236.
Cook v. Bartlett, 262.
v. Bryant, 422.
v. Burlington, 612.
v. Champlain, etc., Co., 337.
v. Charlestown, 770.
v. Chicago, etc., Ry. Co., 141.
v. Cook, 255.
v. Ellis, 127.
v. Gill, 448.
v. Gilman, 467.
v. Hopper, 89, 90.
Cook v. Houston D. N. Co., 492, 495.
v. Irving, 394.
v. Johnson, 710.
v. Loomis, 128.
v. Miller, 357.
v. Milwaukee, 771.
v. Mining Co., 702.
v. Morea, 341, 342.
v. Palmer, 399.
v. Patterson, 419.
v. Bridgen, 327.
v. St. Paul, etc., Co., 534.
v. Southern Ry. Co., 487, 498.
v. Stearns, 325, 327.
v. Thornton, 414.
Cooke v. Balt. Traction Co., 763.
v. Forbes, 604.
Cool v. Crommet, 329, 333.
Cooledge v. Williams, 314.
Cooley v. Galyon, 209, 236.
Coombs v. New Bedford C. Co., 506, 522.
v. Purrington, 771.
Coon v. Atwell, 451.
v. Moffitt, 263.
Cooney v. Hartland, 80.
v. Pullman Pal. Car Co., 665.
Coonradt v. Campbell, 318.
Coons v. Chrystie, 293.
Cooper v. Blair, 85.
v. Butler, 559.
v. Central R. R. Co., 708.
v. Chitty, 418, 426.
v. Crabtree, 320.
v. Fleming, 171, 174.
v. Johnson, 88, 407.
v. Lovering, 449.
v. McJunkin, 160.
v. Overton, 739.
v. Phipps, 226.
v. Portner Brewing Co., 508.
v. Railroad Co., 760, 762, 763.
v. Raleigh, etc., R. R. Co., 648, 650.
v. Randall, 601.

[REFERENCES ARE TO PAGES.]

Cooper v. Shore Elec. Co., 272, 277, 285, 287.
v. Utterbach, 174, 178.
v. Witham, 65.
Copp v. Me. Cent. R. R. Co., 758.
Coppins v. New York Cent., etc., R. R. Co., 558.
Coppner v. Penn., etc., Co., 737.
Coppuck v. Philadelphia, etc., R. R. Co., 763.
Corbett v. St. Vincent's Industrial School, 71.
Corbin v. Grand Trunk Ry. Co., 682.
v. Philadelphia, 699, 709.
Corcoran v. Boston, etc., Co., 281.
Cordell v. New York, etc., Co., 281.
Corey v. Carter, 307.
v. Eastman, 669.
v. Havener, 93, 94, 99.
Cork v. Blossom, 608, 684, 695.
Corley v. Bath, 49.
Corliss v. Walker, 195.
Cornelius v. Hambay, 252.
Correll v. Burlington, etc., R. R. Co., 677, 685.
Corrigan v. Union Sugar Refinery, 490.
Corson v. Maine Central, etc., Co., 518.
Corthell v. Holmes, 108, 109, 110.
Corts v. District of Columbia, 766, 773.
Corwin v. New York, etc., R. R. Co., 676.
Cosgriff v. Miller, 339.
Cosgrove v. Ogden, 493.
Coskery v. Nagle, 642, 643, 645.
Costa v. Yochini, 563.
Cosulich v. Standard Oil Co., 607, 689, 695.
Cotant v. Boone Suburban Ry. Co., 658.
Cote v. Murphy, 300.
Cott v. Lewiston, 586.
Cotten v. Lindgren, 475.
Cotterell v. Jones, 85, 86.
Cottrell v. Cottrell, 171.
Cottrill v. Chicago, etc., Ry. Co., 710.
v. Myrick, 313.
Cotzhausen v. Simon, 462.
Couch v. Steel, 679.
Couchman v. Prather, 147.
Coughlin v. Cambridge, 476.
v. Gillison, 635.
Coughtry v. Globe Woolen Co., 50, 778.
Couley v. Portland, 545.
Coulter v. Minion, 450.
v. Pine Tp., 287.
Countryman v. Lighthill, 578.
County Com'rs v. Burgess, 704.
v. Gibson, 146.
County Court v. Robinson, 307.
Coupland v. Housatonic R. R. Co., 650, 721, 724.
Courser v. Powers, 403.
Courtney v. Knabe & Co. Mfg. Co., 443, 458.
Courts v. Happle, 433.
Courvoisier v. Raymond, 153, 154.
Covanhovan v. Hart, 44.
Coventry v. Barton, 104.
Covey v. Hannibal, etc., Co., 511.
Covington v. Geyler, 483.
v. Roberson, 217.
Covington, etc., Bridge Co. v. Steinbrock, 481, 607.
Covington, etc., R. R. Co. v. Packer, 271.
Cowan v. Umbagg Pulp Co., 511.
v. Western Union Tel. Co., 666.
Coward v. Baddeley, 151.
Cowden v. Wright, 251.
Cowen v. Sunderland, 740.
Cowett v. Am. Woolen Co., 688.
Cowhurst v. Amersham, etc., Board, 573.
Cowin v. Cowan, 407.
Cowing v. Snow, 415.
Cowles v. Kidder, 590, 595.

[REFERENCES ARE TO PAGES.]

Cowles v. Townsend, 452.
Cowley v. Pulsifer, 243.
v. Smyth, 461.
Cox v. Bunker, 204.
v. Burbridge, 343, 344.
v. Hall, 84.
v. Leviston, 324.
v. Murphy, 344.
v. Odell, 581.
v. Peterson, 649.
v. Strickland, 202, 222.
v. Taylor, 185.
Coxe v. Robbins, 338, 342.
Coxhead v. Richards, 238.
Cox Shoe Co. v. Adams, 458, 459.
Coy v. Indianapolis Gas Co., 757.
Coyle v. Griffing I. Co., 530.
Crabtree v. Baker, 585.
v. Dawson, 153.
Craft v. Parker, 775
Craig v. Brown, 207.
v. Burnett, 379.
v. Chambers, 670.
v. Charleston, 76, 474.
v. N. Y., etc., R. R. Co., 763.
v. Pyles, 204, 220.
Craigie v. Hadley, 70.
Cramer v. Burlington, 699.
v. Marsh, 420.
Crampton v. Ivie Bros., 720.
Crandall v. McIlrath, 561.
Crane v. Bennett, 200, 244.
v. Chicago, etc., Ry. Co., 530.
v. Crane, 266.
v. Dwyer, 407.
v. Patton, 301.
v. Stone, 394.
Cranfill v. Hayden, 213, 234, 235, 237.
Cranford v. Tyrrell, 569, 576.
Cranston v. Beck, 405, 406.
Crapo v. Syracuse, 282.
Crary v. Lehigh Valley R. R. Co., 691.
Crashley v. Press Pub. Co., 216, 250.
Crass v. Memphis, etc., R. R. Co., 653.
Cratty v. Bangor, 49.
Craven v. Bloomingdale, 488, 497.
Crawford v. Barnes, 216.
v. Delaware, 370, 613.
v. Daggett, 63.
v. Rambo, 616.
v. Southern Ry. Co., 713.
Crawfordsville v. Smith, 773.
Crawfordsville, etc., R. R. Co. v. Wright, 146.
Creamer v. McIlvain, 19.
Credle v. Swindell, 447.
Creek v. Bozeman W. W. Co., 599.
Cregan v. Marston, 512.
Cremore v. Huber, 306.
Crescent v. Anderson, 718.
Crescent City, etc., Co. v. Butchers', etc. Co., 171.
Cresswell v. Burt, 394, 396.
Crew v. Bradstreet Co., 730.
Cricelins v. Bierman, 226.
Crippen v. Morrison, 409, 422.
Critchfield v. Humbert, 334.
Crittenden v. Wilson, 144.
Crocker v. Carson, 115.
v. Guillifer, 424.
v. New London, etc., R. R. Co., 489.
v. Pacific, etc., Co., 514.
Crockett v. Crockett, 336.
v. McLanahan, 229.
Croft v. Day, 358.
v. N. W. S. S. Co., 31.
v. Parker, 445.
Crofts v. Waterhouse, 691.
Crogan v. Schiele, 686.
Crompton v. Lea, 581.
Cronk v. Wabash Ry. Co., 690.
Cronkhite v. Cronkhite, 326.
Crooker v. Pacific, etc., Co., 556.
v. Pacific, etc., R. R. Co., 509.
Croom v. Chicago, etc., Ry. Co., 656.
Cropp v. Tilney, 212.

[REFERENCES ARE TO PAGES.]

Crosby v. Bessey, 626.
v. Leng, 11.
v. Wadsworth, 314.
Crose v. Rutledge, 251.
v. Andrews, 62.
v. Elliott, 186.
v. Goodman, 263.
v. Grant, 252.
v. Kent, 55.
v. Kistler, 669.
v. Lake Shore, etc., Co., 687.
v. Marston, 409.
v. Peters, 443, 460.
v. State, 155.
Crossman v. Owen, 90.
Crove v. Angell, 205.
Crow v. Manning, 63.
Crowe v. Nanticoke Lt. Co., 694, 755.
Crowell v. Gleason, 158.
v. New Orleans, etc., Co., 320.
Crowley v. Burlington, etc., Ry. Co., 678.
v. Cedar Rapids, etc., Co., 32.
Crown v. Orr, 530.
Crown Cycle Co. v. Brown, 130, 131.
Cruikshank v. Gordon, 206.
Crumbley v. State, 150.
Crump v. Lambert, 601, 606.
Crussell v. Pugh, 189.
Cubbins v. Ayres, 407.
Cudahy Packing Co. v. Marcan, 522, 530, 534.
Cuddy v. Horn, 718.
Cuff v. Newark, etc., R. R. Co., 30, 480.
Culbertson v. Holliday, 689, 712.
Culby v. Northern Pac. Ry. Co., 507.
Cullen v. Baltimore, etc., R. R. Co., 707.
v. Hanish, 179.
v. Morris, 387.
Culley v. Jones, 447.
Cullman v. McMinn, 50.
Cullum v. Branch Bank, 451.
Culmer v. Canby, 221.
v. Wilson, 64, 65, 105.
Culver v. Avery, 386.
v. Streator, 76, 474.
Cumberland v. Lottig, 716.
Cumberland Coal Co. v. Sherman, 469.
Cumberland, etc., Corp. v. Hitchings, 144.
Cumberland, etc., Corp. v. Portland, 81.
Cumberland T. & S. Co. v. Cassidy, 47, 333.
v. Tex. & Pac. Ry. Co., 303.
v. United E. R. Co., 581.
v. Ware, 93, 94, 753.
Cuming v. Brooklyn City R. R. Co., 259.
Cummerford v. McAlvoy, 247.
Cummings v. Ayer, 619.
v. Seymour, 610.
Cumpston v. Lambert, 104, 107.
Cundy v. Lindsay, 426.
Cuney v. Campbell, 344.
Cunningham v. Bath Iron Works, 530.
v. Brown, 46.
v. Bucklin, 377.
v. Bucky, 642.
v. Burchy, 644.
v. Mitchell, 439, 440.
v. St. Louis, 81.
v. Seattle Elec. Ry. & P. Co., 169, 488, 497.
v. Thief River Falls, 719, 721.
v. Union Pac. Ry. Co., 544.
Cunyus v. Guenther, 452.
Curran v. Boston, 474.
v. Galen, 291, 293.
v. Olson, 732.
v. Taylor, 165.
v. Warren, etc., Co., 689.
Currelli v. Jackson, 515, 524.
Currey v. Pringle, 88.
Currie v. Worthy, 394.

[REFERENCES ARE TO PAGES.]

Currier v. McKee, 31.
v. Swarm, 158.
Curry v. Chicago, etc., R. R. Co., 148, 676, 702.
Curtin v. Patton, 61.
v. Somerset, 773.
Curtis v. Carson, 52, 154.
v. Dinneen, 473.
v. Groat, 118, 437.
v. Hoyt, 312.
v. Hubbard, 330.
v. Kiley, 480.
v. Lyman, 390.
v. McNair, 533, 535.
v. Murphy, 644.
v. Mussey, 240.
v. Rochester, etc., R. R. Co., 656.
v. Tenino Stone Quarries, 739.
Curtiss v. Ayrault, 586.
v. Smith, 347.
Cushing v. Adams, 331, 332.
v. Hederman, 101, 203.
v. Wyman, 468.
Cushman v. Smith, 329.
Cusick v. Adams, 736.
v. Norwich, 772.
Cussen v. Southern Cal. Sav. Bank, 639, 640.
Custer v. Baltimore, etc., R. R. Co., 696.
Cuttano v. Metropolitan St. Ry. Co., 663.
Cutler v. Bonney, 643.
v. State, 18, 150.
v. Hamlen, 740.
Czarnicki's Appeal, 603.

D.

Dada v. Piper, 228.
Daggett v. Davis, 422, 435.
v. Gray, 432.
Dahlstrom v. St. Louis, etc., Ry. Co., 758.
Daiker v. Strelinger, 464.
Dailey v. Burlington, etc., R. R. Co., 708, 709.
Daily Post Co. v. McArthur, 244.
Dain v. Cowing, 433.
v. Wycoff, 261.
Daintry v. Brocklehurst, 321.
Dale v. Atchison, etc. R. R. Co., 276.
v. Grant, 30.
v. Hall, 292.
v. See, 636.
Daley v. Halley Mfg. Co., 559.
v. Norwich, etc., R. Co., 707, 716.
Dallas v. Gulf, etc., R. R. Co., 547.
v. Rapid Transit Co. v. Payne, 662.
Dally v. Young, 87.
Dalton v. Thurston, 443, 444.
Daltry v. Media Elec. Lt., etc., Co., 751, 754.
Dame v. Dame, 422.
Damport v. Simpson, 45.
Danbeck v. N. J. Traction Co., 491, 495.
Danenhauer v. Devine, 368.
Danenhoffer v. State, 160.
Daniel v. Chesapeake, etc., Ry. Co., 548.
v. Forsythe, 529.
v. Petersburg R. R. Co., 487.
Daniels v. Ballantine, 38.
v. Brown, 114, 412.
v. Clegg, 50.
v. Daniels, 412.
v. Hathaway, 376, 384, 401.
v. Keokuk W. W., 601.
v. New York, etc., R. R. Co., 738.
v. Pond, 337.
v. Union Pac. Ry. Co., 548, 550.
Dann v. Cudney, 446.
v. Wormser, 182.
Dannerberg v. Ashley, 291.
Danville, etc., R. R. Co. v. Commonwealth, 612, 613.

[REFERENCES ARE TO PAGES.]

Danville Press Co. v. Harrison, 199, 200.
Danville Ry. & Elec. Co. v. Hodnett, 764.
Danville State Hospital v. Belleforte, 145.
Dapper v. Milwaukee, 771.
D'Arcy v. Miller, 341.
Dargan v. Mobile, 76.
v. Waddill, 566, 602, 603, 605.
Dark v. Johnson, 324, 327.
Darling v. Clement, 202, 209.
v. Klock, 457.
v. Simpson, 143.
v. Williams, 281.
Darlington v. New York, 328.
Darrah v. Baird, 410.
Dashiell v. Griffith, 672.
Daugherty v. Herzog, 683.
Davenport v. Magoon, 336.
v. Ruckman, 772.
v. Shants, 410.
Davey v. Greenfield, etc., Ry. Co., 662.
v. London, etc., Co., 762.
Davidson v. Crosby, 466.
v. Fischer, 740.
v. Isham, 602, 605.
v. Nichols, 775.
Davidson Benedict Co. v. Severson, 287.
Davie v. Levy, 478, 482.
Davies v. Mann, 109, 702.
v. Oceanic S. S. Co., 698.
v. Pelham Hod Elevator Co., 776.
v. Solomon, 211.
Davis v. Alexander City, 766.
v. Allen, 382.
v. Augusta Factory, 512.
v. Bangor, 769, 770.
v. Boyett, 264.
v. Brocklebank, 411.
v. Buffum, 431, 432.
v. Cal. St. Cable R. R. Co., 697.
v. Carey, 202.
Davis v. Central Congregational Soc., 72, 733.
v. Central Vt. R. R. Co., 38, 547, 722.
v. Chicago, etc., Ry. Co., 726.
v. Clancey, 312.
v. County Com'rs, 611.
v. Davis, 360, 454, 455.
v. Detroit, etc., R. R. Co., 516, 542, 560.
v. Diamond C. & L. Co., 503.
v. Duncan, 245.
v. Eyton, 410.
v. Fry, 586.
v. Fuller, 595.
v. Gardiner, 211.
v. Getchell, 592, 594, 598.
v. Guarnieri, 282, 288, 750, 775.
v. Henry, 465.
v. Hill, 686.
v. Houghtellin, 494.
v. Houren, 647.
v. Hunt, 418, 431.
v. Hurt, 639.
v. Jenkins, 397.
v. Kendall, 355, 357.
v. Knoxville, 74.
v. Krum, 117.
v. Lebanon, 76, 474.
v. Marxhausen, 219.
v. McKnight, 32.
v. McMildan, 178.
v. Mercer L. Co., 537, 678, 704.
v. Montgomery, 75.
v. Nash, 312.
v. Newkirk, 89.
v. Niagara Falls T. Co., 606.
v. Pacific P. Co., 741.
v. Pacific Tel. & Tel. Co., 170.
v. Railway Co., 274.
v. Rich, 609.
v. Rosenbaum, 427.
v. Russell, 163.
v. Sawyer, 605, 616.
v. Seeley, 170.
v. Sladden, 204.

[REFERENCES ARE TO PAGES.]

Davis v. Sneed, 232.
v. Snyder Tp., 38.
v. Somerville, 49.
v. Starrett, 202, 224.
v. Stuart, 185, 188.
v. Summerfield, 365, 366.
v. Tacoma Ry. & Power Co., 306.
v. Thompson, 411.
v. Turner, 503, 560.
v. Wabash, etc., Co., 649.
v. Wells, 232.
v. W. U. Tel. Co., 26.
v. Whebridge, 112.
v. Whitney, 573, 601.
v. Williams, 110.
v. Winslow, 598, 613.
v. Young, 264.
v. Zimmerman, 293.
Davis Coal Co. v. Polland, 148, 536, 679.
Davis Machine Co. v. Robinson, 293.
Dawe v. Morris, 455.
Dawes v. Rosenbaum, 420, 428, 432.
Dawkin v. Lord Rokeby, 227, 384.
Dawson v. Baxter, 216.
v. Chamney, 642.
v. Midland R. Co., 676.
v. Schloss, 101.
Day v. Brownrigg, 22.
v. Day, 109.
v. Edwards, 416.
v. Holland, 47.
v. Milford, 770.
v. Owen, 303.
Dayharsh v. Hannibal, etc., R. R. Co., 503, 544.
Dayton v. Monroe, 468.
Deal v. Bogue, 89.
v. Harris, 377.
Dean v. Cushman, 428.
v. Lammers, 637.
v. Lowell, 332.
v. McCarty, 742.
v. McLean, 14.
Dean v. Nichols, etc., Co., 421.
v. Peel, 261.
v. Pennsylvania R. R. Co., 720, 762.
v. Ross, 426.
v. State, 157.
v. St. Paul Union Depot Co., 344.
v. Turner, 430.
Deane v. Clayton, 313.
v. Hutchinson, 407.
Dearborn v. Union Nat. Bank, 425, 431.
v. Willman, 312.
De Arnaud v. Ainsworth, 237.
Dearth v. Baker, 343.
Debris Case, The, 624.
Decatur v. Paulding, 375, 376.
v. Simpson, 672, 673.
Decatur, etc., Mfg. Co. v. Mehaffey, 32, 287.
Decker v. Evansville Suburban, etc., R. R. Co., 615.
v. Hardin, 442.
v. McSorly, 345, 680, 685.
De Clark v. Bell, 425.
Decola v. Cowan, 694.
Decorah, etc., Co. v. Greer, 327.
De Courcey v. Cox, 381.
De Cuir v. Benson, 306.
Deeds v. Chicago, etc., Co., 559.
Deep Min. & Dr. Co. v. Fitzgerald, 553.
Deere v. Morgan, 444.
Degelass v. Wight, 671.
Degg v. Midland Ry. Co., 562.
Defee v. Detroit, 78.
De Gray v. Murray, 345.
Dehanitz v. St. Paul, 739.
De Haven v. Kensington Bank, 632.
Deitrick v. Penn. R. R. Co., 658.
Deitring v. St. Louis Transfer Co., 765.
Deitzman v. Dietzman, 257.
v. Mullin, 8.

[REFERENCES ARE TO PAGES.]

Delahoussaye v. Indice, 583.
Delaney v. Errickson, 339.
v. Georgia, etc., Ry. Co., 619.
v. Milwaukee, etc., R. R. Co., 699.
v. Rochereau, 563.
v. Root, 412.
Delaplaine v. Chicago, etc., Ry. Co., 371.
Delaware, etc., Co. v. Hardy, 475.
Delaware, etc., R. R. Co. v. Cadaw, 701.
v. Hefferan, 762.
v. Reich, 738.
v. Salmon, 36, 745.
v. Trautwein, 13, 49, 51, 654, 658.
Delaware & H. Canal Co. v. Goldstein, 358, 579.
Delbert v. Harris, 638.
Delegal v. Highley, 172, 242.
Delory v. Blodgett, 475, 476.
Delphi v. Evans, 79.
Delude v. St. Paul City Ry. Co., 536, 560.
Delz v. Winfree, 86, 299.
Demarest v. Hardham, 606, 620.
v. Wynkoop, 141.
Demars v. Glen Mfg. Co., 533.
De Mers v. Rohan, 338.
Deming v. Merchants' Cotton Press Co., 722.
Democrat Pub. Co. v. Jones, 217, 244, 249.
De Moranda v. Dunkin, 399.
Dempsey v. Chambers, 88.
v. McNabb, 142.
v. Sawyer, 538, 556.
Dengate v. Gardiner, 256.
Deni v. Penn. R. R. Co., 279.
Denneby v. O'Connell, 236.
Dennick v. Railroad Co., 275.
Dennis v. Eckhardt, 605.
v. Huyck, 636.
v. Railroad Co., 275.
v. State, 603.
Denny v. Correll, 346.
Densmore v. Central Ia. R. R. Co., 615.
Denton v. Nashville Title Co., 669.
Denver v. Bayer, 370, 613.
v. Dean, 772.
v. Hyatt, 772.
v. Johnson, 37.
Denver Con. Elec. Co. v. Lawrence, 695.
v. Simpson, 751, 752.
Denver Con. Tramway Co. v. Riley, 254.
Denver, etc., Co. v. Harris, 69.
Denver, etc., R. R. Co. v. Bedell, 41
v. Driscoll, 544.
v. Gustafson, 473.
v. Sipes, 508, 524, 527, 528, 542, 548.
v. Spencer, 285, 287, 712.
Denver, etc., Rapid Transit Co. v. Dwyer, 707.
Denver Pub. W. Co. v. Holloway, 238.
Denver Tramway Co. v. Owens, 662.
De Roo v. Foster, 60.
Derry v. Peck, 462.
Derwort v. Loomer, 654.
Desdall v. County of Olmstead, 81.
Deserant v. Cerrillos Coal R. R. Co., 546.
Des Farges v. Pugh, 443.
Desrosiers v. Bourn, 530.
Detroit v. Beckman, 79.
v. Blakely, 72, 79, 766.
v. Chaffee, 105.
v. Corey, 80.
v. Weber, 441.
Detroit Base Ball Club v. Deppert, 578.
Detroit, etc., Ry. Co. v. Mc Kenzie, 651.
Detwiler v. Bainbridge Grocery Co., 421.
Detzur v. Stroh Brewing Co., 609.

[REFERENCES ARE TO PAGES.]

Deutsch v. Abeles, 617.
De Vaughn v. Minor, 604.
Devine v. McCormick, 445.
Devlin v. Phoenix Iron Co., 506.
v. Smith, 778.
v. Snellenburg, 322.
De Vito v. Crage, 507.
Devoe v. Brandt, 467.
Dewe v. Waterburg, 237.
De Wick v. Dobson, 250.
De Wolf v. Dix, 86.
Dexter v. Cole, 416, 418.
v. Syracuse, etc., R. R. Co., 660.
v. Taber, 205.
De Yampert v. Johnson, 395.
D'Eyncourt v. Gregory, 408.
Diamond P. G. Co. v. Dehoritz, 559.
Diamond State Iron Co. v. Giles, 503, 683, 689.
Diana Shooting Club v. Lamoreaux, 313.
Dibble v. Brown, 660.
Dicas v. Lord Brougham, 377, 378.
Dicken v. Liverpool Salt, etc., Co., 19, 682.
Dickens v. Des Moines, 256.
Dickerson v. Rogers, 640.
Dickins v. N. Y. Cent. R. R. Co., 274.
Dickinson v. Baltimore, 337.
v. Barber, 56.
v. Boyle, 124.
v. Grand Junction Canal Co., 589.
v. N. E. Ry. Co., 279.
Dickle v. Abstract Co., 669.
Dickson v. Chicago, etc., R. R., Co., 617. 622.
v. McCoy, 344.
v. Omaha, etc., R. R. Co., 41, 677.
v. Waldron, 488, 497.
Diebold v. Penn. R. R. Co., 732.
v. Sharp, 284.
Dierks v. Comrs, 597.
Diesenreiter v. Malting Co., 32, 530, 534.
Diess v. Mallon, 164.
Dieterle v. Bekin, 430.
Dietrich v. Northampton, 273.
Dietus v. Fuss, 431.
Dietz v. Langfitt, 179.
Diggs v. Denny, 443, 444.
Dill v. Camp, 468.
v. Marmon, 527.
Dillenberger v. Weingartner, 531.
Dillier v. Cleveland, etc., Ry. Co., 277.
Dilling v. Murray, 592, 598.
Dillingham v. Russell, 69, 487, 657.
Dillon v. Allegheny County Lt. Co., 753.
v. Union Pacific R. R. Co., 560.
Di Lorenzo v. Di Lorenzo, 266.
Dilworth's Appeal, 607.
Di Marcho v. Builders' Iron Fdy., 146.
Dimes v. Pettey, 109.
v. Proprietors, etc., 382.
Dimmock v. Hallet, 448.
Dimock v. Suffield, 770.
Dimick v. Chicago, etc., R. R. Co., 677.
Dinnihan v. Lake Ontario Beach Imp. Co., 732.
Dinwiddie v. State, 349.
Dircks v. Brant, 411.
Dirks v. Juel, 429.
Disano v. New. Eng. Steam Brick Co., 532.
Diston v. Strauck, 395.
District of Columbia v. Gray, 78.
v. McElligott, 557.
v. Robinson, 129.
v. Woodbury, 767.
Divens v. Merideth, 205.
Dixon v. Bell, 747.
v. Brooklyn City, etc., R. R. Co., 139.

[REFERENCES ARE TO PAGES.]

Dixon v. Clow, 23.
v. Cooper, 378, 381.
v. Niccolls, 412.
v. Plums, 694.
v. Swift, 734.
D. M. Osborne Co. v. Pino Mfg. Co., 83, 99.
Doan v. Kelley, 213.
Dobbins v. Lusch, 412.
v. Missouri, etc., Ry. Co., 738.
Dobell v. Stevens, 14.
Dobson v. Blackmore, 320, 371, 611.
Dockerty v. Hutson, 345.
Docking v. Frazell, 409.
Dockrell v. Dougall, 195.
Dodds v. Gullidge, 316.
Dodge v. Burlington, etc., R. R. Co., 677.
v. Colby, 134, 248.
v. Commissioners, etc., 146.
v. Granger, 76.
v. McClintock, 325.
v. Meyer, 423.
v. Stacy, 372, 622.
Dodson v. Mock, 349, 350, 417.
Doe v. Bancks, 48.
v. Brigdes, 147.
v. Doe, 258.
v. Pearsey, 332.
Doeg v. Cook, 92, 93, 401.
Doing v. New York, etc., R. R. Co., 520.
Dolan v. Chicago, etc., Ry. Co., 573, 614.
v. Hubinger, 499.
Dole v. Erskine, 51, 154.
v. Lyon, 247.
Dolph v. Ferris, 339, 565.
Dolson v. Lake Shore, etc., Ry. Co., 274.
Dominick Pipe Works v. Wood, 259.
Donaghue v. Gaffy, 213, 221.
Donahoe v. Richards, 386.
v. Wabash, etc., Co., 709.
Donahue v. Drexler, 280.
v. Enterprise R. R. Co., 515, 705.
v. Richards, 308.
Donald v. Chicago, etc., R. R. Co., 140.
v. Mass. General Hospital, 71.
Donaldson v. Farwell, 444.
v. Milwaukee, etc.. R. R. Co., 700, 701.
v. Mississippi, etc., R. R. Co., 285.
Donk Bus. C. & C. Co. v. Leavitt, 717, 739.
Donnell v. Jones, 145.
v. State, 306.
Donnelly v. Boston Catholic Cem. Ass'n., 72, 267.
v. Brooklyn, 721.
v. Burkett, 171.
v. San Francisco B. Co., 500.
Donoho v. Vulcan Iron Works, 768.
Donohue v. Kelly, 19.
Donovan v. Consolidated Coal Co., 83, 119.
v. Donovan, 266.
v. Ferris, 521, 545.
v. Hartford St. Ry. Co., 662.
v. McAlpin, 475.
v. Oakland, etc., Rapid Transit Co., 48.
Dooling v. Budget Pub. Co., 209.
Doolittle v. Shaw, 424, 638.
Doorman v. Ames, 599.
v. Jenkins, 633.
Doran v. Eaton, 448.
Doremus v. Hennessey, 8, 296.
v. Howard, 411.
Dorr v. Mickley, 398.
Dorsett v. Clement-Ross Mfg. Co., 503.
Dorsey v. Habersack, 367, 368, 369.
v. Moore, 335.
Doscher v. Blackstone, 408.
Doty v. Heth, 412.
v. Hurd, 167.

[REFERENCES ARE TO PAGES.]

Dougherty v. Herzog, 774.
v. Mississippi, etc., R. Co., 653.
v. Step, 311.
Douglas v. Allen, 181.
v. Douglas, 203.
v. Stephens, 128.
Douglass v. Daisley, 239.
v. Kraft, 436.
v. Plotkin, 451.
v. Yallop, 401.
Doulson v. Mathews, 134.
Dovaston v. Payne, 342.
Dove v. School District, 307.
Dow v. Portland Steam Packet Co., 650.
v. Sanborn, 444.
v. Swain, 467.
v. Minnipesaukee Gas, etc., Co., 757.
Dowd v. New York, etc., R. R. Co., 520, 538.
Dowdell v. Carpy, 185, 187.
Dowling v. Allen, 523.
v. Crapo, 263.
v. Hennings, 368, 369.
v. Livingstone, 245, 246.
Downer v. Smith, 468, 469.
Downes v. Elmira Bridge Co., 734.
Downey v. Lyford, 397.
Downing v. Dearborn, 445.
v. Herrick, 377.
v. Mason County, 72, 474.
v. McFadden, 386.
Downs v. Finnegan, 130, 131, 132.
v. Harper Hospital, 71.
Doyle v. Burns, 434.
v. Kirby, 204.
v. Lord, 369.
v. Wade, 142.
Drake v. Auburn City Ry. Co., 506, 532, 533.
v. Hagan, 563.
v. Kiely, 32.
v. Lady Ensley C. Co., 596, 597, 599.
v. Lowell, 770, 772.
Drake v. Wells, 324.
Drake Medicine Co. v. Glessner, 355, 360, 361.
Drapeau v. International P. Co., 524.
Draper v. Arnold, 91.
v. Brown, 624.
v. Del. & H. Canal Co., 652.
Dreher v. Fitchburg, 713.
Drehn v. Fitchburg, 773.
Drennan v. People, 163.
Drew v. Comstock, 154, 156.
v. Coulton, 387.
v. Peer, 305, 326.
v. Sixth Ave. R. R. Co., 487.
Dreyfus v. Aul, 170, 171, 181.
Driggs v. Burton, 182.
v. Phillips, 626.
Driscoll v. Carlin, 492.
v. Clark, 739.
v. Market St. Cable Ry. Co., 765.
v. Norwich, etc., R. R. Co., 97.
v. Scanlon, 495.
v. Towle, 475, 484.
Drohan v. Lake Shore, etc., Ry. Co., 140.
Drum v. Miller, 157.
Drumm v. Cesnum, 171.
Drummond T. Co. v. Randle, 358.
Drury v. Hervey, 114.
v. Mutual, etc., Ins. Co., 419.
Druse v. Wheeler, 325, 327.
Druxy v. Midland R. R. Co., 371.
Dubiver v. City Ry. Co., 714.
Dublin v. Taylor, 483.
Dublin, etc., Ry. Co. v. Slattery, 699.
Dubois v. Campau, 333, 334.
v. Decker, 672, 673.
v. Kelley, 326.
Du Bose v. Marx, 99.
Dubuque v. Benson, 333.
v. Maloney, 333.
Dubuque Wood, etc., Ass'n v. Dubuque, 30,

[REFERENCES ARE TO PAGES.]

Duchewien v. Boston El. Ry. Co., 662.
Duck v. Bates, 353.
Duckett v. Pool, 47.
Duckworth v. Johnson, 283.
Dudden v. Guardian, etc., 589.
Dudgeon v. Bronson, 363.
Dudley v. Abner, 426.
v. Foote, 409.
v. Kennedy, 610.
v. Mahew, 147.
v. Minor, 453.
v. New Britain, 597.
Duer v. Consolidated Gas Co., 481, 695.
Duerst v. St. Louis Stamping Co., 535.
Duggan v. Baltimore, etc., R. R. Co., 169, 488, 497, 657.
Duggins v. Watson, 492.
Dufer v. Cully, 701.
Duffies v. Duffies, 258.
Duffy v. Dubuque, 768, 769.
v. Meadows, 603.
v. Platt, 546.
Dufur v. Boston & M. R. R. Co., 93.
Duke v. Vincent, 397.
Duke of Grafton v. Hilliard, 602.
Dulieu v. White & Sons, 27, 28.
Dumont v. Kellogg, 590, 598.
v. Smith, 332.
Dunbar v. Glenn, 357, 359, 360.
Duncan v. Atchison, etc., R. R. Co., 229.
v. Griswold, 248.
v. Hayes, 605.
v. Sou. Car. R. R. Co., 637.
v. Thwaites, 224.
v. Webb, 394.
v. Yordy, 320.
Dunham v. Powers, 226.
v. Reilly, 394.
Dunkerly v. Webendorfer M. Co., 556.
Dunlap v. Gallitin Co., 148.
v. Glidden, 46.
Dunlap v. Knapp, 401.
v. Linton, 264.
v. New Zealand, etc., Ins. Co., 173, 174.
v. Northeastern R. R. Co., 700.
v. Snyder, 350, 417.
Dunn v. Agricultural Soc., 68, 491, 731.
Dunman v. Bigg, 239.
Dunn v. Hall, 199.
v. Hartford, etc., R. R. Co., 88.
v. Hearst, 200.
v. Miller, 320.
Dunneback v. Tribune P. Co., 241.
Dunsbach v. Hollister, 582, 602.
Dunsmore v. Central R. R. Co., 614.
Duntley v. Boston, etc., R. R. Co., 725.
v. Inman, 562.
Dufee v. Lentine, 155.
Dupre v. Childs, 497.
Dupuy v. Johnson, 99.
Durand v. Hollins, 329.
v. New York, etc., R. R. Co., 531.
Durant v. Palmer, 705.
Durgin v. Am. Ex. Co., 725.
v. Kennett, 684.
Durham v. Joyce, 328.
Duringer v. Moschino, 190.
Durri v. Hunt, 418.
Duryea v. Nat. Starch Mfg. Co., 358.
v. New York, 129.
Dusk v. Fitzhugh, 712.
Dustin v. Cowdry, 321.
Dutton v. Ensley, 408.
v. Lansdowne Bor., 94.
v. Thurston, 444.
v. Weare, 49.
Duval v. Atlantic Coast Line R. R. Co., 720.
v. Barnaby, 347.
v. Hunt, 285.
Duvall v. Mowry, 140.

[REFERENCES ARE TO PAGES.]

Duvall v. Waters, 335.
Dwenger v. Gray, 267.
Dwight v. Hayes, 597, 599.
Dwinelle v. New York Central, etc., R. R. Co., 474, 487, 657.
Dwyer v. American Express Co., 554.
v. St. Louis T. Co., 497.
Dyas v. So. Pac. Co., 285.
Dyckman v. Valiente, 433.
Dyer v. Depui, 372.
v. Hutchins, 95.
v. Walker, 364.
Dyett v. Hyman, 90.
Dyke v. Nat. Tr. Co., 436.
Dynes v. Bromley, 714.

E.

Eads v. Gains, 366.
v. Wynne, 394.
Eagan v. Maguire, 49.
Eager v. Grimwood, 259.
Eagle v. White, 648.
Eagan v. Eagan, 257, 258.
Eakins v. Chicago, etc., Ry. Co., 683.
Eames v. Morgan, 453.
v. Salem, etc., R. R. Co., 120, 342, 676.
v. Texas, etc., R. R. Co., 32.
v. Whittaker, 228, 237.
Eanes v. State, 163.
Earhart v. Youngblood, 346.
Earl v. Van Alstine, 350.
Earle v. De Hart, 584.
Earl of Bristol v. Wilsmore, 444.
Earl of Grannard v. Dunkin, 354.
Earl of Lonsdale v. Nelson, 110, 578.
Earl of Ripon v. Hobart, 602.
Early v. Lake Shore, etc., Co., 687, 734.
Earp v. Lee, 111.
Eason v. S. & E. T. Ry. Co., 473.
East v. Worthington Co 447.
Eastern Counties R. R. Co. v. Broom, 87, 88, 486.
East, etc., R. Co. v. Sims, 522.
Eastham v. Anderson, 315.
Eastin v. Bank, 185.
East Indian Ry. Co. v. Mukerjee, 749.
East Jersey Water Co. v. Bigelow, 23, 24, 125, 591, 592.
Eastland v. Clark, 503, 560.
East Line, etc., Ry. Co. v. Culberson, 476.
Eastman v. Amoskeag Co., 620, 622.
v. Judkins, 399.
v. Keasoe, 175.
v. Meredith, 73, 80, 81.
v. Monastes, 178.
v. Scott, 344.
Easton v. New York, etc., R. R. Co., 612.
East River G. L. Co. v. Donnelly, 386.
East Saginaw, etc., R. R. Co., v. Bohn, 715.
East Tenn., etc., Co., v. Lockhart, 32.
v. Stewart, 561.
East Tennessee, etc., R. R. Co. v De Armond, 550, 555.
v. Hasters, 36.
v. Perkins, 514.
v. Rush, 547.
Eaton v. B. C. & M. R. R. Co., 615.
v. European, etc., R. R. Co., 478, 484.
v. Fairbury W. W. Co., 775.
v. Hill, 58, 59.
v. Langley, 118, 119.
v. Munroe, 426.
v. Oregon Ry. & Nav. Co., 746.
v. R. R. Co., 595.
v. Winnie, 324, 457, 608.
Eaton, etc., Co. v. Avery, 458.
Eberhart v. Reister, 348.
Eberley v. Rupp, 187, 189.

[REFERENCES ARE TO PAGES.]

Eck v. Hocker, 340.
Eckert v. Long Island, etc., R. R. Co., 709.
v. Van Pelt, 213.
Eckes v. Stetter, 735.
Economy Lt. & P. Co. v. Hiller, 751, 753.
Eddy v. Howard, 84.
v. Kinney, 342.
v. Union R. R. Co., 344.
Edelman v. Yeakel, 332.
Eden v. Drey, 643, 645.
v. Legare, 215.
Edgar v. Castello, 273.
v. Walker, 619.
Edgerly v. Swain, 205.
v. Whalen, 429.
Edmondson v. John Birch & Co., 198, 233.
v. Pittsburg, etc., R. R. Co., 478.
Edward Hines Lumber Co. v. Ligas, 525.
Edwards v. Allonez Mining Co., 625.
v. Burke, 663.
v. Chandler, 221.
v. Charlotte, etc., R. R. Co., 583.
v. Crume, 62.
v. Davis, 147.
v. Ferguson, 386.
v. Howell, 207.
v. Lamb, 673.
v. Law, 329.
v. Leavitt, 127, 158.
v. London, etc., R. R. Co., 70.
v. Manufacturers' Bldg. Co., 664, 695.
v. Midland Ry. Co., 69.
v. New York, etc., R. R. Co., 619.
v. Roberts, 469.
v. Wessinger, 63, 64.
Efron v. Wagner, 664.
Efroymson v. Smith, 498.
Egan v. Dry Dock, etc., R. R. Co., 749, 750.
v. Murray, 263.
v. Semrod, 205.
Egbert v. Greenwalt, 252.
Eggett v. Allen, 178.
Eggleston v. Mundy, 420.
Ehrgott v. Mayor, etc., 32.
Eicheler v. Hanggi, 508, 511.
Eichengreen v. Railroad Co., 169, 488, 497.
Eichner v. Bowery Bank, 210.
Eickhoff v. Fidelity, etc., Co., 185.
Eidmiller Ice Co. v. Guthrie, 47.
Eickhoff v. Gilbert, 241.
Eiland v. State, 154.
Einstein v. Marshall, 462.
Elam v. Badger, 239.
Elbin v. Wilson, 388.
Elcox v. Hill, 644.
Eldridge v. Atlas S. S. Co., 533, 534, 540.
Electric Ry. Co. v. Lawson, 540.
Elerick v. Reid, 449.
Elgin v. Kimball, 584.
Elgin, etc., Traction Co. v. Wilson, 690.
Elgin Natl. Watch Co. v. Ill. Watch Case Co., 355, 359.
Eli v. Northern Pac. R. R. Co., 543, 546, 554.
Elizabeth, etc., R. R. Co. v. Combs, 613.
Elkins v. Empire Trans. Co., 725.
v. McKeon, 777.
v. State, 626.
Ellenwood v. Marietta Chair Co., 135.
Eller v. Koehler, 573, 574, 606.
Ellington v. Ellington, 262.
Elliot v. N. E. R. R. Co., 365.
Elliotson v. Feetham, 605, 626.
Elliott v. Ailsberry, 203.
v. Brown, 154.
v. Chicago, etc., Ry. Co., 697.
v. Field, 92, 93.

[REFERENCES ARE TO PAGES.]

Elliott v. Fitchburg R. R. Co., 371.
v. Hayden, 101, 437.
v. Jackson, 130.
v. Norfolk, 395.
v. Porter, 101.
v. Pray, 731, 733.
v. St. Louis, etc., R. R. Co., 273.
v. Smith, 336.
v. Van Buren, 222.
Ellis v. American Tel. Co., 728.
v. Andrews, 447, 448.
v. Bitzer, 103.
v. Buzzell, 221.
v. Esson, 103.
v. Howard, 84.
v. Kansas City, etc., R. R. Co., 603.
v. Lindley, 222.
v. Loftos Iron Co., 340.
v. McNaughton, 563.
v. New York, etc., Co., 558.
v. Portsmouth, etc., R. R. Co., 744.
v. Southern Ry. Co., 563.
v. Whitehead, 218.
Ellsworth v. Ellingson, 743.
v. Metheney, 505.
Elmer v. Fessenden, 247.
v. Locke, 558.
Elmore v. Overton, 385, 386.
v. Sands, 656, 658.
v. Seaboard A. L. R. Co., 537.
Elrod v. Hammer, 397.
Elsass v. Harrington, 443.
Elwell v. Martin, 62.
v. Reynolds, 168, 398.
Elwes v. Maw, 407.
Elwood Elec. St. Ry. Co. v. Ross, 283.
Ely v. Davis, 186.
v. Rosholt, 338.
v. Supervisors, 109, 111.
v. Thompson, 374, 377.
v. Yore, 318, 321.
Elyton Land Co. v. Mingea, 719.
Embler v. Wallkill, 770.
Embrey v. Owen, 593, 598.
Embry v. Owen, 22.
Emerson v. Badger, 358.
v. Brigham, 445.
v. Clayton, 255.
v. Cochran, 189.
v. Lowell Gas. Co., 756.
v. McNamara, 131.
v. Miller, 217.
v. Schoonmaker, 129.
Emery v. Ginnan, 189.
v. Gowan, 261.
v. Lowell, 77.
v. Minneapolis Industrial Exposition, 731.
v. Philadelphia, 751, 754.
Emig v. Daum, 220.
Emma Cotton Seed Oil Co. v. Hale, 522, 527.
Emmerick v. Thorley, 166.
Emmerling v. Graham, 399.
Emmerson v. Fay, 481, 484.
Emmons v. Pottle, 199.
v. Quade, 151, 156.
Emory v. Hazard P. Co., 607.
Empire Trans. Co. v. Johnson, 18.
Employers' Liability Ass'n v. Employers' L. I. Co., 359.
Employing Printers Club v. Doctor B. Co., 292, 293, 296.
Emporia v. Kowalski, 529, 560.
v. Soden, 593.
Emry v. Raleigh, etc., R. R. Co., 697.
v. Roanoke Nav., etc., Co., 683, 736.
Enfeld v. Colburn, 186.
Engel v. Eureka Club, 478.
v. Smith, 731.
Engelhart v. Farrant, 41, 491, 492.
Engelke v. Chouteau, 183, 384.
Engeman v. Taylor, 456.
English v. Amidon, 503.
v. Free, 672.

[REFERENCES ARE TO PAGES.]

English v. Progress Elec. L. & M. Co., 571, 573, 574, 606.
Eno v. Del Vecchio, 368.
Enoch Morgan's, etc., Co. v. Troxell, 360.
Enochs v. Pittsburg, etc., Ry. Co., 43.
Enos v. Enos, 224.
Enquirer Co. v. Johnstone, 219.
Enright v. Gibson, 163.
v. Oliver, 532, 546, 549, 551.
v. Pittsburg Junction R. R. Co., 487, 498.
Ensign v. Central N. Y. Tel. Co., 699.
Ensley Lumber Co. v. Lewis, 430.
Entrinck v. Carrington, 8.
Epps v. Hinds, 646.
Epstein v. Berkowsky, 175.
Equitable Co-op. Foundry Co. v. Hersee, 467.
Erber v. Dun, 239.
Erd v. St. Paul, 701.
Erdman v. Illinois Steel Co., 532, 556, 558.
v. Mitchell, 293, 295.
Erickson v. Fisher, 457.
v. McNeeley, 537.
Erie City Iron Works v. Barber, 68.
Erie, etc., W. Co. v. Dater, 724.
Erie Pass. Co. v. Schuster, 716.
Erie R. R. Co. v. McCormick, 684.
Erie Tel. & Tel. Co. v. Kennedy, 47.
Ernst v. Hud. Riv. R. R. Co., 677.
Erskine v. Hohnbach, 438.
v. Savage, 323, 429.
Ertz v. Produce Exchange, 297.
Erwin v. Clark, 637.
v. State, 154.
Esberg Cigar Co. v. Portland, 81.
Eslava v. Jones, 402.
Eslow v. Mitchell, 428.
Essex v. Local Board, 615.
Essex County Elec. Co. v. Kelly, 504, 525, 562.
Essey v. Southern Pac. Co., 707, 708.
Estelle v. Peacock, 324.
Estep v. Hammon, 362, 363.
Esterly Harvesting Machine Co. v. Berg, 453.
Estes v. China, 324.
Estey v. Smith, 44.
Estill v. Fort, 63, 64.
Estopinal v. Peyroux, 380.
Esty v. Baker, 319.
v. Chandler, 91.
Etchberry v. Leiville, 50.
Ettinger v. Weil, 448.
Eubank v. Boughton, 307.
Eufaula v. Simmons, 583, 584.
Eureka v. Merrifield, 271.
Eureka, etc., Co. v. Buss, 557.
Euting v. Chicago, etc., Ry. Co., 491, 493, 496, 748.
Evans v. Adams Exp. Co., 701.
v. Chamberlain, 543.
v. Foster, 377.
v. Iowa City, 698.
v. Keystone Gas. Co., 757.
v. La. Lumber Co., 544.
v. Mason, 424, 638.
v. Merriweather, 593.
v. Murphy, 480.
v. Reading F. Co., 603.
v. Rothschild, 467.
v. Smith, 246.
v. Wabash R. R. Co., 700.
Evanisch v. Gulf, etc., Ry. Co., 260, 737.
Evans L. Co. v. Crawford, 518, 522, 528, 538.
Evansville v. Senhenn, 716.
Evansville, etc., Co. v. Griffin, 734.
v. McKee, 68, 70.
Evansville, etc., R. R. Co. v. Baum, 489.
v. Lowdermilk, 281.

[REFERENCES ARE TO PAGES.]

Evarts v. St. Paul, etc., Ry. Co., 471.
v. Smith, 222.
Evening Jour. Co. v. McDermott, 69.
Evening Post Co. v. Richardson, 224.
Everett v. Edwards, 368.
v. Hydraulic Co., 580.
v. Sherfey, 259.
Everett Piano Co. v. Bent, 250.
Everett Waddey Co. v. Richmond T. Union, 298.
Everhart v. Terre Haute, etc., R. R. Co., 473.
Everson v. Seller, 437.
Everton v. Esgate, 156.
Evirs v. Krouse, 496.
Ewen v. Chicago, etc., R. R. Co., 285.
Ewing v. Ainger, 218.
v. Blount, 436.
v. Chicago, etc., R. R. Co., 676.
v. Pittsburg, etc., Ry. Co., 26.
Excelsior Elec. Co. v. Sweet, 694.
Excelsior Needle Co. v. Smith, 125.
Express Cases, 647.
Express, etc., Co. v. Copeland, 221.
Exum v. Brister, 88.
Eyre v. Higbee, 354.
v. Jordan, 740.

F.

Factors & T Ins. Co. v. Werleim, 607.
Fadner v. Filer, 169.
Fagnam v. Knox, 172.
Fahn v. Reichart, 742.
Fahr v. Hayes, 233, 234, 239.
Fairbank v. Hoentzche, 733.
v. Phelps, 419.
Fairbanks v. Alston, 42.
Fairchild v. Keith, 383.
v. McMahon, 449.
v. St. Louis, 611.
Fairfax v. N. Y. Cent. R. R. Co., 634.
Fairlie v. Boosery, 353.
Fairman v. Ives, 236.
Fake v. Addicks, 343, 345, 349.
Fallon v. Schilling, 577.
Falls v. San Francisco, etc., R. R Co., 655.
Falvey v. Faxon, 179.
Fanning v. Chase, 204.
Farebrother v. Ansley, 99.
Faren v. Sellers, 483, 535.
Fargo Gas & C. & Co. v. Fargo Gas & Elec. Co., 448.
Faribault v. Sater, 450.
Faris v. Hoberg, 684, 735.
Farish v. Reigle, 654.
Farley v. Danks, 183.
v. Evening Chronicle Pub. Co., 219.
v. Gate City G. L. Co., 603.
Farmer v. Calvert, 466.
v. Crosby, 88, 90.
v. Cumberland Tel. & Tel. Co., 515.
Farmers' Alliance, etc., Co. v. McElhannon, 422.
Farmers' Bank v. McKee, 420.
Farmers' etc., Bank v. Transportation Co., 649.
Farmers' High Line Canal, etc., Co., v. Westlake, 683.
Farmers' Turnpike Road v. Coventry, 144.
Farnam v. Feeley, 171.
Farnsworth v. Rockland, 332.
v. Storrs, 237.
v. Tilton, 394.
Faro v. Remington Arms Co., 750, 776.
Farr v. Peterson, 447, 464.
Farrand v. Aldrich, 219.
Farrar v. Bridges, 452.
v. Close, 294.
Farrant v. Barnes, 748.
v. Hoff, 356.

[REFERENCES ARE TO PAGES.]

Farrell v. Richmond, etc., R. R. Co., 653.
v. Waterbury Horse R. R. Co., 696.
Farrelly v. Hubbard, 422.
Farris v. Strong, 453.
Farwell v. Bicker, 106, 107.
v. Boston, etc., R. R. Co., 485, 500, 541, 542, 544, 552.
v. Cook, 576.
v. Laird, 178.
Fassett v. Roxbury, 700.
Fatjo v. Seidel, 202.
Faucett v. Nichols, 646.
Faucher v. Grass, 605.
Faulkner v. Alderson, 332.
v. Aurora, 75.
v. Brown, 415.
v. Hart, 652.
v. Mammouth Min. Co., 504, 538.
v. State, 394.
Fausler v. Parsons, 388.
Faust v. Hosford, 454.
Fawcett v. Fowlis, 377.
v. York, etc., R. R. Co., 676, 678, 679.
Fay v. Minn., etc., Co., 547.
v. Munson, 396.
v. Pacific Imp. Co., 640, 641, 642, 643.
v. Parker, 127.
v. Steamer New World, 646.
Feeley v. Andrews, 267.
Fehlhauer v. St. Louis, 619.
Felch v. Harriman, 412.
Felkner v. Scarlet, 262, 263.
Fellman v. Dreyfous, 211.
Felton v. Aubrey, 714, 737.
Felts v. Collins, 434.
Felters v. Twan, 563.
Fenderson v. Atlantic City R. R. Co., 508.
Fenduson v. Rackliff, 407.
Fennell v. Sequin St. Ry. Co., 340.
Fenner v. Crips Bros., 477.
Fenstermaker v. Tribune Pub. Co., 249.
Fent v. Toledo, etc., R. R. Co., 36.
Fenter v. Toledo, etc., R. R. Co., 622.
Fenton v. Bisel, 349.
Fenwick v. Grimes, 452.
Ferguson v. Arnow, 187.
v. Boston Gas Lt. Co., 757.
v. Brooks, 64.
v. Carrington, 444.
v. Collins, 64.
v. Columbus, etc., Ry. Co., 716, 737.
v. Earl of Kinnoull, 383, 387.
v. Evening Chron. Pub. Co., 213.
v. Formenich Mfg. Co., 591, 596.
v. Gies, 306.
v. Hubbell, 743.
v. Miller, 413.
v. Moore, 264.
v. Smelters, 252.
v. Spencer, 328.
Ferman v. Lombard Invest. Co., 620, 622.
Fernold v. Knox W. Co., 594.
Fernsler v. Mayer, 265.
Fero v. Buffalo, etc., R. R. Co., 745.
Ferrero v. Western Union Tel. Co., 666, 667.
Ferrin v. Symonds, 332.
Ferriter v. Tyler, 386.
Ferry Cos. v. White, 654, 657.
Fertich v. Michener, 160, 309.
Fewings v. Mendenhall, 661.
Fickett v. Lisbon Falls Fibre Co., 533, 560.
Fidelity & Casualty Co. v. Cutts, 682.
Fidelity Lodge v. Bond, 367, 368.
Field v. Borodofski, 55.
v. Brackett, 635.
v. Colson, 211, 216.
v. French, 776.

[REFERENCES ARE TO PAGES.]

Field v. Kane, 159, 498.
v. Wallace, 402.
v. West Orange, 584, 585.
Fifield v. Northern R. R. Co., 500.
Fifth Ave. Bank v. Forty-Second St., etc., R. R. Co., 71, 488.
Filber v. Dauterman, 201.
Filburn v. People's Palace, etc., Co., 350.
Filer v. New York Cent., etc., R. R. Co., 711.
v. Smith, 168.
Filkins v. O'Sullivan, 191.
Fillebrown v. Grand Trunk, etc., Co., 648.
Filley v. Fassett, 355.
Fillman v. Ryan, 87.
Finch v. Vifquain, 207.
Findon v. Parker, 48.
Findlay v. Smith, 336.
Fink v. Campbell, 254, 256.
v. Gorman, 272.
v. Miss., etc., Co., 484.
Finlay v. Bryson, 132.
Finlayson v. Utica Min. & M. Co., 504.
Finkbinder v. Ernst, 583.
Finley v. Hershey, 111.
v. Lynch, 468.
v. Steele, 236.
v. St. Louis, etc., Co., 166.
Finn v. Frink, 174.
Finnerty v. Burnham, 509, 511.
Finney v. Curtis, 343, 344.
Fiquet v. Allison, 131, 433.
Firer v. Lowery, 177.
Firestone v. Rice, 164, 169.
Fire Ins. Patrol v. Boyd, 71, 72.
First Bap. Ch. v. Schenectady, etc., R. R. Co., 605, 614.
First Nat. Bank v. Clements, 390.
v. First Nat. Bank, 636.
v. Graham, 635.
v. Mattingly, 453.
v. Ocean Nat. Bank, 682.
v. Piano Co., 102.
First Nat. Bank v. Schween, 116.
v. Scott, 116.
v. Villegra, 366.
First Presb. Cong. v. Smith, 482.
Fischer v. Blank, 361.
v. Johnson, 323, 326, 407, 410.
Fish v. Chapman, 648.
v. Cleland, 447.
v. Dodge, 605, 618.
v. Ferris, 59.
v. Kelly, 675.
v. St. Louis, etc., Co., 239.
Fishback v. Miller, 464, 466.
Fishburn v. Burlington, etc., Ry. Co., 714.
Fisher v. Badger, 349.
v. Beard, 367.
v. Boston, 75.
v. Brown, 437.
v. Delaware, etc., Co., 523.
v. Feige, 44, 577.
v. Galladay, 750, 775.
v. Jansen, 741.
v. Kelsey, 643.
v. Kyle, 424.
v. McGirr, 374.
v. Mellen, 461, 462.
v. Monongahela Con. Ry. Co., 697.
v. Oregon Short Line, 550.
v. Seaboard Air Line Co., 21.
v. West Virginia, etc., Ry. Co., 98.
v. Zumwalt, 578, 604, 611.
Fishkill Sav. Bank v. Nat. Bank, 70.
Fiske v. Forsythe D. L. B. Co., 681, 699.
Fitchburg R. R. Co. v. Gage, 647.
Fitzgerald v. Cavin, 138, 152.
v. Edison Elec. Ill. Co., 699, 754.
v. Fitzgerald, 157.
v. Fitzgerald etc., Co., 68.
v. Quinn, 63, 64, 66.
v. Smith, 104.

[REFERENCES ARE TO PAGES.]

Fitzgerald v. St. Paul, etc., Ry. Co., 715.
Fitzmaurice v. Fabian, 775.
Fitzpatrick v. Boston, etc., R. R. Co., 128.
v. Comberland Glass Mfg. Co., 736.
v. Daily State Pub. Co., 241.
v. Welch, 580.
Fitz Simons & Connell Co. v. Braun, 608.
F. & M. Bank v. Kingsley, 102.
Flagg v. Worcester, 582, 584.
Flaherty v. Moran, 45.
Flam v. Lee, 173.
Flannery v. Brewer, 432.
Flannigan v. Guggenheim Smelting Co., 508, 528.
Fleckenstein v. Dry Dock, etc., R. R. Co., 764.
Fleet v. Hegeman, 315.
Fleischmann v. Starkey, 360.
Fleischner v. Citizens' Invest. Co., 619.
Flemmins v. Ball, 161.
Fleming v. Katahdin Pulp & P. Co., 433.
v. McDonald, 101.
v. Montgomery Lt. Co., 305.
v. Pittsburgh, etc., Ry. Co., 691.
v. Southern Ry. Co., 680.
Flesh v. Lindsay, 64.
Fletcher v. Baxter, 192.
v. Boston, etc., R. R. Co., 687.
v. Evans, 323.
v. Rylands, 581.
Flewelling v. Lewiston, etc., Horse R. R. Co., 763.
Flickinger v. Wagner, 178, 179.
Flike v. Boston, etc., R. R. Co., 510, 518, 541, 544.
Flinn v. New York Cent. R. R. Co., 743.
Flint v. Hutchinson Smoke Burner Co., 248, 250.
Flint v. Norwich, etc., Co., 657.
Flint, etc., Ry. Co. v. Detroit, etc., R. R. Co., 22.
v. Weir, 634.
Flockhart v. Hocking C. Co., 529, 530.
Flood v. News & C. Co., 215.
Flora v. Russell, 183, 497.
Florida Cent. R. R. Co. v. Foxworthy, 287.
v. Mooney, 47.
Florida Southern Ry. Co. v. Hirst, 304, 653, 658, 701.
Floyd v. Barker, 43, 377.
v. Browne, 437.
v. Wiley, 131.
Flynn v. Butler, 607.
v. Canton, 148.
v. Central R. R. Co., 731.
v. Hatton, 715.
v. Phila., etc., R. R. Co., 726.
v. San Francisco, etc., R. R. Co., 744, 745.
Fobes v. Shattuck, 411.
Fogarty v. Finlay, 399.
v. St. Louis Transfer Co., 134.
Fogg v. Boston, etc., R. R. Co., 67.
Foley v. Cudahy Packing Co., 503.
v. Godchaux, 583.
v. Holtry, 456.
v. Jersey City E. L. Co., 529.
v. Martin, 398.
v. Phelps, 268, 269.
v. Wyeth, 364, 365, 366.
Folk v. Milwaukee, 74, 77, 80.
Folks v. Chad, 626.
Follman v. Mankato, 719.
Folsom v. Marsh, 354.
Folwell v. Miller, 200.
Fones v. Phillips, 522.
Foot v. Card, 6, 8, 257, 258.
v. New Haven, etc., Co., 326.
v. Pitt, 216.
Foote, Ex parte, 568.
Foote v. Calvin, 412.
Foran v. Rodick, 733.

[REFERENCES ARE TO PAGES.]

Forbell v. New York, 312, 588.
Forbes v. Boston, etc., R. R. Co., 649.
Force v. Gregory, 671, 673.
Ford v. Caldwell, 131.
v. Clough, 439.
v. Cobb, 409.
v. Dyer, 191.
v. Fitchburg R. R. Co., 509, 535.
v. Foster, 356, 357.
v. Lake Shore, etc., R. R. Co., 548.
v. Lamb, 210.
v. Parker, 393.
v. School District, 72, 77, 79, 80, 474.
v. Taggart, 350.
v. Williams, 90.
Fordyce v. Briney, 542.
v. McCants, 283.
Foren v. Rodick, 741.
Forgarty v. Junction City Pressed Brick Co., 627.
Forks Tp. v. King, 718.
Formall v. Standard Oil Co., 736, 739.
Forsythe v. Central Mfg. Co., 259.
v. Price, 412.
Fort Dearborn Lodge v. Klein, 318, 321.
Forth v. Pursley, 419.
Fortman v. Rottier, 184.
Fort Scott, etc., Ry. Co. v. Tubbs, 744, 745.
Fort Wayne v. Coombs, 77.
Fort Wayne, etc., R. R. Co. v. Gildersleeve, 509, 530, 557.
Fort Worth v. Crawford, 80, 604.
Fort Worth, etc., Ry. Co. v. Glenn, 627.
v. Greathouse, 726.
v. Hogsett, 745.
Forward v. Adams, 207.
v. Deetz, 334.
Foshay v. Ferguson, 172.
Foss v. Bigelow, 529.
v. Smith, 154.
Fossbinder v. Svitak, 155.
Foster v. Bone, 204.
v. Browning, 327.
v. Chicago, 478.
v. Chicago, etc., Ry. Co., 555
v. Commonwealth, 12.
v. Denison, 185.
v. Eliott, 320.
v. Essex Bank, 633.
v. Orr, 166.
v. Minnesota R. R. Co., 542.
v. Mo. Pac. R. R. Co., 539.
v. Scott, 615.
v. Scripps, 213, 241.
v. St. Louis, 79.
v. St. Luke's Hospital, 278.
v. Warner, 117.
v. Wright, 314.
Fottler v. Moseley, 441, 455, 466.
Fountain v. West, 222.
Fow v. Roberts, 618.
Fowler v. Chichester, 247.
v. Dorlon, 644.
v. Haynes, 435.
v. Jenkins, 44, 45.
v. Western U. Tel. Co., 729.
Fowles v. Bowen, 208, 239.
Fowlkes v. Nashville, etc., R. R. Co., 273, 282.
Fox v. Borkey, 608.
v. Buffalo Park, 618, 731.
v. Hazelton, 382.
v. Northern Liberties, 437.
v. Oakland Con. St. Ry. Co., 682, 696, 698, 707, 717.
v. People, 157.
v. Philadelphia, 663.
v. Prickett, 437.
v. Sandford, 543.
v. Smith, 171, 178.
Fox v. Spring Lake Iron Co., 527.
v. W. P. R. R. Co., 329.
v. Wood, 192.
v. Young, 637.
Foy v. Minn., etc., Co., 527.

[REFERENCES ARE TO PAGES.]

Frace v. New York, etc., R. R. Co., 36.
Frammell v. Little, 347.
Francies' Appeal, 363.
Francis v. Cockrell, 731.
v. Kansas City, etc., R. R. Co., 520.
v. Schoelkoff, 602.
v. Telyon, 167.
v. W. U. Tel. Co., 25, 668.
Frank v. Bullion, etc., Min. Co., 505, 561.
v. New Orleans, etc., R. R. Co., 277.
Frankford & Co. v. Phila., etc., R. R. Co., 687, 744.
Frankford, etc., Co. v. Phila., etc., R. R. Co., 682.
Franklin v. Amerson, 165.
v. Browne, 206.
v. Durger, 569, 584.
v. Smith, 399.
v. Southeastern R. R. Co., 285.
Franklin Bank v. Cooper, 446.
v. Small, 395.
Franklin Coal Co. v. McMillan, 336.
Fraser v. Freeman, 489.
Frasier v. Brown, 2.
Frassi v. McDonald, 481.
Frazer v. Bigelow Carpet Co., 129.
v. Lewiston, 766.
v. South, etc., R. R. Co., 717.
Frazier v. Brown, 21, 44, 587.
Fray v. Blackburn, 377.
Frech v. Philadelphia, etc., R. R. Co., 703.
Fredenburg v. Baer, 736.
Fred v. Traylor, 208.
Fredrick v. Marquette, etc., R. R. Co., 658.
Fredericks v. Northern Central R. R. Co., 654.
Fredericksen v. Singer Mfg. Co., 112.
Frederickson v. Johnson, 201, 224.
Freeman v. Boland, 59.
v. Cornwall, 385.
v. Headley, 324, 325.
v. Hunnewell, 740.
v. McLennan, 412.
v. Railroad Co., 287, 504, 550, 560.
v. Reagan, 469.
v. Sand C. Coal Co., 558.
v. Sanderson, 204, 217, 220, 224.
v. Tinsley, 222.
v. Underwood, 426.
Freeport v. Isbell, 75, 374.
v. Marks, 376.
Freer v. Cameron, 733.
Frees v. Ford, 380.
Fremont, etc., R. R. Co. v. Marley, 128, 129, 585.
French v. Conn. River, etc., Co., 609.
v. First Ave. Ry. Co., 529.
v. Guyot, 183.
v. Ryan, 448.
v. Vining, 445.
v. Vix, 481, 608.
Frenzel v. Miller, 461,
Fresh v. Cutter, 232, 234, 235.
v. Philadelphia R. R. Co., 759.
Freudenstein v. McNier, 394.
Friedman v. Suare, 332.
Friend v. Hamill, 388.
v. Woods, 648, 649.
Frink v. Pratt, 419, 421, 711.
Fritsch v. Allegheny, 770, 772.
v. Clemow, 344.
Fritz v. First Div., etc., R. R. Co., 706.
v. Hall, 61.
v. Salt Lake, etc., Elec. Lt. Co., 513, 532.
Frizzell v. Duffer, 91, 398.
Froelicher v. Oswald I. Works, 606.
Frolich v. Cranker, 513.
Frost v. Beekman, 390.

[REFERENCES ARE TO PAGES.]

Frost v. Domestic, etc., Co., 70.
v. Eastern R. R. Co., 738.
v. Holland, 177, 178.
Frostburg v. Dufty, 78.
v. Hutchins Bros., 78.
Frout v. Hardin, 412.
Fry v. Albemarle County, 73, 474.
v. Leslie, 57.
v. McCord, 198, 216, 218.
v. Voules, 23.
Frye v. Bath Gas & Elec. Co., 503, 527.
Fuchs v. St. Louis, 20.
Fuhr v. Dean, 325.
Fuller v. Baltimore, etc., R. R. Co., 140.
v. Chicopee Manufacturing Co., 580, 591.
v. Coats, 644.
v. Davis, 395.
v. Duren, 130.
v. Edings, 146.
v. Glidden, 179.
v. Gould, 377.
v. Jewett, 525, 527.
v. Naugatuck R. R. Co., 253.
v. Tremont L. Co., 558.
Fuller-Warren Co. v. Harter, 406.
Fullerton v. Fordyce, 654, 655.
Fulton v. Hood, 447.
v. Short Route R. R. Trans. Co., 612.
Fulton County St. R. R. Co., v. McConnell, 482.
Fulton Grocery Co. v. Maddox. 188.
Funk v. Beverly, 246.
Funston v. Chicago, etc., Ry. Co. 761, 763.
Furlong v. Bartlett, 414.
v. Polley, 124.
Furman v. Van Sise, 261, 263.
Furnish v. Missouri Pac. Ry. Co., 253, 254, 653, 690.
Furr v. Speed, 202.
Fye v. Chapin, 345.

G.

Gaare v. Clay County Com'rs, 73.
Gabbert v. Jeffersonville R. R. Co., 676.
Gage v. Barnes, 162.
v. Graffan, 191.
v. Springer, 373.
Gagg v. Vetter, 699, 742.
Gagnon v. Dana, 635.
v. French Lick Sp. Hotel Co., 46, 588.
Gaines v. Aetna Ins. Co., 229.
v. Belding, 202, 224.
v. Green Pond, etc., Co., 337.
v. Newbrough, 385.
Gainesville Nat. Bank v. Bamberger, 458.
Gaiser v. Hurleman, 181.
Gaither v. Advertiser Co., 208, 209, 220.
Galbraith v. West End St. Ry. Co., 689.
Galena, etc., R. R. Co. v. Dill, 704.
v. Jacobs, 712.
v. Yarwood, 704.
Gallagher's Estate, 249.
Gallagher v. Buckley, 705.
v. Flury, 566, 603.
v. Kemmerer, 95, 597, 624.
v. Proctor, 704.
v. Stoddard, 181.
Gallin v. London, etc., Ry. Co., 727.
Galloway v. Stewart, 172.
Gallwey v. Marshall, 206.
Galveston v. Barbour, 285.
v. Poswainsky, 767.
Galveston City, etc., Co. v. Hewitt, 684.
Galveston, etc., Ry. Co. v. Ball, 726.
v. Farmer, 548.
v. Kutac, 277, 720, 762.
v. Moore, 716.
v. Smith, 520, 543, 554, 661.
v. Zantzinger, 487, 498.

[REFERENCES ARE TO PAGES.]

Galveston Oil Co. v. Morton, 734.
Galpin v. Chicago, etc., R. R. Co., 744.
Galvin v. MacMin, etc., Co., 131.
v. Pierce, 521.
Gambill v. Schmuck, 165.
Gambrill v. Schooley, 196, 197, 198, 212, 224, 249.
Ganley v. Hall, 741.
v. Looney, 372.
Gann v. Railroad Co., 529, 554.
v. Varnado, 177, 180.
Gannon v. Hargadon, 582.
v. Laclede Gas Lt. Co., 751, 752.
Garby v. Bennett, 243.
Gardemal v. McWilliams, 229, 234.
Gardiner v. Swan Point Cem., 267.
Gardner v. Campbell, 439.
v. Grace, 717.
v. Newburgh, 593.
v. New Haven, etc., R. R. Co., 726.
v. Paine L. Co., 702.
v. Rowland, 324, 325.
v. Southern Ry. Co., 96, 563, 723, 725.
v. Stroever, 610, 613.
v. Ward, 388.
Garigan v. Atlantic Ref. Co., 579, 604.
Garing v. Fraser, 86.
Gariter v. Baltimore, 371.
Garity v. Bullion, etc., Min. Co., 504.
Garland v. Aurin, 584.
v. Carlisle, 426.
v. Furber, 364.
v. Towne, 608, 609.
v. Wilkesbarre, 771.
Garlinghouse v. Jacobs, 403.
Garman v. Bangor, 701.
Garn v. Lockard, 234, 235, 237.
Garner v. Citizens' Nat. Gas. Co., 756.
Garnett v. Ferrand, 384.
Garnett v. Jacksonville, etc., Co, 612.
Garnier v. Porter, 742.
v. Squires, 158, 159, 163.
Garr v. Selden, 228.
Garrard v. Davis, 390.
Garraty v. Duffy, 312.
Garrett v. Bissell Chilled Plow Works, 217.
v. Freeman, 742, 743.
v. Western Union Tel. Co., 729.
Garretzen v. Duenckel, 492, 493.
Garritee v. Baltimore, 609.
Garrow v. Miller, 507.
Gartin v. Meredith, 702, 704.
Gartland v. Toledo, etc., R. R. Co., 521.
Garvey v. Long Island R. R. Co., 614.
Garwood v. New York, etc., R. R. Co., 593, 599.
Gaskins v. Davis, 118.
v. Runkle, 26, 29.
Gas Lt. Co. v. Colliday, 305.
Gates v. Blincoe, 109.
v. Bowers, 432, 433, 434.
v. Fleischer, 670.
v. Kansas City, etc., R. R. Co., 611.
v. Latta, 608.
v. Meredith, 56.
v. Nor. Pac. R. R. Co., 610.
v. Rifle Boom Co., 118.
Gatis v. Kilgo, 237, 239.
Gatzow v. Buening, 302.
Gault v. Jenkins, 318.
Gaunt v. Fynney, 571, 572, 605.
Gavin v. Armistead, 443, 444.
Gayetty v. Bethune, 363.
Gaylor v. Hunt, 383.
Gazette Co. v. Timberlake, 242.
Gee v. Culver, 174, 180.
v. Pritchard, 354.
Geer v. Hovey, 60.
Geesen v. Laquin, 701.

[REFERENCES ARE TO PAGES.]

Gehler v. Knorr, 594.
Geisman v. Mo. Ed. Elec. Co., 694.
Geldard v. Marshall, 514.
Gelzenleuchter v. Niemeyer, 158.
Genessee, etc., Bank v. Mich. Barge Co., 458.
Genessee Salt Co. v. Burnap, 359, 360.
Geno v. Fall Mt. Paper Co., 513, 527.
Gensburg v. Field, 435.
Geo. C. Bagley El. Co. v. Am. Express Co., 639.
George v. Clark, 535.
v. Mobile, etc., R. R. Co., 559.
v. Norcross, 320.
v. Skivington, 750, 775.
George F. Ditman B. & S. Co. v. Keokuk, etc., Ry. Co., 661.
George H. Hammond Co. v. Johnson, 515.
Georgia v. Tenn. Copper Co., 630.
Georgia, etc., Co. v. Neely, 699.
Georgia L. & T. Co. v. Johnston, 187.
Georgia Mid., etc., R. R. Co., v. Evans, 713.
Georgia Pac. R. R. Co. v. Blanton, 736.
v. Hughes, 31, 719.
v. O'Shields, 707.
v. Propst, 471.
Georgia R. & B. Co. v. Eskew, 715.
Georgia Southern, etc., Ry. Co. v. Cartledge, 701.
v. Hughart, 725.
v. Jossey, 105, 563.
Georgetown, etc., R. R. Co. v. Eagles, 316.
Gerhard v. Bates, 458.
German S. & L. Soc. v. Weber, 409.
German Theolog. School v. Dubuque, 127.
Germolus v. Sausser, 154.
Gernerd v. Gernerd, 257, 258.
Gerner v. Mosher, 460.
Gerry v. Am. Exp. Co., 725.
Gerst v. St. Louis, 365.
Gessler v. Grieb, 357.
Gibbes v. Town Council, 145.
Gibbon v. Paynton, 700.
Gibbons v. Farwell, 425, 652.
Gibbs v. Chase, 434.
v. Estey, 409.
v. Hannibal, etc., Co., 278.
v. Prices, 207.
v. Randlett, 89.
v. Williams, 586.
Gibelene v. Smith, 152.
Giberson v. Wilber, 397.
Giblan v. Nat. A. L. Union, 292, 296.
Gibson v. Cincinnati Enquirer, 244.
v. Denton, 607.
v. Erie R. R. Co., 530.
v. Huntington, 767, 768, 770.
v. Leonard, 328, 735.
v. Midland Ry. Co., 279.
v. Minet, 11.
v. New York, etc., R. R. Co., 529.
v. Pacific R. R. Co., 510.
v. Western N. Y., etc., R. R. Co., 140.
Giddens, v. W. U. Tel. Co., 25.
Gier v. Los Angeles C. E. Ry. Co., 516, 517.
Giffin v. Lewiston, 772.
Gifford v. McArthur, 610.
v. Wiggins, 167, 168.
Gila Val., etc., Ry. Co. v. Lyon, 559.
Gilbert v. Crandall, 396.
v. Dickerson, 433.
v. Duluth General Elec. Co., 755.
v. Kennedy, 320.
v. Nagle, 733.
v. Peck, 434.
v. Roxbury, 770.

[REFERENCES ARE TO PAGES.]

Gilbert v. Showerman, 573, 601, 606, 625.
Gilbough v. West Side Am. Co., 605.
Gilchrist v. Bale, 252.
Gilcrist v. Nautker, 22.
Gildersleeve v. Hammond, 365, 366.
Giles v. Hutt, 145.
v. Simonds, 113, 325.
v. Walker, 582.
Gilhooly v. New York, etc., Co., 656.
Gill v. Fontleroy's Heirs, 334.
v. Homrighausen, 705.
Gillard v. Chester, 767.
Gillen v. Rowley, 559.
Gillespie v. Beecher, 156.
v. Gillespie, 255.
v. McGowan, 609, 734, 736, 739.
v. Palmer, 388, 389.
Gillett v. Johnson, 593.
v. Knowles, 468.
v. Mason, 413.
Gillette v. Goodspeed, 420.
v. Tucker, 672.
Gillham v. Madison Co. R. R. Co., 583.
Gilliford v. Windel, 179.
Gillis v. Penn. R. R. Co., 732.
v. West. U. Tel. Co., 729.
Gillispie v. Brooklyn Heights R. R. Co., 657.
Gillison v. Charleston, 585.
Gillon v. Boddington, 616.
Gillott v. Esterbrook, 355.
Gilluly v. Madison, 81.
Gillum v. Sisson, 349.
Gilman v. Eastern R. R. Co., 516, 561.
v. Emery, 416.
v. Hill, 423.
v. Hunnewell, 357, 358.
v. Laconia, 77.
v. McClatchy, 244.
v. Noyes, 342.
v. Tilton, 590.
Gilmore v. Driscoll, 364, 366.
v. Federal St., etc., Ry. Co., 765.
v. Fuller, 48.
v. Moore, 395.
v. Newton, 431.
v. Oxford Iron, etc., Co., 546.
v. Wilbur, 130, 325.
Gilpatrick v. Hunter, 103.
Gilmer v. Hanks, 455.
Gilson v. Spear, 60.
Gimson v. Woodfull, 11.
Girard v. St. Louis Car Wheel Co., 139, 140.
Girard Life Ins. Co. v. Mangold, 53.
Gisbourn v. Hurst, 646.
Gisson v. Schwabacher, 518, 537.
Gittens v. Wm. Porten Co., 514.
Given v. West. U. Tel. Co., 668.
Givens v. Van Studdiford, 566, 605, 621.
Gizler v. Witzel, 154.
Gladfelter v. Walker, 23, 596, 626.
Gladwell v. Steggall, 675.
Glaessner v. Anheuser-Busch Brewing Co., 611.
Glamorgan Coal Co. v. So. Wales M. F. Co., 292, 293, 296.
Glantz v. South Bend, 772.
Glanz v. Chicago, etc., Ry. Co., 39, 710.
Glass v. Memphis, etc., R. R. Co., 758.
Glass Co. v. Wolcott, 130.
Glavin v. R. I. Hospital, 71.
Glazar v. Hubbard, 381.
Gleason v. Beers, 636.
v. Boehm, 741.
Gleeson v. Excelsior Mfg. Co., 701.
v. Va. Mid. R. R. Co., 656, 690, 692.
Glencoe L. & G. Co. v. Hudson Bros. C. Co., 293.

[REFERENCES ARE TO PAGES.]

Glendon Iron Co. v. Uhler, 45, 359.
Glen Jean, etc., R. R. Co., v. Kanawha, etc., R. R. Co., 185.
Glenmont L. Co. v. Roy, 536.
Glenn v. Garrison, 419.
v. Jackson, 645.
Glidden v. Mechanics Nat. Bank, 425.
v. Reading, 769.
Gloss v. Black, 85.
Glover v. Burbridge, 633.
Gluckman v. Strauch, 356.
Glueck v. Scheld, 746.
Goddard v. Grand Trunk R. R. Co., 69, 486.
Godeau v. Blood, 346.
Godefroy v. Dalton, 670.
Godell v. Tower, 381.
Godfrey v. Beattyville Coal Co., 702.
Godley v. Hagerty, 780.
Godsell v. Flemming, 109.
Goe v. Nor. Pac. Ry. Co., 31.
Goebeler v. Wilhelm, 218.
Goell v. Morse, 433.
Goetchens v. Matthewson, 388.
Goff v. Brainerd, 117.
v. Kilts, 414.
v. Gt. Western R. R. Co., 70.
Goffin v. Donnelly, 227.
Goggans v. Myrick, 610, 613.
Going v. Ala. Steel & Wire Co., 508, 532.
Golden v. Newbrant, 498.
Goldey v. Pennsylvania R. R. Co., 723.
Golding v. Hall, 101.
Goldman v. Cohen, 256.
Goldmark v. Kreling, 353.
Goldnamer v. O'Brien, 138.
Goldsborough v. Darst, 107.
Goldsmith v. Holland Bldg. Co., 663.
v. Joy, 151, 155.
Golibart v. Sullivan, 158.
Gonzales v. Cobliner, 187.
Gonzales v. Galveston, 32, 78, 767, 773.
Gooch v. Stevenson, 144.
Good v. Altoona, 597.
v. French, 177.
Goodale v. Tuttle, 584.
Goode v. Martin, 347.
Goodenow v. Luyder, 130.
v. Tappan, 206.
Goodlander Mill Co. v. Standard Oil Co., 33, 43, 774, 776, 780.
Goodlett v. Louisville, etc., R. R. Co., 699.
Goodloe v. Memphis, etc., R. R. Co., 496.
Goodman v. Coal Tp., 94.
v. Gay, 344.
Goodnow v. Walpole E. Mills, 529.
Goodrich v. Dorset M. Co., 595.
v. Smith, 467.
Goodrow v. Buckley, 421.
Goodrum v. State, 150.
Goodsell v. Hartford, etc., R. R. Co., 280.
v. Taylor, 663.
Goodspeed v. East Haddam Bank, 69.
Goodtitle v. Alker, 332, 333.
v. Tombs, 334.
Goodwin v. Bodcaw Lumber Co., 282.
v. Cheveley, 323, 342.
v. Guild, 168, 374.
v. Thompson, 259.
v. Wertheimer, 430.
Goransson v. Riter-Conley Mfg. Co., 500, 508, 562.
Gordon v. Buchanan, 649.
v. Clifford, 162.
v. Cummings, 609.
v. Farrar, 388.
v. Harper, 419.
v. Irvine, 446.
v. Parmelee, 222, 451.
v. Stockdale, 423, 431.
Gore v. Condon, 292.

[REFERENCES ARE TO PAGES.]

Gore v. Martin, 439.
Gorham v. Gale, 399.
v. Gross, 368.
Gorman v. Sutton, 222.
Gormeley v. Gym. Ass'n, 452.
Goshen v. England, 715, 772.
Goshen Turnpike Co. v. Hurtin, 145.
Goslin v. Wilcox, 183.
Gosling v. Morgan, 201.
Gott v. Mitchell, 438.
v. Pulsifer, 247.
Gottbehmet v. Hubachek, 207.
Goucher v. Jamison, 155.
Gould v. Boston Duck Co., 590, 591, 592, 593, 598.
v. Hammond, 385.
v. James, 315.
v. McKenna, 580, 715.
v. Schermer, 401.
v. Slater Woolen Co., 20, 43, 775.
v. Topeka, 79.
Goupil v. Simmonson, 190.
Govashki v. Downey, 183, 497.
Gove v. Blethen, 207.
Govenor v. Meredith, 79.
Govett v. Radnidge, 14.
Gowen v. Bessey, 267.
v. Phila. Exchange Co., 322.
Goyle v. Missouri Car., etc., Co., 484.
Grabenheimer v. Budd, 91.
Grable v. Margrave, 262.
Grace v. Mitchell, 105, 169, 440.
v. Willets, 315.
Grace & Hyde Co. v. Probst, 476, 484.
Gradin v. St. Paul, etc., Ry. Co., 727.
Grady v. Nurby, 419.
v. Wolsner, 582, 618.
Graham v. Cass Circuit Judge, 228.
v. Keene, 584.
v. Life Ass'n, 171.
Graham v. McReynolds, 263.
v. Newburg, etc., Co., 533.
v. Payne, 344.
v. St. Charles St. R. R. Co., 300.
Grainger v. Hill, 189.
Gram v. Northern Pac. R. R. Co., 36.
Gramlich v. Wurst, 687, 734, 736.
Grand Fountain Order v. Murray, 68.
Grandola v. Lovdal, 578.
Grand Pacific Hotel Co. v. Rowland, 422, 644.
Grand Rapids Booming Co. v. Jarvis, 613.
Grand Rapids, etc., R. R. Co. v. Heisel, 613.
v. Huntley, 656.
v. Southwick, 676.
Grand Tower, etc., Co. v. Ullman, 650.
Grand Trunk Ry. Co. v. Cummings, 558.
v. Ives, 678, 685, 687.
v. Latham, 105.
v. Richardson, 746.
Granger v. Hill, 159.
Grant v. Allen, 582.
v. Erie, 75.
v. Reinhart, 187.
v. Slater, etc., Co., 147.
v. Stillwater, 767.
v. Varney, 503, 527.
v. Wilson, 406.
Gratis v. Kansas City, etc., Ry. Co., 542.
Graves v. Adams Exp. Co., 724.
v. Dawson, 182.
v. Lake Shore, etc., R. R. Co., 724.
v. Lebanon Nat. Bank, 446, 463.
v. Neville, 60.
v. Scott, 182.
v. Shattuck, 109, 332.

[REFERENCES ARE TO PAGES.]

Graves v. Tichnor, 633
Gray v. Ayers, 109.
v. Bartlett, 446.
v. Boston, etc., Co., 622.
v. Building Trades Council, 297, 298.
v. Cincinnati, etc., Co., 304.
v. Combs 156.
v. Durland, 263.
v. Griffith, 130.
v. Harris, 581, 623.
v. Hedges, 324.
v. Jackson, 651.
v. Knoxville, 584.
v. Little, 672.
v. McWilliams, 583.
v. Merriam, 634.
v. Pennsylvania R. R. Co., 763.
v. Pentland, 236.
v. Red Lake Falls Lumber Co., 517, 556.
v. Wash. Water Power Co., 37.
Graybill v. De Young, 201.
Greaney v. Holyoke Water Power Co., 756.
Grear v. Marshall, 384.
Great Falls Co. v. Worster, 372.
Greathouse v. Summerfield, 159.
Great Nor. R. Co. v. Kennedy, 145.
Great Western R. R. Co. v. Geddis, 679.
Greeley v. Foster, 504, 524, 540, 561.
Greeley Irr. Co. v. House, 579, 580.
Green v. Am. Car & F. Co., 536.
v. Bailey, 147.
v. Berge, 96.
v. Bryant, 449.
v. Button, 293.
v. Danby, 772.
v. Eastern Ry. Co., 677.
v. Goddard, 155.
v. Greenbank, 59.
v. Hudson R. R. Co., 274.
v. Lake, 605.
Green v. Nixon, 441.
v. Nunnemacher, 578, 609.
v. Russell, 427, 430.
v. Sansom, 475, 514.
v. Soule, 483, 484.
v. Sperry, 57.
v. Weaver, 23.
v. Western Am. Co., 537.
v. Youngs, 193.
Greenbaum v. Taylor, 419.
Green Bay, etc., Canal Co., v. Kaukauna W. P. Co., 599.
Greenberg v. Whitcomb L. Co., 559.
Greene v. Nunnemacher, 578, 609.
Greenfield v. Chicago, etc., Ry. Co., 744.
Greening v. Wilkinson, 436.
Greenland v. Chaplin, 708.
Greenleaf v. Francis, 587.
v. Gerald, 455.
Greenslade v. Halliday, 111.
Greenville v. Alland, 614.
Greenwell v. Washington Market Co., 700, 701.
Greenwich Ins. Co. v. Louisville, etc., R. R. Co., 730.
Greenwood v. Colby, 230.
v. Greenwood, 261.
v. Louisville, 76.
Greer v. Van Meter, 369.
Gregg v. Gregg, 339.
v. Sumner, 192.
Gregory v. Brooks, 385, 386.
v. Brown, 386.
v. Bush, 583.
v. Cleveland, etc., Co., 759.
v. Commonwealth, 610.
v. Piper, 316.
Grenlee v. So. Ry. Co., 537.
Gress Lumber Co. v. Coody, 129.
Gribben v. Yellow Aster M. & M. Co., 514.
Grider v. Tally, 383, 386, 387.
Gridley v. Bloomington, 105.
Griffe v. McClung, 101.

[REFERENCES ARE TO PAGES.]

riffen v. Manice, 664, 695.
riffin v. Coleman, 164.
v. Creppin, 317.
v. Farrier, 456
v. Jackson Lt. & P. Co., 740.
v. Ransdell, 407, 410.
v. S. W. Pa. Pipe Lines, 423.
v. United Electric Lt. Co., 753.
v. Willow, 713.
Griffith v. Follett, 403.
v. Holman, 313.
v. Lewis, 617.
v. New England Tel. & Tel. Co., 755.
v. Slinkard, 385.
v. Zippenwick, 431.
Griffiths v. Earl of Dudley, 536.
v. Woolfram, 562.
Griffs v. Sellars, 177.
Grigby v. Breckinridge, 354.
Griggs v. Day, 425.
v. Flechenstein, 31.
Grigsby v. Chappell, 679.
v. Clear Lake, 372.
v. Stapleton, 446.
Grill v. General Iron Screw Collien Co., 689.
Grim v. Byrd, 450.
v. Carr, 265.
v. Wicker, 433.
Grinnell v. Cook, 642.
v. Wells, 259.
v. Weston, 168.
v. Western U. Tel. Co., 666, 728.
Grinnelle v. Anderson, 131.
Grisham v. Bodman, 417.
Griswold v. Gebie, 451, 460, 461.
v. Haven, 486.
v. Ill. Cent. Ry. Co., 730.
v. New York, etc., R. R. Co., 727.
v. Sabine, 460.
Grizzle v. Frost, 523.
Groendyke v. Cramer, 324.
Groenvelt v. Burwell, 379.
Groff v. Ankenbrandt, 622.
Grogan v. Adams Exp. Co., 726.
Grogery v. Bush, 585.
Grose v. West, 332.
Gross v. Lampasas, 583.
v. Miller, 50.
v. Scheel, 430.
v. Water Com'rs, 82.
Grosso v. Del., etc., R. R. Co., 271, 273, 279.
Grostick v. Detroit, etc., R. R. Co., 762.
Groth v. Thomann, 522, 529.
Grotton v. Glidden, 152.
Grout v. Tacoma Eastern R. R. Co., 518, 532, 535.
Grove v. Ft. Wayne, 578, 606, 770.
v. Van Duyn, 380, 381.
v. Wise, 420, 434.
Grube v. St. Paul, 76.
Grumon v. Raymond, 162.
Grund v. Van Vleck, 87, 106.
Grundell v. Union Iron Works, 99, 101, 731.
Gualden v. K. C. Southern Ry. Co., 533.
Guarantee, etc., Co. v. Drew Investment Co., 119.
Gudfelder v. Pittsburg, etc., Ry. Co., 32, 33, 35.
Gudger v. Penland, 236.
Guenther v. St. Louis, etc., Ry. Co., 708.
Guess v. S. C. Ry. Co., 702.
Guest v. Reynolds, 364.
Guethler v. Altman, 297.
Guggenheim Smelting Co.v Flanigan, 515.
Guille v. Campbell, 498.
v. Swan, 42, 311, 416.
Guisti v. Del Papa, 177.
Guldager v. Rockwell, 139.
Gulf, etc., Co. v. Wilson, 729.
Gulf, etc., Ry. Co. v. Beall, 260, 271.
v. Brentford, 557.

[REFERENCES ARE TO PAGES.]

Gulf, etc., Ry. Co. v. Cherrault, 603.
v. Galveston, etc., Ry. Co., 104.
v. Gatewood, 722.
v. Greenlee, 699.
v. Grentford, 532.
v. Hill, 537.
v. Holliday, 129.
v. Horton, 652.
v. James, 69, 474, 488, **497.**
v. Johnson, 532, 744.
v. Jones, 523.
v. Larkin, 511.
v. Levi, 648.
v. McGown, 727.
v. McWhirter, **31, 737.**
v. Pendry, 720.
v. Pomeroy, 581.
v. Redecker, 705.
v. Reed, 47.
v. Silliphant, 509.
v. Smith, 690.
v. Trawick, 650, 722.
v. Trott, 26.
v. Wilson, 730.
Gulf, etc., Tel. Co. v. Richardson, 25.
Gulf Red Cedar Co. **v.** Walker, 684.
Gulline v. Lowell, 768.
Gunder v. Tibbits, 85, 264.
Gunderman v. Buschner, 184.
Gunderson v. N. W. El. Co., **281,** 491, 739.
v. Swarthout, 406.
Gunn v. Ohio Riv. R. R. Co., 713.
Gunning System v. La Pointe, 529, 555, 557.
Gunsolus v. Lormer, 312, 313, 317.
Gunter v. Wilker, 708.
Gunther v. Johnson, 398.
Gurley v. Tompkins, 187.
Gustafson v. Rustemeyer, 448, 450.
Guthrie v. Louisville, etc., R. R. Co., 512.
v. Swan, 767.
v. Wever, 270.
Guthrie v. Wickliffe, **130.**
Gutzman v. Clancy, 152, **154**
Guyther v. Pettijohn, 335.
Gwilliam v. Twist, 472.
Gwinnell v. Eamer, **619**
Gwynn v. Citizens' Telephone Co., 303.
v. Turner, 391.

H.

Haack v. Brooklyn Labor Lyceum Ass'n, 739.
v. Fearing, 747.
Haag v. Delorme, 362.
Haas v. Taylor, 430.
Haber v. Jenkins Rubber Co., **504.**
Hackett v. Louisville, etc., R. R. Co., 274, 278.
v. Middlesex Mfg. Co., 514.
v. Providence Tel. Pub. Co., 220.
v. Western Union Tel. Co., 478.
Hackney v. State, 568, 604.
Hadcock v. Osmar, 461.
Hadd v. U. S. Exp. Co., 651.
Hadley v. Heywood, 251, **252.**
v. Taylor, 621.
v. Upshaw, 644.
v. Western U. Tel. Co., 667.
Haehl v. Wabash R. R. Co., 287, 488, 498.
Hafford v. New Bedford, 75, 76.
Hafner v. Chesapeake, etc., Ry. Co., 506.
Haft v. First Nat. Bank, 238.
Hagar v. Randall, 432.
Hagee v. Grossman, 464.
Hagerstown v. Klotz, 76.
Haggart v. Stehlin, 576.
Haggerty v. Central R. R. Co., 278.
v. Hallowell Granite Co., 503.
v. St. Louis, etc., R. R. Co., 72.
Haggett v. Montgomery, 417.
Haight v. Cornell, 237.

[REFERENCES ARE TO PAGES.]

Haines v. Lewiston, 766.
v. Schultz, 200.
v. Welling, 247.
Hairston v. State, 150.
Haizlip v. Rosenberg, 619.
Hake v. Buell, 430.
Haldeman v. Buckhardt, 589.
Hale v. Boylen, 178.
v. Clark, 439.
v. Johnson, 478.
v. McLea, 589.
v. Philbrick, 455, 464.
Haley v. Colcord, 329.
v. St. Louis Transit Co., 43.
Hall v. Boyd, 325.
v. Chaffee, 326, 327.
v. Corcoran, 59, 424.
v. De Cuir, 307.
v. Hawkins, 178.
v. Hollander, 259.
v. Law Guarantee, etc., Soc., 406.
v. Pickard, 417.
v. Ray, 397.
v. Rising, 584.
v. Snowhill, 321.
v. Thayer, 382.
v. West & S. M. Co., 537.
Halley v. Gregg, 215.
Halligan v. Chicago, etc., R. R. Co., 312, 321.
Hallyburton v. Burke County Fair Ass'n, 344, 348.
Halsey v. Rapid Tr. St. R. R. Co., 370.
Haluptzok v. Great Northern Ry. Co., 472.
Ham v. Rogers, 134.
Haman v. Omaha H. Ry. Co., 155, 156.
Hamberger v. Seavey, 394.
Hamden v. New Haven, etc., Co., 772.
Hamer v. First Nat. Bank, 184, 187.
v. Hatheway, 128, 436.
Hamet v. Letcher, 426.
Hamilburgh v. Shepard, 181.
Hamilton v. Arnold, 112.
v. Boston, 49.
v. Chicago, etc., Ry. Co., 425, 434, 652.
v. Delaware, etc., R. R. Co., 762.
v. Eno, 241.
v. Fleming, 396.
v. Hannibal, etc., R. R. Co., 275.
v. Huntley, 409.
v. Minneapolis Desk Mfg. Co., 679, 735.
v. Phillips, 417.
v. Smith, 180.
v. Texas, etc., Ry. Co., 732.
v. Third Ave. R. Co., 656.
v. Whittridge, 566.
v. Williams, 377.
Hamlin v. Abell, 461.
v. Fanti, 218.
Hammatt v. Emerson, 461.
Hammer v. Pierce, 259.
Hammet v. Emerson, 462.
Hammond v. Hall, 586.
v. Howell, 378.
v. Melton, 347.
v. Schiff, 367, 368.
v. Stanton, 467.
Hampton v. Pullman Pal. Car Co., 665.
v. Wheeler, 334.
v. Wilson, 246.
Hamrick v. Belfour Q. Co., 538.
Hance v. Tittabawassee Boom Co., 117.
Hanchett v. Chiatovitch, 217, 218.
v. Williams, 397.
Hancke v. Hooper, 670.
Hancock v. Blackwell, 237.
v. Rand, 641.
Hand v. Newton, 315.
v. Winton, 213.
Handley v. Daly Min. Co., 516.

[REFERENCES ARE TO PAGES.]

Handley v. Louisville, etc., R. R. Co., 86.
Handy v. Foley, 64.
Haney v. Compton, 315.
v. Kansas City, 78.
v. Pittsburg, etc., Ry. Co., 711.
Haney Mfg. Co. v. Perkins, 97.
Hanger v. Abbott, 141.
v. Evins, 450, 461, 467.
Hanke v. Frederick, 347.
Hankel v. Schaub, 208.
Hankes v. Minneapolis, 771.
Hankins v. New York, etc., R. R. Co., 554.
v. Watkins, 746.
Hanley v. Grand Trunk Ry. Co., 542.
Hanlon v. Ingram, 742.
v. Milwaukee Elec. Ry. & Lt. Co., 765.
v. Missouri Pacific R. R. Co., 679.
Hammer v. Wilsey, 434.
Hann v. Drovers' Nat. Bank, 210.
v. Lloyd, 161, 439.
Hanna v. Granger, 543.
v. Jeffersonville, R. R. Co., 282.
Hannabalson v. Sessions, 311.
Hanneford v. Hun, 134.
Hannem v. Pence, 609, 618.
Hannen v. Edes, 51, 152.
Hannibal, etc., Co. v. Kanaley, 520.
Hannibal, etc., R. R. Co. v. Martin, 472.
Hannibal R. R. Co. v. Swift, 659.
Hannon v. County of St. Louis, 73.
v. Hannah, 334.
v. St. Louis, 80.
Hanrahan v. Cochran, 95.
Hanrathy v. Nor. Cent. R. R. Co., 542.
Hanscom v. Druillard, 456.
Hansell E. Foundry Co. v. Clark, 560.
Hansen v. North Jersey St. Ry. Co., 653.
v. Railway Co., 762.
v. Seattle L. Co., 678.
Hanser v. Griffith, 127.
Hansford v. Payne, 750.
Hanson v. Edgerly, 443.
v. European, etc., R. R. Co., 158, 657, 658.
v. Globe Newspaper Co., 219.
v. McCue, 590.
Hard v. Vermont, etc., R. R. Co., 543, 546.
Hardcastle v. So. Yorkshire, etc. R. R. Co., 686.
Harden v. North Carolina R. R. Co., 97, 680, 685.
Hardenbergh v. St. Paul, etc., Ry. Co., 659.
Hardin v. Cumstock, 228.
v. Sin Claire, 371.
Harding v. Boston, 478, 484.
v. Stamford W. U. Co., 592.
v. Townshend, 287.
Hardman v. Booth, 426.
v. King, 339.
v. Willcock, 430.
Hardwick v. Hardwick, 257.
Hardy v. Brooklyn, 80.
v. Keeler, 90.
Hare v. Dean, 259.
v. McIntire, 562, 563
Harff v. Green, 529, 531, 533, 540. 559.
Hargan v. Purdy, 206.
Hargous v. Stone, 445.
Hargreaves v. Deacon, 734.
Hargro v. Hodgon, 610, 613.
Harington v. Fuller, 398.
Harkins v. State, 159.
Harkness v. Chicago Daily News Co., 218.
v. Western U. T. Co., 668, 729.
Harkrader v. Moore, 179.
Harley v. Buffalo Car Mfg. Co., 508, 512, 525, 526.

[REFERENCES ARE TO PAGES.]

Harley v. Merrill Brick Co., 96, 573, 601, 611, 623, 625.
Harlow v. Carroll, 229.
v. Stinson, 342.
Harman v. Delaney, 208.
v. St. Louis, 75.
v. Tappenden, 385.
v. Washington, etc., R. R. Co., 662.
Harmon v. Columbia, etc., R. R. Co., 97.
v. McRae, 84.
v. Old Colony R. R. Co., 256.
Harn v. Mex. Nat. Ry. Co., 275.
Harndon v. Stultz, 582.
Harner v. Fisher, 444.
Harness v. Steele, 164, 165, 167.
Harold v. Jones, 613.
v. Whatney, 609.
Harper v. Harper, 178.
v. Indianapolis, etc., R. R. Co., 514, 516, 542.
v. Luffkin, 262.
v. Mangel, 145.
Harpham v. Whitney, 180.
Harrill v. South Car, etc., Ry. Co., 275.
Harriman v. Boston, 771.
v. Pittsburg, etc., Ry. Co., 40, 493, 731.
v. Railway Co., 491, 496, 747.
Harrington v. Buffalo, 772.
v. Commissioners, etc., 385.
v. Douglas, 618.
v. Glidden, 147.
v. Los Angeles Ry. Co., 707.
v. Scott, 319.
Harriott v. Plimpton, 238, 672.
Harris v. Butler, 260.
v. Cameron, 747.
v. Carson, 411.
v. Clinton, 773.
v. Cohen, 619.
v. Cowles, 739.
v. Elliott, 332.
v. Frink, 412.
Harris v. Huntington, 236.
v. Marco, 112, 113.
v. Minvielle, 196, 246.
v. Russell, 84.
v. Smith, 419.
v. State, 157.
v. Swanson, 143.
v. Tenney, 653.
v. Tyson, 443.
v. Woodford, 173.
v. Zazone, 202, 224.
Harrisburg, The, 142, 271.
Harrison v. Adamson, 339.
v. Brown, 339.
v. Central R. R. Co., 500, 542.
v. Detroit, etc., R. R. Co., 545.
v. Harrison, 156.
v. Manship, 205
v. Mitchell, 87.
v. Redden, 377.
v. Sutter St. Ry. Co., 287.
Harriss v. Mabry, 491.
v. Sneedem, 248.
Harshman v. Rose, 156.
Harson v. Halkyard, 358.
Hart v. Albany, 110.
v. Cole, 736, 741.
v. Connor, 362.
v. Frame, 670.
v. Grennell, 731.
v. Knapp, 257.
v. Morton, 117.
v. Penn. Co., 725.
v. State, 304.
v. Ten Eyck, 116.
v. Washington Park Club, 731
v. Western R. R. Co., 746.
v. West. U. Tel. Co., 729.
v. Wright, 445.
Hartfield v. Roper, 57, 707, 715
Hartford v. Brady, 342.
v. State, 206.
v. Talcott, 148.
Hartford Deposit Co. v. Calkins, 369.
v. Sollitt, 663, 695.

[REFERENCES ARE TO PAGES.]

Hartford, etc., R. R. Co. v. Andrews, 276.
Hartford Ice Co. v. Greenwoods, 432.
Hartford Ins. Co. v. Matthews, 460.
Hartleib v. McLane, 395.
Hartley v. Herring, 206.
v. Halliwell, 346.
Hartnett v. Plumbers' Supply Ass'n, 297.
Hartock v. Reddick, 228.
Harton v. Tel. Co., 32.
Hartshorn v. Smith, 176, 177, 181.
Hartung v. Shaw, 229.
Hartrig v, Northern Pac. Lumber Co., 520.
Hartwell v. Armstrong, 567.
Hartzall v. Sill, 590, 594.
Harvey v. Alturas G. M. Co., 500, 531.
v. Buchanan, 344.
v. Epes, 638.
v. Georgia Southern, etc., R. R. Co., 610.
v. Ice Co., 603.
v. Morse, 435.
v. Murray, 636.
v. Railroad Co., 613.
v. Terre Haute, etc., R. R. Co., 725.
Harwood v. Keech, 238.
v. Tompkins, 44.
Haskell v. Boston Dist. Messenger Co., 647.
Haskins v. Jordan, 202.
v. Lumsden, 247.
v. Royster, 292.
Haskin Wood, etc., Co. v. Cleveland S. B. Co., 406.
Hass v. Damon, 424.
Hassenger v. Mich. Centr. R. R. Co., 699.
Hastey v. Sears, 475.
Hastings v. Cruncleton, 336.
v. Livermore, 371.
v. Lusk, 227.
Hastings v. Montana Union Ry. Co., 542, 546.
Hasty v. Sears, 475.
Hatch v. Cohen, 181.
v. Donnell, 311.
v. Hart, 412.
v. Lane, 239.
v. Potter, 224.
Hatcher v. Dunn, 392.
Hathaway v. Hinton, 401.
v. Rice, 160.
v. Smith, 188.
v. Tinkham, 348.
Hathorn v. Richmond, 670, 715.
Hauch v. Hernandez, 682.
Hauer v. Northern Pac. Ry. Co., 704.
Haugen v. Albina L. & W. Co., 305.
Haughey v. Hart, 686.
Hugh's App. 578.
Hauns v. Central Ky. Lunatic Asylum, 71.
Haven v. Emery, 409.
Haver v. Central R. R. Co., 659.
Haverly v. State Line, etc., R. R. Co., 32.
Haviland v. Kansas City, etc., R. R. Co., 515, 559.
Hawarden v. Youghiogheny L. & C. Co., 298, 302.
Hawes, In re, 190.
Hawes v. Burlington, etc., Ry. Co., 704.
Hawk v. Evans, 229.
v. Harman, 63, 64.
Hawks v. Northampton, 699.
Hawkins v. Front St. Cable Ry. Co., 691.
v. Hatton, 98.
v. Hersey, 409.
v. Hoffman, 424.
v. Johnson, 524.
Hawley v. Columbia Railway Co., 707.
v. Cramer, 468.
Hawn v. Banghart, 263.

[REFERENCES ARE TO PAGES.]

Hawthorn v. Hammond, 641.
Hawver v. Whalen, 481.
Hay v. Cohoes Co., 316, 569.
v. Reid, 207.
Haycraft v. Creasy, 462.
Hayden v. Attleborough, 769.
v. Fair Haven, etc., R. R. Co., 765.
v. Smithville Mfg. Co., 506, 542, 559.
v. Tucker, 576.
Hayes v. Buzzell, 397.
v. Colchester Mills, 523.
v. East Tenn., etc., R. R. Co., 139.
v. Kennedy, 649.
v. Mass. Mut. Life Ins. Co., 422, 430, 436.
v. Mich. Cent. R. R. Co., 677.
v. Norcross, 714.
v. Northern Pacific R. R. Co., 98.
v. Oshkosh, 76, 80.
v. Philadelphia, etc., Co., 778.
v. Porter, 144, 392.
v. Press Co., 209.
v. Sease, 155.
v. Smith, 345, 347.
v. Waldron, 598, 599.
v. Williams, 274.
v. Western R. R. Co., 545.
Hayman v. Saucer, 264.
Hayner v. Cowden, 206.
v. Smith, 256.
Haynes v. Burlington, 596.
v. Clinton Printing Co., 221, 244.
v. Leland, 197.
v. Nowlin, 8, 257.
v. Patterson, 424.
v. Raleigh Gas. Co., 694.
v. Ritchey, 204.
v. Spokane Chronicle Pub. Co. 217.
v. Thomas, 370, 613.
Hays v. Farwell, 143.
Hays v. Gainesville St. Ry. Co., 41, 708.
v. Hinkleman, 584.
v. Midas, 467.
v. Millar, 491, 543, 647.
v. Waldron, 597.
Haywood v. Tillson, 46.
Hazard v. Harding, 189.
v. Irwin, 461.
Hazelton v. Edgmand, 579.
Hazelton Boiler Co. v. Hazelton T. B. Co., 359.
Hazen v. Essex Co., 146.
Hazy v. Woitke, 199.
Hazzard v. Council Bluffs, 37, 773.
v. Flury, 171, 176.
Hazzard Powder Co. v. Sommerville Mfg. Co., 598.
H. Channon Co. v. Hahn, 679.
Head v. Briscoe, 64.
v. Levy, 381.
Heald v. Carey, 43.
Healey, In re, 192.
Healey v. Ballentine, 345.
v. City R. R. Co., 487.
v. New York, etc., R. R. Co., 548.
Healy v. Vordran, 609.
Heap v. Parrish, 179.
Hearn v. Quillan, 503.
Hearne v. De Young, 217, 249.
Hearns v. Waterbury Hospital, 71, 485.
Heath v. Glisan, 670.
v. Halfhill, 377, 381, 439.
v. Ricker, 342.
v. Ross, 52.
v. Whitebreast Coal, etc., Co., 561.
v. Williams, 372, 590, 591.
Heaton, In re, 256.
Heaven v. Pender, 681, 778.
Hebner v. Gt. Northern Ry. Co., 231, 234, 235, 239.
Hebron Gravel R. Co. v. Harvey. 594.

[REFERENCES ARE TO PAGES.]

Hecht v. Dettman, 411.
v. Metzler, 451, 456.
v. Ohio, Ry. Co., 280, 281.
Hector Min. Co. v. Robertson, 707.
Hedgepeth v. Robertson, 329.
Hedges v. Tagg, 260.
Hedin v. Minneapolis Medical, etc., Institute, 451.
Hedley v. Pinkney & Sons, 543.
Hedrick v. Ilwaco R. & N. Co., 274.
Heeg v. Licht, 607.
Heeney v. Kilbane, 217.
v. Sprague, 148.
Heermance v. Fernoy, 115.
v. James, 252.
Hefferen v. Northern Pac. R. R. Co., 514.
Heflin v. Bingham, 113, 326.
Hegevich v. Keddie, 272.
Heh v. Consolidated Gas Co., 755, 756.
Heidecamp v. Jersey City, etc., St. Ry. Co., 279.
Heidenway v. Philadelphia, 482.
Heidt v. Southern Tel. & Tel. Co., 751, 753.
Heigel v. Wichita County, 766.
Heilbron v. Land & W. Co., 599.
Heiligmann v. Rose, 350.
Heiman v. West. U. Tel. Co., 668.
Heimann v. Kinnare, 739.
Heinekamp v. Beaty, 435.
Heinlein v. Boston, etc., Ry. Co., 732.
Heintz v. Graupner, 224, 249.
Heister's Lessee v. Fortner, 390.
Heizer v. Kingsland & D. Mfg. Co., 774.
Heldemaier v. Cobbs, 505.
Helena v. Thompson, 596.
Helfrich v. Catonsville W. Co., 599.
Heler v. Howard, 197.
v. Hufsmith, 433.
Helling v. Schindler, 514.
Helm v. O'Rourke, 560.
Helmer v. Castle, 332.
Helmke v. Stetler, 515.
Helton v. Ala. Midland R. R. Co., 133.
Helwig v. Jordan, 618.
Hemingway v. Chicago, etc., Co., 657.
v. Hemingway, 112, 155.
Hemmens v. Nelson, 235, 237.
Hemmer v. Cooper, 449.
Henderson's Case, 458.
Henderson v. Broomhead, 45, 225, 228.
v. Foy, 428.
v. Louisville, etc., Co., 661.
v. Marx, 414.
v. O'Haloran, 679.
v. Smith, 400.
v. Wendler, 63, 64.
v. Williams, 528, 530.
Henderson Tobacco Ext. Works v. Wheeler, 503, 531, 560.
Hendricks v. Middlebrooks Co., 97.
Hendrickson v. Sullivan, 203.
Hendrixon v. Cardwell, 412.
Heneger v. Lomas, 263.
Henke v. McCord, 374, 375.
Henkle v. Dillon, 409.
Henley v. Wilson, 63, 64, 66.
Hennepin v. Naylor, 466.
Hennessy v. Bavarian Br. Co., 273.
Hennies v. Vogel, 66, 256.
Henniker v. Contoocook Valley R. R. Co., 146.
Henry v. Carlton, 83, 98.
v. Dennis, 42, 457, 460.
v. Koch, 368.
v. Moberly, 230.
v. Newburyport, 371.
v. Pittsburg, etc., R. R. Co., 291.
v. Sargeant, 439.
v. St. Louis, etc., Co., 33.
Hensey v. Howland, 425.
Henshaw v. Foster, 388.
Henwood v. Harrison, 245.
Hepburn's Case, 12.

[REFERENCES ARE TO PAGES.]

Hepfel v. St. Paul, etc., Ry. Co., 714, 736, 758.
Hepting v. New Orleans Pac. R. R. Co., 612.
Herbert v. Lake Charles, etc., Co., 694.
Hercy v. Dinwoody, 468.
Herdman H. M. Co. v. Spehr, 528, 531.
Heritage v. Dodge, 160.
Hern v. Ia. State Agricultural Soc., 71, 82, 497.
Herndon v. Bartlett, 115.
Herold v. Myers, 341.
Herr v. Lebanon, 38.
Herrick v. Minn., etc., R. R. Co., 136.
v. Tribune Co., 219, 221.
v. Wixom, 736.
Herrin v. Libbey, 467.
Herring v. Chesapeake, etc., R. R. Co., 38, 649.
v. Finch, 8, 22.
v. Hoppock, 90.
Herringer v. Ingberg, 218, 220, 241.
Herrington v. Lansingburgh, 478, 482.
v. Macon, 714.
Herrman Irr. Co. v. Butterfield M. & M. Co., 587.
Herron v. Hughes, 17, 85.
v. Pittsburg, 751, 754.
Herschberg Optical Co., v. Richards, 450.
Hersey v. Chapin, 321.
Hershaw v. Bailey, 237.
Hershey v. Road Com'rs, 718.
Herstine v. Lehigh Val. R. R. Co., 691.
Hervey v. Moseley, 259.
Herzog v. Graham, 158.
Hess v. Griggs, 52.
v. Lowrey, 97, 671.
v. Ore. Baking Co., 171, 174, 175, 176, 177.
v. Rosenthal, 527.
Hess v. Sparks, 202.
Hesse v. Meriden, etc., Tramway Co., 663.
Hesseltine v. Stockwell, 116, 117.
Hetfield v. Central R. R. Co., 327.
Hetherington v. Sterry, 206.
Hetrich v. Deachler, 594, 598, 601.
Hewes v. McNamara, 344.
Hewey v. Nourse, 742.
Hewison v. New Haven, 769.
Hewitt v. Chicago, etc., Ry. Co., 649.
v. Eisenhart, 672.
v. Newburger, 167.
v. Prime, 261.
v. Woman's Hospital Aid Ass'n, 71.
Hewlett v. Ragsdale, 157, 264.
v. West. U. Tel. Co., 668.
Hey v. Moorhouse, 321.
v. Philadelphia, 38, 769.
Heyne v. Blair, 178.
Heywood v. Tillson, 300.
Hexamer v. Webb, 478.
Hext v. Gill, 366.
Hexter v. Bast, 461.
Hiatt v. Kinkaid, 179.
Hibbard v. Foster, 143.
v. West. U. Tel. Co., 729.
Hibbard, Spencer, Bartlett & Co. v. Ryan, 182, 184.
Hibner v. Fleetwood, 204.
Hickey v. Taaffe, 522.
v. Welch, 27, 149, 150.
Hillis v. Chicago, etc., Co., 660.
Hickman v. Kansas City, etc., R. R. Co., 704.
v. Miss., etc., Ry. Co., 657.
Hicks v. Brantley, 174, 175.
v. Citizens' St. Ry. Co., 708, 764.
v. Faulkner, 158, 159.
v. Manufacturing Co., 508, 533.
v. Silliman, 585.
v. Southern Ry. Co., 517.
v. Stevens, 456, 464.

[REFERENCES ARE TO PAGES.]

Hicks v. Swift Creek Mill Co., 328.
Hidy v. Murray, 178.
Hieatt v. Morris, 368.
Hier v. Abrahams, 357.
Higby v. Williams, 84.
Higgins v. Breen, 265.
v. Butcher, 11.
v. Central New Eng., etc., R. R. Co., 136.
v. Dewey, 742, 743.
v. Fanning, 562.
v. Farnsworth, 320.
v. Higgins, 514.
v. Minaghan, 154.
v. New Orleans, etc., R. R. Co., 727.
v. Reynolds, 332.
v. Southern Pac. Co., 515.
v. State, 112, 157.
v. Watervliet T. & R. Co., 69, 487, 489.
v. Western Union Tel. Co., 475.
Higgins Carpet Co. v. O'Keefe, 536.
Higginson v. York, 416.
Higham v. Vanosdol, 253.
Highland Ave., etc., R. R. Co. v. Donovan, 696.
v. Walters, 533.
Hight v. Naylor, 163.
Hightower v. Bamberg Cotton Mills, 524.
Highway Com'rs v. Ely, 374.
Higman v. Carmody, 639.
Hildebrand v. McCrum, 159.
v. Toledo, etc., R. R. Co., 561.
Hilder v. Brooklyn Daily Eagle, 221.
Hildreth v. Camp, 64.
v. Googins, 363.
v. Sands, 467.
Hilje v. Hettich, 556, 557.
Hill v. Applegate, 343, 344, 348.
v. Balls, 443, 446.
v. Big Creek Lumber Co., 515.
Hill v. Boston, 73, 80.
v. Boston, etc., R. R. Co., 724.
v. Brower, 451.
v. Charlotte, 75, 374.
v. Davis, 131.
v. De Rochemont, 337.
v. Figley, 438.
v. Fond du Lac, 771.
v. Gray, 442.
v. Hayes, 429.
v. Kimball, 27, 29.
v. Lord, 324.
v. Managers, etc., 615.
v. Morey, 472.
v. New Haven, 692, 702.
v. No. Pac. Ry. Co., 725.
v. Owen, 642, 643.
v. Pennsylvania R. R. Co., 273, 280.
v. Portland, etc., R. R. Co., 677.
v. Pride, 380.
v. Reifsnider, 466.
v. Taylor, 159.
v. United States, 82.
Hillary v. Gay, 318, 319, 321.
Hiller v. Chicago, etc., Ry. Co., 650.
Hillman v. Newington, 624.
Hills v. Foote, 718.
v. Hobert, 259.
Hilmes v. Stroebel, 84.
Hilsenbeck v. Guhring, 733, 741.
Hilte v. Republican Val., etc., R. R. Co., 478.
Hilton v. Adams, 643.
v. Ala. Midland R. R. Co., 134.
v. Fitchburg, 518.
v. Lord Granville, 367.
Hilton, etc., L. Co. v. Ingram, 539.
Hilton L. Co. v. Railroad Co., 303.
Hilts v. Chicago, etc., Ry. Co., 516.
Hinchey v. Manhattan Ry. Co., 39.
Hinckley v. Baxter, 407.
v. Emerson, 349.
v. Horazdowsky, 522.

[REFERENCES ARE TO PAGES.]

Hinckley v. Penobscot, 49.
v. Somerset, 769, 773.
Hindman v. First Nat. Bank, 457, 460.
Hindry v. Holt, 271.
Hinds v. Barton, 743.
v. Parker, 152.
Hine v. Commercial Bank, 422.
Hines v. Jarrett, 85.
v. Lockport, 403.
v. Willcox, 740.
Hingham v. Sprague, 312.
Hinkle v. Avery, 592.
v. Davenport, 143.
Hinman v. Borden, 394.
v. Hayderstadt, 436.
Hinshaw v. Raleigh, etc., R. R. Co., 697.
Hinson v. Powell, 179.
Hinton v. Dibin, 689.
Hirsch v. Leatherbee Lumber Co., 130, 131.
Hirst v. Denham, 355.
v. Ringen R. E. Co., 741.
History Co. v. Dougherty, 452, 453.
Hitch v. Lambright, 378.
Hitchcock v. Bacon, 21.
v. Burgett, 670.
v. Caruthers, 203.
v. Riley, 742.
Hitchin v. Campbell, 130.
Hite v. Long, 112.
v. Whitney Co., 81.
Hitson v. Sims, 170.
Hixon v. Lowell, 772.
Hoadley v. International P. Co., 49.
v. North. Transportation Co., 38.
v. Seward & Son Co., 566, 569, 571, 606.
v. Watson, 127.
Hoag v. Hatch, 201.
v. Lake Shore, etc., R. R. Co., 32, 33.
Hoag v. New York Central, etc., R. R. Co., 720.
Hoagland v. Forest Park, etc., Co., 156, 421.
v. State, 394.
v. Todd, 394.
Hoar v. Merritt, 549.
v. Wood, 227.
Hoard v. Peck, 254.
Hoare v. Silverlock, 242.
Hobart v. Conn. Turnpike Co., 142.
v. Frisbie, 398.
v. Hagget, 416.
Hobbs v. Atlantic, etc., R. R. Co., 543.
v. Parker, 443, 455.
v. Stauer, 510.
Hobditch v. MacIlwaine, 233.
Hoboken P. & T. Co. v. Kahn, 68, 200, 246.
Hobson v. Fullerton, 263.
v. Todd, 8, 23.
Hodge v. Wetzler, 258.
Hodgedon v. Hubbard, 112.
Hodges v. Tama County, 147.
Hodgkinson v. Ennor, 579.
v. Hodgkinson, 257.
Hodgson v. Scarlett, 227.
Hoe v. Sanborn, 445.
Hoeger v. Chicago, etc., Ry. Co., 660, 661.
Hoehle v. Allegheny Heating Co., 757.
Hoeller v. Haffner, 466.
Hoff v. Shockley, 481.
Hoffman v. Connor, 449.
v. Cumberland Valley R. R. Co., 651.
v. Dickinson, 504, 525, 682, 683, 687.
v. Harrington, 320.
v. King, 36.
v. Kuhn, 369.
v. Union Ferry Co., 50.
Hoffund v. Journal Co., 216.

[REFERENCES ARE TO PAGES.]

Hogan v. Cent. Pacific R. R. Co., 516, 542.
v. Kurtz, 142.
v. Manhattan Ry. Co., 693.
v. Missouri, etc., Ry. Co., 705.
Hogenson v. St. Paul, etc., Ry. Co., 585.
Hogg v. Connellsville W. Co., 592.
Hoggott v. Bigley, 385.
Holbrook v. Aldrich, 733.
v. Connor, 444, 449, 450.
v. Hyde, 116.
Holcomb v. Danby, 49.
Holdeman v. Bruckhart, 587.
Holden v. Fitchburg, etc., R. R. Co., 547.
v. Lake Co., 598.
v. Merritt, 182.
v. Rutland R. R. Co., 13.
Holder v. Cannon Mfg. Co., 291.
Holderman v. Pond, 134.
Holdom v. Ayer, 464.
Hole v. Barlow, 572.
Holladay v. Marsh, 338.
Holland v. Beard, 259, 402.
v. Flick, 209.
v. So. Express Co., 13.
Holland House Co. v. Baird, 608.
Holleman v. Harward, 9, 254.
Hollenbeck v. Hall, 47, 196, 216.
v. Ristine, 43, 44, 47, 214, 216, 291.
Holler v. Ross, 498.
Holley v. Burgess, 203.
v. Mix, 163.
Holliday v. Holliday, 176, 177.
v. Jackson, 87, 88.
v. National Telephone Co., 480, 483.
Hollingsworth v. Shaw, 201.
Hollins v. Fowler, 426.
Hollister v. Nowlen, 648.
Holloway v. Commonwealth, 154.
v. McIntosh, 95.
Holly v. Boston Gas Lt. Co., 626, 715, 756.
Holman v. Kempe, 539.
Holmes v. Barclay, 135.
v. Blyler, 168.
v. Clarke, 678.
v. Clisby, 208, 219, 247.
v. Corthell, 609, 610.
v. Goring, 363.
v. Holmes, 257.
v. Holmes, etc., Co., 358.
v. Hurst, 353.
v. Jones, 209.
v. Langston, 435.
v. Mather, 632.
v. Mo. Pac. Ry. Co., 714.
v. No. G. L. S. S. Co., 724.
v. N. E. Ry. Co., 732.
v. Oregon, etc., R. R. Co., 285.
v. Peck, 670.
v. Seeley, 312, 329, 363.
v. Tremper, 407.
v. Wilson, 616.
Holroyd v. Breare, 377.
Holsman v. Bolling S. B. Co., 596.
Holsoffer v. Rome, etc., R. R. Co., 727.
Holst v. Stewart, 462.
Holt v. Hayes, 118, 119, 437.
v. Penobscot, 772.
v. Spokane, etc., Ry. Co., 738.
v. Stratton Mills, 324.
Holton v. Daly, 273.
v. Taylor, 397.
Holtz v. Dick, 64, 66, 252, 253.
Holtzman v. Hoy, 670.
Holz v. Rediske, 162, 381, 439.
Holzah v. New Orleans, etc., Co., 719.
Holzapeel's Comp. Co. v. Rahtjen's Am. Comp. Co., 356.
Homer v. Thwing, 59, 61, 424, 637.
Homes v. Crane, 428.
Home Sewing Machine Co. v. Sloan, 120.
Homestead L. Co. v. Becker, 406.
Honzik v. Delaglise, 408.
Hook v. Joyce, 267, 268.

[REFERENCES ARE TO PAGES.]

Hooker v. Cummings, 313.
v. Miller, 156.
Hooksett v. Concord R. R. Co., 36, 746.
Hooper v. Wells, 722.
v. Whitaker, 455.
Hoosier Stone Co. v. McCain, 99, 100.
Hooten v. Barnard, 580.
Hootman v. Shriner, 394.
Hoover v. Chesapeake, etc., Ry. Co., 281, 282.
v. Heim, 259.
v. Barkhoof, 401, 403.
v. Pennsylvania R. R. Co., 303.
Hopkins v. Atlantic, etc., R. R. Co., 253.
v. Butte, etc., Co., 19.
v. Dickson, 112, 113.
v. Drowne, 248.
v. O'Leary, 527.
v. Oxley Stave Co., 297, 298.
v. Sievert, 466.
Hopkinson v. Knapp, 704.
v. Leeds, 394.
Hoppe v. Chicago, etc., Ry. Co., 685.
Horan v. Byrnes, 21, 44.
Horbach v. Elder, 106.
Hord v. Grimes, 670, 675.
Horgan v. Mills, 260.
Horn v. Atlantic, etc., R. R. Co., 676.
v. Chicago, etc., R. R. Co., 677.
v. La Crosse Box. Co., 523, 554.
v. Whitaker, 404.
Hornbeck v. State, 157.
Hornbein v. Blanchard, 347.
Hornby v. Close, 293.
Horne v. Pudil, 378, 381.
v. Smith, 406.
Horner v. Harvey, 641.
v. Marshall, 56.
v. Nicholson, 506.
Hornketh v. Barr, 261.
Hornor v. Watson, 367.
Horsely v. Branch, 424.
Horstick v. Dunkle, 609, 736.
Horton v. Lee, 447, 451, 456.
v. Newell, 80, 183, 474.
v. Taunton, 769, 770.
v. Wylie, 680.
Hosford v. Whitcomb, 317.
Hosking v. Phillips, 320.
Hosmer v. Loveland, 236.
Hotchard v. Mege, 248.
Hotchkiss v. Oliphant, 246.
Hoth v. Peters, 703.
Hough v. Grant's Pass Powder Co., 520.
v. Ry. Co., 528, 535, 557, 705.
Houghkirk v. Del. & H. C. Co., 287.
Houghton v. Rice, 258.
Houfe v. Fulton, 718, 769.
Houlden v. Smith, 381.
Houldsworth v. Glasgow Bank, 70.
Hourigan v. Norwich, 81.
v. Nowell, 678.
House v. Metcalf, 618.
Housman v. Girard Bldg., etc., Ass'n, 391.
Houston v. Brush, 509, 511, 528, 561.
v. Laffee, 325, 326.
v. Vicksburg, etc., R. R. Co., 701.
Houston, etc., Co. v. Cowser, 287.
v. Marcelles, 547.
v. Miller, 543.
Houston, etc., Ry. Co. v. Bradley, 274.
v. De Wall, 540.
v. East, 587.
v. Gorbett, 713.
v. Rider, 547.
v. Simpson, 737.
v. Smith, 647, 687.
v. Stewart, 520.
v. Terry, 678.
Houston Printing Co. v. Dement, 223.
v. Mouldin, 219.

[REFERENCES ARE TO PAGES.]

Houx v. Seat, 324.
Hovey v. Bromley, 431.
v. Mayo, 583.
Howard v. Babcock, 635.
v. Brooklyn, 73, 76.
v. Clark, 105.
v. Dickie, 235, 237.
v. Grover, 670.
v. First Nat. Bank, 420.
v. Lee, 602.
v. Ludvig, 484.
v. Rugland, 428.
v. San Francisco, 75, 76
v. Thompson, 236.
v. Union Traction Co., 94.
v. Worcester, 77, 474.
Howe v. Buffalo, etc., R. R. Co., 105.
v. Clancy, 130.
v. Munson, 424.
v. Newmarcn, 489.
v. West Seattle L. & I. Co., 31.
v. White, 394.
Howe Mach. Co. v. Souder, 69.
Howell v. Jackson, 641.
v. Lansing City Elec. Ry. Co., 653, 711.
v. McCoy, 602.
v. Young, 616.
Hower v. Ulrich, 62.
Howery v. Hoover, 428.
Howitt v. Estelle, 430.
Howland v. Blake Mfg., Co., 69, 137, 232.
v. Flood, 237.
Howlett v. Tuttle, 127.
Howser v. Cumberland, etc., R. R. Co., 693.
Howth v. Franklin, 640, 642.
Howver v. Whalen, 480.
Hoxie v. Small, 449.
Hoy v. Sterrett, 590, 593, 594.
Hoyt v. Fallet, 179.
v. Hoyt, 355, 360.
v. Hudson, 584, 705.
v. Jeffers, 36, 743, 744.
Hoyt v. Southern N. E. Tel. Co., 333.
Hubbard v. Briggs, 462.
v. Concord, 771.
v. Hunt, 88.
v. Lyman, 419.
v. Mace, 320.
v. New York, etc., R. R. Co., 744.
v. St. Louis, etc., R. R. Co., 103.
v. Switzer, 402.
v. Weare, 461, 462.
Hubbell v. Yonkers, 769.
Hubbuck v. Wilkinson, 208.
Huber v. Merkel, 571, 587, 589.
v. Stark, 327, 580.
Hubert v. Rainey, 601, 627.
Huchting v. Engel, 57.
Huckenstein's Appeal, 573, 628.
Huekestein v. New York Life Ins. Co., 171.
Huddleston v. West Bellevue, 99.
Hudman Brothers v. Du Bose, 420, 423, 429.
Hudnut v. Gardner, 461.
Hudson v. Lynn, etc., R. R. Co., 656.
v. Roberts, 343.
Hudson Riv. Tel. Co. v. Watervleit T. & R. Co., 582.
Huff v. Ames, 716.
v. Austin, 689, 695, 749.
v. Ford, 477.
v. McCauley, 327.
Huffer v. Miller, 202.
Huffman v. Chicago, etc., Ry. Co., 517.
v. State, 332.
Hughbanks v. Boston Investment So., 483, 484.
Hughes v. Auburn, 74, 78, 585.
v. Boston, etc., R. R. Co., 684, 748.
v. Edisto C. S. Co., 407.
v. Fond du Lac, 81.

[REFERENCES ARE TO PAGES.]

Hughes v. Leonard, 554.
v. Railroad Co., 480.
v. United Pipe Lines, 118.
Hughson v. Richmond, etc., R. R. Co., 477.
Huhn v. Missouri, etc., R. R. Co., 512.
Hulbert v. New Nonpareil Co., 219.
Hulett v. Kansas, etc., R. R. Co., 559.
v. Swift, 642.
Huling v. Henderson, 47.
v. Huling, 258.
Hull v. Hall, 512.
v. Kansas City, 773.
v. Pickersgill, 87.
v. Sac. Val. R. R. Co., 743.
Hulson v. King, 609.
Humboldt Bldg. Ass'n v. Ducker, 670, 671.
Hume v. Long, 334.
v. New York, 770.
v. Oldacre, 99, 313.
Humphrey v. Douglass, 58.
v. Hathorn, 399.
v. Merriam, 462, 464.
v. Pope, 257.
Humphreys v. Perry, 660.
v. Pratt, 107.
Humphries v. Brogden, 365.
v. Cousins, 579.
v. Pratt, 105.
Humpton v. Unterkircher, 477, 483.
Hunckel v. Voneiff, 226.
Hundley v. Harrison, 566, 568, 574, 602, 603.
v. Louisville, etc., R. R. Co., 9, 289, 290.
Hungerman v. Wheeling, 37.
Hunnewell v. Duxbury, 460.
Hunt v. Barker, 454, 457.
v. Bates, 101.
v. Bennett, 240.
v. Boonville, 80, 127.
Hunt v. Boston, 423.
v. Dowman, 22.
v. Gas Lt. Co., 626.
v. Missouri, etc., Ry. Co., 408.
v. New York, 772.
v. Pownal, 769, 773.
v. Salem, 768.
v. Simonds, 45.
Hunter v. Kansas City, etc., Co., 19.
v. Mathis, 384.
v. McLaughlin, 448.
v. Recke Bros., 639.
v. Southern Pac. Ry. Co., 651.
v. Stewart, 123.
Huntingford v. Massey, 458.
Huntingdon, etc., R. R. Co. v. Decker, 516.
Huntington v. Gault, 171.
Huntley v. Russell, 336.
Huntress v. Boston, etc., R. R. Co., 760, 761.
Hupport v. Morrison, 115.
Hurd v. Darling, 412.
v. Hubbell, 435.
v. Lacy, 339, 340.
v. Rutland, etc., R. R., 342.
Hurdman v. Northeastern Ry. Co., 579.
Hurgren v. Union M. L. Ins. Co., 185, 187.
Hurlbut v. McKone, 569, 573, 605, 606, 625.
Hurley v. Eddingfield, 671, 674.
v. Packard, 32.
Hurst v. Detroit City Ry. Co., 283.
v. Kansas City, etc., R. R. Co., 503, 701.
Hurt v. St. Louis, etc., Ry. Co., 712.
Huset v. J. I. Case Threshing Machine Co., 777, 778.
Huson v. Dale, 221.
Hussey v. Coger, 520, 543, 546, 554.
Hussey v. Ryan, 617.

[REFERENCES ARE TO PAGES.]

Huston v. Freemansburg, 26, 28.
Hutchens v. Smith, 601.
Hutcher v. Range, 204.
Hutcheson v. Peck, 253.
Hutchings v. Western, etc., R. R. Co., 650.
Hutchins v. Brackett, 393.
v. Hutchins, 86.
Hutchinson v. Chase, 335.
v. Concord, 75, 770.
v. Gorman, 460, 461.
v. Granger, 372.
v. Lewis, 225.
v. Parkhurst, 91.
v. Railway Co., 516, 543.
v. St. Paul, etc., Ry. Co., 760.
v. Western, etc., R. R. Co., 68.
v. Wheeler, 221.
Huth v. Graham, 413.
Huttley v. Simmons, 86.
Huyett v. Phila., etc., R. R. Co., 743.
Hyatt v. Adams, 12, 254, 256, 271.
v. Albro, 594.
v. Myers, 601.
v. Rondout, 769.
v. Wood, 112.
Hyde v. Brush, 388.
v. Cooper, 88, 89.
v. Grench, 181.
v. Jamaica, 704.
v. Noble, 437.
v. Stone, 415, 432.
Hyde Park T.-H. Lt. Co. v. Porter, 606, 614.
Hydraulic Works v. Orr, 733.
Hyman v. Nye, 681.
v. Tilton, 498.

I

Idaho, The, 116.
Idol v. Jones, 413.
Ilatt v. Wilkes, 139.
Iles v. Swank, 204.
Illidge v. Goodwin, 31.
Illinois Central R. R. Co. v. Anderson, 726, 727.
v. Beele, 726, 727.
v. Benton, 712.
v. Bogard, 725.
v. Cox, 542.
v. Cragin, 689, 714.
v. Dick, 49.
v. Downey, 68, 489.
v. Finnigan, 715.
v. Grabill, 604.
v. Hall, 686.
v. Handy, 660.
v. Hopkins, 732.
v. Jernigan, 713.
v. Jewell, 516.
v. Johnson, 279.
v. Kuhn, 654.
v. Laloge, 679.
v. Langan, 515, 537.
v. Le Blanc, 119, 436.
v. Leiner, 707, 708.
v. Matthews, 660.
v. McClelland, 743.
v. McKay, 745.
v. McLeod, 720.
v. Miller, 585.
v. Mills, 744.
v. Mirror, 657.
v. O'Connor, 683.
v. O'Keefe, 655.
v. Patterson, 559.
v. Phillips, 750.
v. Prickett, 287.
v. Read, 727,
v. Reardon, 284.
v. Slater, 714.
v. Smith, 303, 656.
v. Swift, 559.
v. Treat, 655.
v. Welch, 139, 513.
v. Wells, 147.
v. Williams, 676.
Illinois, etc., Co. v. Cobb, 319.
Illinois, etc., Coal Co. v. Cobb, 320.
Ill. Leather Co. v. Flynn, 443, 444.

[REFERENCES ARE TO PAGES.]

Illinois Steel Co. v. Novak, 156.
v. Schymanowski, 507, 540.
Ilsley v. Nichols, 190, 330.
Ilwaco Ry. & Nav. Co. v. Hedrich, 737.
Inchbald v. Robinson, 605.
Indermaur v. Dames, 506, 731.
Ind. Cent. R. R. Co. v. Mundy, 727.
Indiana, etc., Gas Co. v. Anthony, 758.
v. Long, 757.
Indiana, etc., R. R. Co. v. Birney, 127.
v. Eberle, 370, 613.
v. Greene, 281, 704.
Indiana N. & T. Co. v. Lippincott Gas Co., 96.
Indianpolis v. Emmelman, 768, 769.
v. Miller, 111,
Indianapolis, etc., R. R. Co. v. Horst, 702, 705, 726.
v. Love, 509.
v. Lyon, 676.
v. McClure, 707.
v. McKinney, 676.
v. Smith, 677.
v. Tyng, 462.
v. Watson, 531, 557, 558.
Indianapolis, etc., R. T. Co. v. Foreman, 530, 531.
Indianapolis St. Ry. Co. v. Robinson, 253, 704.
v. Schomberg, 713.
Indianapolis Water Co. v. Am. Strawboard Co., 599.
Ingalls v. Bills, 656.
v. Bulkley, 432.
Ingersoll v. Barnes, 409.
v. Rousseau, 566, 576.
v. Stockbridge, etc., R. R. Co., 746.
Ingham v. Honor Co., 518, 537.
Ingle v. Bottoms, 324.
Inglis v. Great Northern R. Co., 145.
Ingram v. Rankin, 129.
v. Threadgill, 313.
Ingwaldson v. Skrivseth, 261.
Ingwerson v. Rankin, 620.
Inland, etc., Co. v. Tolson, 705, 708.
Inland Print. Co. v. Economical, etc., Co., 209.
Inman v. Foster, 247.
Innes v. Milwaukee, 513.
Insurance Co. v. Baldwin, 403.
v. Lake Erie, etc., R. R. Co., 721, 722.
v. Reed, 452.
International, etc., Ry. Co. v. Cooper, 489, 496.
v. Hinzie, 520.
v. Kernan, 509, 511, 528, 548, 560.
v. Welch, 654.
International Fraternal Alliance v. Mallalien, 200, 209.
International Ocean Tel. Co. v. Saunders, 25, 667.
Interurban Con. Co. v. Hays, 423.
Int., etc., Co. v. Kindred, 273.
Inv. Com., in re, 237.
"Iolanthe" Case, The, 353.
Iowa Gold M. Co. v. Diefenthaler, 529, 531, 538.
Ipswich v. County Com'rs, 580.
Irion v. Lewis, 378.
Irlbeck v. Bierle, 155, 218.
Iron Mt. Bank v. Merch. Bank, 69.
Iron Mt., etc., Co. v. Johnson, 318.
Iron Mt. Ry. Co. v. Knight, 650.
Irons v. Field, 205.
Ironton v. Kelly, 80.
Irvine v. Chattanooga, 76.
v. Gibson, 56.
v. Wood, 621, 622, 624.
Irwin v. State, 154.
v. Yeager, 329.
Isaacs v. Flahire, 157.
v. Third Ave. R. R. Co., 68.

[REFERENCES ARE TO PAGES.]

Isbell v. New Work, etc., R. R. Co., 676.
Isham v. Dow, 33, 688.
v. Post, 669.
Island Coal Co. v. Swaggerty, 536.
Ittner Brick Co. v. Killian, 523, 535, 540.
Ives v. Carter, 14, 449.
v. Jones, 106.
v. Lucas, 438.
v. Welden, 679, 685.
Ivey v. Pioneer S. & L. Co., 206.
Ivy Coal & Coke Co. v. Ala. Coal & Coke Co., 119, 436.

J.

Jack v. Hudnall, 346.
Jackman v. Arlington Mills, 596, 618.
Jackson v. Armstrong, 456.
v. Babcock, 324.
v. Baker, 350.
v. Bell, 173, 174.
v. Burnham, 671, 672.
v. Commissioners, 701.
v. Criely, 700.
v. Douglass, 52.
v. Foley, 450.
v. Galveston, etc., R. R. Co., 40.
v. Hathaway, 332, 333.
v. Jackson, 613.
v. Knowlton, 159.
v. Norfolk, etc., R. R. Co., 554.
v. Pesked, 579.
v. Pittsburg, etc., Ry. Co., 271.
v. Pool, 772.
v. Smithson, 343, 344.
v. Standard Oil Co., 19, 683.
v. Stanfield, 299.
v. Tel. Co., 188.
Jackson Architectural Iron Works v. Hurlbut, 647.
Jackson L. Co. v. Cunningham, 502.
Jackson Tp. v. Wagner, 38, 681, 683.
Jacksonville v. Doan, 597.
v. Drew, 482.
Jacksonville Elec. Co. v. Adams, 716.
Jacksonville, etc., R. R. Co. v. Cox, 583.
v. Peninsular, etc., Co., 31.
v. P. L. T. & M. Co., 128.
v. Thompson, 611, 613.
Jacob v. Lorenz, 122.
Jacobs v. Andrews, 742.
v. Louisville, etc., R. R. Co., 287.
v. Pollard, 107.
Jacobson v. Lynn, 134.
v. Van Boening, 585.
Jacobus v. Children of Israel, 47, 126.
v. St. Paul, etc., Ry. Co., 727.
Jacques v. Parks, 88, 162, 439.
Jager v. Adams, 608.
Jaggar v. Winslow, 452.
James v. Campbell, 153.
v. Emmet Min. Co., 547.
v. Griffin, 652.
v. Harrodsburg, 75.
v. James, 358.
v. Orrell, 636.
v. Plank, 637.
v. Sweet, 168.
Jamison v. Weaver, 670.
Janeko v. West Coast, etc., Co., 524.
Janesville v. Carpenter, 615.
Jansen v. Jersey City, 478, 549.
Janson v. Brown, 349.
J'Anson v. Stewart, 212,
Janorin v. Curtis, 107.
Jaques v. Great Falls Mfg. Co., 512.
Jarmain v. Hooper, 397.
Jarman v. Rea, 207.
Jarnigan v. Fleming, 221.
Jarrett v. Apple, 145.

[REFERENCES ARE TO PAGES.]

Jarvis v. Hathaway, 237.
Jastrzembski v. Maxhausen, 243.
Jay v. Michael, 362, 371.
Jayne v. Price, 321.
Jefferson v. Chapman, 478, 482.
v. Hale, 431, 435.
Jeffersonville, etc., R. R. Co. v. Esterle, 601.
v. Hendricks, 278.
v. Lyon, 704.
Jeffersonville R. R. Co. v. Bowen, 715.
v. Rogers, 68.
Jeffery v. Bigelow, 446.
Jeffries v. Ankenny, 388.
v. Great West. R. R. Co., 419.
v. Phila., etc., R. R. Co., 743.
v. Williams, 365.
Jemison v. Moseley, 154.
v. Woodruff, 469.
Jencks v. Coleman, 656.
v. Smith, 412.
Jenkins v. Fowler, 43, 44, 45.
v. Jensen, 142.
v. Lykes, 324, 326.
v. Mammouth M. Co., 558.
v. McConico, 436.
v. McCurdy, 405.
v. Motlow, 637.
v. Nat. Bank of Bowdoinham, 635.
v. Steanka, 116, 117.
v. Turner, 344.
v. Waldron, 8, 388.
Jenks v. Williams, 44.
Jenne v. Sutton, 747.
Jenner v. Joliffe, 387, 394, 395.
Jenney Elec. L. & P. Co. v. Murphy, 525.
Jenning's Lessee v. Wood, 390.
Jennings v. Florence, 188.
v. Grand Trunk Ry. Co., 727.
v. Paine, 227.
v. Rundall, 58.
v. Thompson, 161, 439.
v. Van Shaick, 617.
Jensen v. Damm, 218.
v. Halstead, 174.
v. Kyer, 519, 533, 541, 697, 698.
Jeremy v. St. Paul Boom Co., 174.
Jerome v. Smith, 658.
Jerrett v. Mahan, 591.
Jasperson v. Phillips, 742, 746.
Jessen v. Sweigert, 623.
Jesser v. Gifford, 322.
Jessup & M. P. Co. v. Ford, 596.
Jesurum v. Kent, 429.
Jewell v. Gardiner, 372.
v. Mahood, 332.
Jewett v. Dringer, 116.
v. New Haven, 76.
v. Whitney, 125.
J. H. Clark Co. v. Rice, 447, 453, 464.
J. J. Douglas Co. v. Minn. Tr. Ry. Co., 725.
Joannes v. Bennett, 238.
Johanson v. Pioneer Fuel Co., 498.
John A. Tolman Co. v. Waite, 437.
John Monat L. Co. v. Wilmore, 744.
Johns v. Marsh, 180.
v. Stevens, 23, 626.
Johnsen v. Oakland, etc., Ry. Co., 32.
Johnson v. Anderson, etc., Co., 557.
v. Ashland Water Co., 472, 473, 515, 518.
v. Baltimore, etc., R. R. Co., 707.
v. Barber, 96, 98, 490, 743.
v. Bellingham Bay Imp. Co., 503, 705.
v. Borson, 364.
v. Bouton, 90, 169, 379.
v. Bradstreet Co., 239.
v. Cate, 461.
v. Cent. Vt. R. R. Co., 492.
v. Chadbourn Finance Co., 640, 643.
v. Chambers, 172,

[REFERENCES ARE TO PAGES.]

Johnson v. Chapman, 93, 94, 95, 608.
v. Charleston, etc., Ry. Co., 723.
v. Chesapeake, etc., Ry. Co., 560, 562.
v. Chicago, etc., Ry. Co., 36, 136, 487, 583, 677.
v. Coenant, 125.
v. Detroit, etc., Ry. Co., 487.
v. Farr, 428.
v. Forse, 203.
v. Gavitt, 449.
v. Gibson, 134.
v. Girdwood, 6, 9, 137.
v. Glidden, 747.
v. Goslett, 458.
v. Hudson Riv. R. R. Co., 701.
v. Irasburg, 48.
v. Jones, 397, 440.
v. King, 187.
v. Lewis, 622.
v. Lindsay, 549.
v. Louisville, etc., R. R. Co., 656, 714, 715.
v. Maxwell, 108.
v. McConnell, 350.
v. McDaniel, 14.
v. McMillan, 619, 621.
v. Miller, 173, 175, 182.
v. Northern Pac. R. R. Co., 744.
v. N. W. Telephone Exch. Co., 31.
v. Ore. Short Line, 339, 529, 531.
v. Patterson, 348, 350.
v. Perry, 155.
v. Phila., etc., R. R. Co., 140.
v. Portland Stone Co., 546.
v. Pye, 60.
v. Randall, 439, 440.
v. Reed, 131.
v. Reynolds, 640, 641.
v. Richardson, 642.
v. Rio Grande W. Ry. Co., 700.
Johnson v. St. Paul, etc., R. R. Co., 678.
v. Skillman, 326.
v. State, 160.
v. Steam Guage, etc., Co., 678. 680.
v. Tacoma Mill. Co., 518.
v. Torpy, 104, 107.
v. Union Pac. Coal Co., 520.
v. West, 318, 321.
v. West. U. Tel. Co., 668.
v. Wilson, 419, 420.
v. Wing, 341.
v. Winona, etc., R. R. Co., 654.
John Spry Lumber Co. v. Duggan, 549.
Johnston v. Allen, 253.
v. Covenant Mut. Life Ins. Co., 452.
v. District of Columbia, 77, 79, 80.
v. Fargo, 730.
v. Lance, 247.
v. Louisville, 147, 148.
v. Phila., M. & T. Co., 406.
v. Wilson, 404.
v. Richmond, etc., R. R. Co., 648, 725.
v. Sutton, 8.
Joliet v. Steward, 720.
v. Shufeldt, 37.
v. Verley, 75, 773.
Joliet Steel Co. v. Shields, 549.
Jolly's Admx. v. Hawesville, 76, 475.
Jonasen v. Kennedy, 176.
Jones v. Adams, 599.
v. Alsbrook, 396.
v. Andover, 48.
v. Baker, 17, 86.
v. Belt, 490.
v. Brown, 385.
v. Brownlee, 229.
v. Bull, 405, 406.
v. Buzzard, 131.
v. Clouser, 120.

[REFERENCES ARE TO PAGES.]

Jones v. Cobb, 435.
v. Diver, 206.
v. Finch, 42.
v. Florence Min. Co., 523.
v. Forehand, 231.
v. Forest Oil Co., 571.
v. Foster, 169.
v. Fruin, 184, 187.
v. Gale, 51, 138, 152.
v. George, 445.
v. Greeley, 214.
v. Hannovan, 125.
v. Hoar, 130.
v. Howell, 603.
v. Jenkins, 177.
v. Jones, 110, 453.
v. Kellogg, 428.
v. Kemp, 637.
v. Lemon, 141.
v. Loving, 376, 384.
v. McMillan, 274.
v. Mfg. Co., 529.
v. Mich. Cent. R. R. Co., 745.
v. Minneapolis, etc., R. R. Co., 649.
v. Murray, 249.
v. New Am. File Co., 556, 557.
v. New Haven, 770.
v. New Orleans, etc., Co., 408.
v. New York, etc., R. R. Co., 511.
v. Old Dominion Cotton Mills, 518, 523.
v. People, 397.
v. Percival, 362.
v. Roberts, 213, 221.
v. Robertson, 581.
v. St. Louis S. W. Ry. Co., 726, 728.
v. Sanders, 371.
v. Scanland, 404.
v. Stanley, 292.
v. Tevis, 259.
v. Union Ry. Co., 694, 752.
v. Voorhees, 648.
v. Wagner, 367.
Jones v. Weatherbee, 335.
v. Williams, 110, 603, 622.
v. Williamsburg, 73, 74, 76.
v. Wilmington, etc., R. R. Co., 177.
v. Witherspoon, 339.
Joost v. Craig, 399, 400.
Jordan v. Ala., etc., R. R. Co., 69, 180.
v. Cincinnati, etc., R. R. Co., 278.
v. Fall River R. R. Co., 660.
v. Hanson, 377.
v. Lendsay, 421.
v. Middlesex, etc., Co., 256.
v. Money, 452.
v. New York, etc., R. R. Co., 49.
v. Pickett, 443.
v. Sullivan, 740.
v. Wells, 398.
v. Wyatt, 416, 685.
Joseph Schlitz Brewing Co. v. Compton, 627.
Joslin v. Grand Rapids Ice Co., 477.
Joslyn v. Milford, etc., St. Ry. Co., 43.
Josselyn v. McAllister, 172.
Journal Print. Co. v. MacLean, 210.
Joyce v. Martin, 98, 618.
v. Parkhurst, 169.
Joyner v. Early, 467.
Joynt v. Cycle Trade Pub. Co., 245.
Juchter v. Boehm, 189.
Judd v. Ballard, 153.
v. Hartford, 78.
v. Weber, 444.
Judge v. Cox, 346.
v. Meriden, 80.
Judkins v. Me. Cent. R. R. Co., 559.
Judson v. Central Vt. R. R. Co., 760, 763.

[REFERENCES ARE TO PAGES.]

Judson v. Grant P. Co., 607, 692, 695.
Judy v. Citizen, 318.
Justice v. Nesquehoning Val. R. R. Co., 408.
v. Pennsylvania Co., 542, 553.

K.

Kaare v. Troy S. & I. Co., 529.
Kahaley v. Haley, 422.
Kahl v. Love, 775.
Kahn v. Atlantic, etc., R. R. Co., 697.
Kahner v. Otis El. Co., 776.
Kaine v. Commonwealth, 307.
v. Weigley, 466, 467.
Kaiser v. Flaccus, 558.
v. Latmer, 639.
v. Nummerdor, 456.
Kalleck v. Deering, 545.
Kallock v. Perry, 322.
Kaminitsky v. North East R. R. Co., 700.
Kamp v. Coxe Bros. & Co., 516.
Kampass v. Light, 174.
Kamphouse v. Gaffner, 328.
Kane v. N. Y. El. R. R. Co., 370.
v. Santa Clara, etc., Co., 685.
v. Yonkers, 701.
Kankakee, etc., R. R. Co. v. Horan, 595.
Kannenberg v. Alpena, 770.
Kansas Central Ry. Co. v. Fitzsimmons, 737.
Kansas City v. File, 93.
v. Gilbert, 767, 773.
v. Orr, 49, 78, 767, 773.
v. Seise, 738.
v. Slangstrom, 99.
Kansas City, etc., R. R. Co., v. Flippo, 679, 685.
v. Lackey, 705, 707.
v. Langley, 711.
v. McGahey, 659, 660, 661.
v. McHenry, 676.
Kansas City, etc., R. R. Co. v. Rodebaugh, 725.
v. Ryan, 508, 510, 525, 562.
v. Simpson, 722, 724.
v. Southern Ry. News Co., 730.
v. Thornhill, 709.
v. Wagand, 421.
Kansas, etc., Coal Co. v. Galloway, 173, 175.
Kansas, etc., R. R. Co. v. Peavy, 535, 537, 712, 713.
v. Waters, 546.
Kan. Pac. Ry. Co. v. Brady, 699.
v. Salmon, 542.
v. Whipple, 707, 714.
Karger v. Rich, 210.
Karner v. Stump, 163.
Karr v. Parks, 259, 715.
Kaspar v. Dawson, 566, 574, 603.
Katz v. Walkinshaw, 569, 588, 589.
Kaucher v. Blinn, 205.
Kaufhold v. Arnold, 531.
Kauffman v. Greismer, 583, 584.
v. Kennedy, 192.
v. Maier, 514.
Kaumeier v. City Elec. Ry. Co., 739.
Kavanagh v. Barber, 627.
Kay v. Pennsylvania R. R. Co., 323.
Keaggy v. Hite, 435.
Kean v. Coleman, 61.
Kearney v. Boston, etc., R. R. Co., 273, 280.
v. Fenn, 394.
Kearney Elec. Lt. Co. v. Laughlin, 274, 681.
Keating v. Cincinnati, 80.
v. Pacific Steam Whaling Co., 540.
v. Springer, 369.
Kebel v. Philadelphia, 756.
Kedrolivansky v. Niebaum, 203.
Keeble v. Hickeringill, 47.
Keech v. Baltimore, etc., R. R. Co., 702.

[REFERENCES ARE TO PAGES.]

Keedy v. Howe, 493.
Keefe v. Chicago, etc., Ry. Co., 701, 708.
v. Furlong, 409.
v. Milwaukee, etc., R. R. Co., 323.
Keegan v. Kavanaugh, et al., 699.
v. Western R. R. Co., 514.
Keel v. Levy, 466.
Keeley v. Maine Cent. R. R. Co., 658.
Keen v. Coleman, 65.
Keenan v. Cook, 388.
v. New York, etc., R. R. Co., 546.
v. State, 163.
Keene v. Chapman, 329.
v. Clarke, 353.
v. Kimball, 353.
Keeney v. Grand Trunk, etc., R. Co., 647.
Keeney, etc., Mfg. Co. v. Union Mfg. Co., 599.
Keep v. Quallman, 154.
Keffe v. Milwaukee, etc., Ry. Co., 737.
Kehl v. Abram, 455.
v. Hope Oil Mill, etc., Co., 175.
Kehler v. Schwenk, 501, 509, 513.
Keifer v. Rogers, 453.
Keightlinger v. Egan, 346.
Keller v. Lessford, 203.
Kelley v. West. U. Tel. Co., 668.
Keim v. Union, etc., Co., 678, 704.
Keiser v. Lovett, 603.
Keit v. Wyman, 87.
Keith v. Eastern, 770.
v. Howard, 388, 389.
v. Tilford, 320.
Keleher v. Putnam, 166.
Kellar v. Garth, 424, 638.
v. Koerber, 305, 306.
Kellenberg v. Russell, 338.
Keller v. Donnelly, 261.
v. Lewis, 156, 671.
v. Sioux City, etc., Co., 657.
Kellerman v. Kans. City, etc., R. R. Co., 725.
Kelley v. Anderson, 742.
v. Dillon, 221.
v. Flaherty, 202, 204.
v. Mich. Cent. R. R. Co., 686.
v. New York, etc., R. R. Co., 253, 254.
v. Norcross, 510.
v. Savage, 438.
v. Sherlock, 241.
v. Texas, etc., Ry. Co., 43.
v. Tinling, 241.
Kellogg v. Chicago, etc., R. R. Co., 36, 744.
v. Cochran, 166.
v. Gilbert, 394.
v. Malin, 333.
v. New York, etc., Co., 287.
v. Thompson, 626.
Kelly v. Bemis, 377.
v. Bragg, 388.
v. Dunning, 584.
v. Howell, 480.
v. Lafitte, 228.
v. Met. Ry. Co., 13.
v. Mich. Cent. R. R. Co., 682, 683, 736.
v. Milwaukee, 75.
v. Natoma W. Co., 590.
v. New York, 484.
v. New Haven Steamboat Co., 553.
v. N. Y., etc., Ry. Co., 656.
v. Pittsburg, etc., I. Co., 714.
v. Schuyler, 330.
Kelley Island L. & T. Co. v. Pachuta, 520, 543, 546.
Kelleyville Coal Co. v. Bruzas, 504.
v. Petraytis, 279.
v. Strine, 703.
Kelsey v. Barney, 684, 687.
v. Berry, 644.
v. Chicago, etc., Ry. Co., 744.
v. Glover, 773.

[REFERENCES ARE TO PAGES.]

Kelsey v. Klabunde, 378, 439.
v. Railway Co., 762.
Kelton v. Taylor, 636.
Kelty v. Owens, 130.
Kempster v. Milwaukee, 77
Kendall v. Hathaway, 406.
v. Stokes, 400.
v. U. S., 375.
Kendrick v. McCrary, 262.
v. Towle, 128.
Keney v. McLaughlin, 246.
Kennedy v. Burrier, 282.
v. Burnap, 369.
v. Chase, 505.
v. Denver, etc., Ry. Co., 700.
v. Holladay, 181.
v. Lange, 120.
v. New York, 81.
v. Shea, 261.
v. Standard S. R., 273.
Kennett v. Peters, 419.
Kenney v. Hannibal, etc., R. R. Co., 129.
v. Ill. State Journal Co., 201.
v. Meddaugh, 506.
Kenney & W. M. F. G. Co. v. Union Mfg. Co., 590.
Kennick v. Chicago, etc., Co., 650.
Kenny v. Barns, 619.
Kenrick v. Rogers, 430.
Kent v. Bongartz, 235, 236.
v. Judkins, 329.
Kent County Agricultural Soc. v. Ide, 322, 337.
Kentucky Central R. R. Co., v. Ackley, 547, 548.
Kentucky Hotel Co. v. Camp, 663.
Kenyon v. Woodruff, 101, 102.
Kern v. De Castro, etc., Co., 508. 512.
Kerner v. McDonald, 6.
Kerr v. Herring, 42.
v. Kingsbury, 410.
v. Pennsylvania R. R. Co., 260.
Kerwhacker v. Cleveland, etc., R. R. Co., 339, 341, 682, 683, 708.
Kesslee v. Lett, 45.
Kestler v. Hereth, 142.
Ketcham v. Newman, 365
Ketterman v. Dry Fork R. R. Co., 697.
Kettle v. Turl, 700.
Kewanee v. Almy, 627, 628.
v. Otley, 596, 597.
Keweenaw Ass'n v. O'Neil, 116, 118.
Keyser v. Chicago, etc., Co., 677.
Keystone, etc., Co. v. Newbury, 546.
Khron v. Brock, 608, 694.
Kibele v. Philadelphia, 78, 772.
Kidd v. Horry, 250.
v. Ward, 218.
Kidder v. Bacon, 249.
v. Broom Co., 147.
v. Parkhurst, 178, 180, 226.
Kidgill v. Moor, 371.
Kiene v. Ruff, 197.
Kiernan v. Jersey City, 80.
Kiesel v. Ogden City, 78.
Kiff v. Youmans, 44.
Kirkman v. Handy, 603.
Kilbourn v. Rewer, 320.
v. Thompson, 376.
Kilbride v. Carbon Dioxide, etc., Co., 748.
Kiley v. Western U. Tel. Co., 728.
Kilgore v. Jordan, 61.
Kilgour v. Evening Star Co., 218, 220.
Kilham v. Ward, 388.
Killea v. Faxon, 507.
Killian v. Southern Ry. Co., 271.
Killion v. Power, 580.
Kilpatrick v. Grand Tr. Ry. Co., 537, 702.
Kimball v. Adams, 408.
v. Bates, 180.
v. Billings, 431.
v. Borden, 744.
v. Cushman, 475.
v. Friend, 705, 762.

[REFERENCES ARE TO PAGES.]

Kimball v. Harman, 17, 85, 86, 293.
v. Saguin, 454.
v. Shoemaker, 318.
v. Western R. R. Co., 677.
v. Yates, 325.
Kimber v. Press Ass'n, 242.
Kimble v. Whitewater, etc., Co., 146.
Kimmel v. Henry, 174.
Kincade v. Bradshaw, 221.
Kincaid's Appeal, 267.
Kincaid v. Hardin County, 81.
v. Oregon Short Line, 562.
Kincheloe v. Priest, 636.
Kinchlow v. Midland Elevator Co., 738.
King v. Bates, 380.
v. Boston, etc., R. R. Co., 521.
v. Foscue, 412.
v. Granger, 78.
v. Hamill, 603.
v. Hanson, 257.
v. Higgins, 11.
v. Hoare, 101.
v. Johnston, 161, 167.
v. Mackellar, 425.
v. Merriman, 119, 437.
v. Miller, 369.
v. Moore, 605.
v. Morgan, 524, 530, 534.
v. Morris, etc., R. R. Co., 625, 706.
v. New York, etc., R. R. Co., 478.
v. Patterson, 239.
v. Richards, 419, 430.
v. Root, 224, 240.
v. Rosewell, 111.
v. Vantandillo, 608.
Kingsbury v. Bradstreet Co., 217, 239.
v. Collins, 411.
v. Dedham, 770.
v. Flowers, 624.
Kingsley v. Bloomingdale, 37.
Kingsley v. Goldsborough, 363.
Kingsley v. McFarland, 408.
Kinnard v. Standard Oil Co., 578.
Kinnare v. Chicago, 73, 77, 474.
Kinney v. Central R. R. Co., 727.
v. Koopman, 607, 679.
v. North Carolina R. R. Co., 97, 690.
v. Slattery, 334.
Kinsel v. Atlantic, etc., Ry. Co., 19.
Kinsley v. Lake Shore, etc., Co., 661.
Kinyon v. Palmer, 244.
Kirby v. Foster, 112, 157.
v. Market Ass'n, 148, 771.
v. Western Union Tel. Co., 668, 730.
Kirchgraber v. Lloyd, 601.
Kirchner v. Sewing Machine Co., 140.
Kirk v. Garrett, 97, 164, 165, 167.
v. Railway Co., 546.
Kirkendal v. Hartsock, 464.
Kirkman v. Handy, 566, 573.
Kirkpatrick v. Eaglelodge, 237.
v. Kirkpatrick, 180.
v. Reeves, 461, 462.
Kirkwood v. Finnegan, 45.
Kisch v. R. R. Co., 448.
Kissel v. Lewis, 568, 625, 626.
Kitchens v. Elliott, 345, 346, 679.
Kitchey v. Welsh, 362, 363.
Kivett v. McKiethan, 326.
Klages v. Gillette S. H. Mfg. Co., 484.
Klanowski v. Grand Trunk, etc., Co., 763.
Kleber v. Ward, 120.
Kleebauer v. Western Fuse, etc., Co., 607.
Kleiber v. Peoples Ry. Co., 711.
Klenberg v. Russell, 340, 345.
Klepsch v. Donald, 608, 609.
Kley v. Healey, 139.
Klieforth v. Northwestern Iron Co., 517.

[REFERENCES ARE TO PAGES.]

Kline v. Eubanks, 270, 293.
v. Hibbard, 170.
Kliegel v. Weisel, etc., Mfg. Co., 554.
Klingman v. Holmes, 259.
Klinkler v. Wheeling S. & I. Co., 700.
Klix v. Nieman, 734.
Klos v. Zaharik, 245, 246.
Klotz v. Lindsay, 88.
Knapp v. Campbell, 202.
v. Jones, 700, 701.
v. Roche, 22, 103.
v. Winchester, 419.
v. Wing, 257.
Knappen v. Freeman, 461, 462.
Knell v. Briscoe, 378.
Knelling v. Lean Mfg. Co., 778.
Knickerbocker v. Colver, 98, 101, 102.
Knight v. Brown, 585.
v. Cooper, 562.
v. Dunbar, 316.
v. Foster, 221, 247.
v. Gibbs, 238.
v. Goodyear, etc., Co., 605.
v. International, etc., Ry. Co., 177.
v. Nelson, 87, 89, 90, 101.
v. Prov., etc., R. R. Co., 651.
v. R. R. Co., 136, 697.
v. West Jersey R. R. Co., 275.
Knights v. Piella, 639.
Knightstown v. Musgrove, 719, 721.
Knisley v. Pratt, 529, 536, 537, 539.
Knott v. Cunningham, 98, 101.
v. Jarboe, 191.
Knowing v. Manly, 64.
Knowles v. Bullene, 498.
v. Pennsylvania R. R. Co., 610.
v. Scribner, 222.
Knowlton v. Bartlett, 91, 399.
v. Johnson, 409.
Knox v. Chaloner, 626.
Knox v. New York, 611.
v. Pioneer Coal Co., 505.
v. Rives, 646.
v. Tucker, 342.
Knoxville Iron Co. v. Pace, 504, 534.
Knoxville Traction Co. v. Lane, 657.
Koch v. Peters, 84, 398.
Koehler v. Sanders, 357.
Koelsch v. Phila. Co., 718, 755, 756.
Koerber v. Patek, 268.
Koester v. Ottumwa, 772.
Kohl v. Memphis, etc., R. R. Co., 134.
Kohler Mfg. Co. v. Beeshore, 356.
Kohlhess v. Mabley, 252.
Kolka v. Jones, 185.
Kompass v. Light, 176.
Koon v. Southern Ry. Co., 509.
Koons v. St. Louis, etc., R. R. Co., 737.
Koontz v. Oregon Ry. & Nav. Co., 744.
Koplan v. Boston Gas Lt. Co., 756.
Korrady v. Lake Shore, etc., Ry. Co., 283.
Kosminsky v. Goldburg, 63, 64.
Kost v. Bender, 450.
Koukle v. Haven, 232.
Kountz v. Kennedy, 461, 462.
Koutz v. Toledo, 701.
Kramer v. Stock, 187.
Krause v. Busacker, 461.
v. Pa. R. R. Co., 132.
Krantz v. Rio Grande W. Ry. Co., 657.
Kranz v. Baltimore, 85.
Krebs v. Oliver, 203.
Kreiter v. Nichols, 493.
Kress v. State, 378.
Krom v. Schoonmaker, 55, 56.
Krug v Pitass, 206.
v. Ward, 163, 178, 180, 189.
Kruger's Estate, 670.

[REFERENCES ARE TO PAGES.]

Krum v. Anthony, 342.
Kuehn v. Milwaukee, 76.
Kuhn v. Brownfield, 13.
v. Hermann, 257.
Kujek v. Goldman, 9, 266.
Kumba v. Gilham, 62, 63.
Kutter v. Smith, 410.
Kuzniak v. Kozminski, 45.

L.

Labadie v. Hawley, 563.
Labeume v. Hill, 131.
Labowitz v. Frankfort, 636.
Lacey v. Porter, 170, 171, 180.
Lackhart v. Lutz, 735.
Lackawana, etc., R. R. Co. v. Chenewith, 723.
Lackland v. No. Mo. R. R. Co., 613.
La Clef v. Concordia, 81.
Lacon v. Hooper, 402.
Lacustrine, etc., Co. v. Lake, etc., Co., 409.
Ladd v. Boston, 369.
v. Brockton Street Ry. Co., 506.
v. Granite State Brick Co., 573, 601.
v. New Bedford R. R. Co., 509, 530, 560.
Lade v. Sheperd, 332.
Ladies' Art, etc., Co's. Appeal, 605.
Ladner v. Balsley, 452, 456.
Ladue v. Branch, 120.
Lafayette v. Timberlake, 75.
Lafayette County Bank v. Metcalf, 428.
Lafayette, etc., R. R. Co. v. Adams, 707.
v. Huffman, 715.
Lafervere v. Weeks, 360.
Lafeyth v. Emporia Nat. Bank, 83, 99.
Laflin v. Willard, 23.
Laflin & R. P. Co. v. Tearney, 566, 577, 607, 625.
Lafith v. New Orleans, etc., R. R. Co., 497.
Lagroue v. Mobile, etc., R. R. Co., 546.
Lahr v. Met. El. R. R. Co., 613.
Laidlow v. Sage, 40.
Laing v. Colder, 690.
v. Mitten, 226.
Laird v. Eichold 648.
v. Farwell, 497.
v. Railroad Co., 133, 407.
Lake v. King, 236.
v. Milliken, 31.
Lake Erie, etc., Ry. Co. v. Acres, 655.
v. Charrman, 33, 276.
v. Holland, 721.
v. Middleton, 555.
Lake Roland El. Ry. Co. v. McKewen, 763, 764, 765.
Lake Shore, etc., R. R. Co. v. Hessions, 712.
v. Liidtke, 677.
v. McIntosh, 719, 760, 761.
v. Miller, 699, 704, 718, 763.
v. Parker, 678.
v. Rosenzwig, 656.
v. Scofield, 303.
Lake St. El. R. R. Co. v. Burgess, 655.
Lake Sup., etc., Co. v. Erickson, 480.
Lackin v. Ames, 593.
v. Oregon Pac. R. R. Co., 472.
Lally v. Cantwell, 291.
v. Emery, 218.
v. Holland, 390.
LaLonde v. Peake, 37.
Lamb v. Camden, etc., Co., 38.
v. Taylor, 262.
Lambar v. St. Louis, 79.
Lambeck v. Grand Rapids, etc., R. R. Co., 37.
Lambert v. Bersey, 55.
v. Missisquoi P. Co., 507.
v. Robinson, 113, 157.

[REFERENCES ARE TO PAGES.]

Lambert v. Southern Pac. R. R. Co., 761.
Lamberton v. Dunham, 461, 462.
Lamine v. Bonell, 130.
Lamming v. Galusha, 122.
Lamotte v. Boyce, 512, 525.
Lamphear v. Buckingham, 284.
Lamson v. Am. Ax & Tool Co., 535.
Lanark v. Dougherty, 712.
Lancaster v. Eve, 407.
v. Hamburger, 44, 291.
v. McKay, 171, 172.
Lancaster Co. Bank v. Albright, 446.
v. Moore, 55.
Lancaster Mills v. Merchants' Cotton Press Co., 722, 723.
Lance v. Apgar, 23.
v. Butler, 116.
Land v. Fitzgerald, 740.
Lander v. Hall, 335.
v. Propper, 428, 435.
v. Seaver, 160, 309.
Landgraff v. Kuh, 32, 679.
Landigan v. Mayer, 409, 410.
Landis v. Campbell, 237.
Landon v. Emmons, 428.
v. Humphrey, 670.
Lane v. Atlantic Works, 31.
v. Borcourt, 13, 671.
v. Bryant, 66.
v. Concord, 576.
v. Cotton, 392.
v. Crombie, 704.
v. Hancock, 772.
v. Kennedy, 332.
v. Miller, 328.
v. Salter, 144.
v. Thompson, 312, 320, 321.
Laney v. Jasper, 584, 585.
Lang v. Scott, 147.
Langabaugh v. Anderson, 770.
Langan v. Atchison, 770.
v. Tyler, 472.
Langdon v. Bruce, 88.
v. Buchanan, 406.
Langdon v. New York, 609.
Lange v. Benedict, 162, 377, 380.
v. Ill. Cent. R. R. Co., 174.
v. Schoettler, 287.
Langford v. Boston, etc., Co., 167, 182.
v. Jones, 672.
Langhammer v. Manchester, 37.
Langhoff v. Milwaukee, etc., R. R. Co., 677.
Langley v. Augusta, 78.
Langlois v. Dunn Worsted Mills, 534.
Langridge v. Levy, 14.
Laning v. N. Y. Cent. R. R. Co., 514, 516, 557.
Lanpher v. Dewell, 380.
Lanphier v. Phipos, 670.
Lansing v. Smith, 109.
Lansing Iron, etc., Works v. Wilbur, 405, 406.
Lanson v. Conaway, 672, 673.
Lanzon v. Charroux, 183, 188.
Lapere v. Luckey, 369.
Lapham v. Anthony, 593.
v. Curtis, 580.
v. Norton, 407.
Larch v. Stratton, 535.
Larich v. Moies, 507.
Larison v. Larison, 255.
Larkin v. Chicago, etc., R. R. Co., 653.
v. Burlington, etc., Ry. Co., 719, 720.
v. Noonan, 236.
Larman v. Huey's Heirs, 334.
Larmore v. Crown Point Iron Co., 500.
Larned v. Castle, 583.
v. Wheeler, 388.
Larrabee v. Minn. Tribune Co., 206.
v. Peabody, 80.
Larson v. Chase, 268, 269.
v. Dawson, 422.
v. Fidelity M. L. Ass., 497.

[REFERENCES ARE TO PAGES.]

Larson v. Furlong, 109, 111, 611.
v. Grand Forks, 772.
v. Knapp, 559.
v. Met. St. Ry. Co., 366, 482. 483.
Larsson v. McClure, 507.
Lasala v. Holbrook, 364.
Lash v. Ziglar, 394.
Lasher v. Littell, 85.
Lassell v. Reed, 337.
Lasure v. Graniteville, etc., Co., 534.
Latham v. Roach, 731.
Latremoille v. Bennington, etc., R. R. Co., 517, 530.
Lattimer v. Livermore, 369.
Lauer v. Palms, 607.
Laufer v. Bridgeport Traction Co., 763, 764.
Laugher v. Pointer, 621.
Laughlin v. Barnes, 426.
v. Nash, 408.
Laughman's Appeal, 359.
Laverenz v. Chicago, etc., R. R. Co., 762.
Laverone v. Mangianti, 350.
Laverty v. Snethen, 424.
v. Vanarsdale, 85, 86.
Lavery v. Crooke, 261.
Law v. Grant, 443.
v. Llwellyn, 226.
Lawatsch v. Cooney, 421, 434.
Lawler v. Androscoggin, R. R. Co., 542.
v. Earle, 238.
Lawless v. Anglo-Egyptian, etc., Co., 233.
Lawlor v. French, 347.
Lawrence v. Cleary, 177.
v. Combs, 342.
v. Fairhaven, 596.
v. Green, 691, 711.
v. Hagemeyer, 508, 525, 558, 560.
v. Hagerman, 145.
v. Hedger, 163.
Lawrence v. New York, etc., R. R. Co., 725.
v. Shipman, 479.
v. Spence, 261.
Lawrence, etc., Co. v. Lowell, etc., Mills, 357.
Lawrence R. R. Co. v. Cobb, 129.
Lawson v. Chicago, etc., Ry. Co., 287, 726.
v. Hicks, 227.
v. Morning Jour. Ass'n, 215.
v. Shreveport W. W. Co., 736.
Lawton v. Rivers, 363.
v. Waite, 562.
Lawyer v. Fritcher, 259.
Lay v. King, 314.
Lazalle v. Newfane, 283.
L. Bucki, etc., Co. v. Atlantic L. Co., 184.
Lea v. White, 227, 228.
Leach v. Francis, 89.
Leachman v. Dougherty, 169, 440.
League v. Stradley, 733.
Leame v. Bray, 21, 416, 417.
Learock v. Putnam, 308.
Lease v. Pa. R. R. Co., 140.
Leather Cloth Co. v. Am. L. C. Co., 358.
Leavenworth v. Hatch, 719.
Leavenworth Coal Co. v. Ratchford, 751, 753.
Leavet v. Sherman, 143.
Leavitt v. Bangor, etc., R. R. Co., 478, 482.
v. Leavitt, 266.
Lebanon v. Olcott, 146.
Lebanon L. H. & P. Co. v. Leap, 756.
Lebbering v. Struthers, 524, 528.
Lebby v. Ahrens, 464.
Lebeau v. Dyerville Mfg. Co., 519.
Le Blanc v. Sweet, 653.
Le Clair v. St. Paul, etc., R. R. Co., 560.
Le Clear v. Perkins, 184, 187.
Le Clef v. Concordia, 74.

[REFERENCES ARE TO PAGES.]

Ledbetter v. Davis, 451.
Ledyard v. Hibbard, 637.
Lee v. Burlington, 42.
v. Haley, 360.
v. Hodges, 262.
v. Jones, 446.
v. Knapp, 663.
v. McClelland, 447, 456.
v. Pembroke Iron Co., 612, 613.
v. Riley, 342.
v. Smart, 535.
v. Tarpin, 451.
Lee County v. Yarborough, 766.
Le Fevre v. Le Fevre, 327.
Le Forest v. Tolman, 136.
Lefrois v. Monroe County, 72, 474.
Legallee v. Blaisdell, 177.
Leger v. Warren, 165, 167.
Legg v. Britton, 273, 281.
v. Dunlevy, 216.
Lehigh Co. v. Field, 420.
Lehigh, etc., Coal Co. v. Hayes, 513.
Lehigh Z. & I. Co. v. Bamford, 461.
Lehman v. Brooklyn City R. R. Co., 28.
v. Shackleford, 322, 447.
Lehmann v. Schmidt, 131.
Lehrer v. Elmore, 202, 222, 249.
Leid v. Shelby Iron Co., 161.
Leidy v. Quaker City, etc., Co., 639.
Leigh v. Omaha St. Ry. Co., 515.
v. Taylor, 407.
Leighton, Ex parte, 56.
Leighton v. Preston, 130.
v. Sargent, 670.
Leipsic v. Gerdeman, 772.
Leitz v. Hohman, 209.
Le Lievre v. Gould, 775.
Lemay v. Williams, 175.
Lemke v. Deitz, 356.
Lemmar v. Webb, 578.
Lennon v. Rawitzer, 691.
Lenox v. Grant, 385.
Lentz v. Carnegie Bros., 597.
v. Stroh, 417.
Leonard v. Columbia, etc., Co., 275.
v. Herrman, 513.
v. Hendrickson, 647.
v. N. Y., etc., Tel. Co., 668.
v. Spencer, 604.
v. Springer, 449, 459.
v. Storer, 619.
Leonorvoitz v. Ott, 348.
Lepnick v. Gaddis, 731, 733.
Lesan v. Me. Cent. R. R. Co., 760, 761, 762.
Lesch v. Gt. Nor. Ry. Co., 28.
Leslie v. Lewiston, 715, 716.
v. Pounds, 621.
Lester v. Mahan, 456.
v. Thurmond, 227.
v. Young, 335.
Letts v. Kessler, 21, 45.
Leveret v. Shreveport Belt Ry. Co., 658.
Levering v. Union Trans. Co., 723.
Levi, Ex parte, 192.
Levi v. Booth, 426.
Levin v. Goodwin, 576, 616.
Levins v. Bancroft, 537.
v. New York, etc., R. R. Co., 665.
Levy v. Brannan, 177.
v. Brothers, 21, 45.
v. Clark, 522.
v. Fenner, 369.
v. Langridge, 776.
v. Southern Exp. Co., 725.
Lewis v. Avery, 162.
v. Baltimore, etc., R. R. Co., 701, 702.
v. Clark, 433.
v. Chapman, 239.
v. Daily News Co., 214, 220, 223.
v. Few, 240.
v. Flint, etc., Co., 33.
v. Hawley, 208.

[REFERENCES ARE TO PAGES.]

Lewis v. Henley, 307.
v. Johns, 90, 98.
v. Jones, 333, 337, 452.
v. Levy, 242.
v. Littlefield, 59.
v. Long Island R. R. Co., 711, 720.
v. McNatt, 325.
v. N. Y. Sleeping Car Co., 664.
v. Read, 87, 88.
v. St. Louis, etc., R. R. Co., 510, 514.
v. Schulte, 488.
v. State, 82, 154.
v. Stein, 626.
v. Terry, 776.
v. Western Union Tel. Co., 26.
Lewton v. Hower, 171, 174, 177.
Lexington v. Batson, 77.
v. Lewis, 287.
Lexington Ry. Co. v. Fain, 754.
Leyser v. Fried, 184.
Libby v. Berry, 255.
v. Maine Cent. R. R. Co., 653.
v. Sherman, 507.
Lichtenstein v. Jarvis, 637, 639.
Lidlie v. Wallen, 203.
Liebstadter v. Federgreen, 149, 156, 319.
Liederkronz Singing Soc. v. Germania Turn Verein, 143.
Lienallen v. Mosgrove, 743.
Lienow v. Ritchie, 321.
Life v. Blackwelder, 349.
Lightfoot v. Winnebago Tr. Co., 718.
Liles v. Crawthorn, 109.
v. Gaster, 225.
Lilienthal v. Campbell, 385.
Lillard v. Whitaker, 435.
Lillibridge v. McCann, 36, 742, 743.
Lillie v. American Car, etc., Co., 504.
Lima Ry. Co. v. Little, 486.
Linck v. Driscoll, 199.
v. Troll, 395.
Lincoln v. Boston, 75.
v. Chadbourne, 108, 591.
v. Chaflin, 129.
v. Davis, 315, 414.
v. Gay, 669.
v. Gillilan, 697.
v. Hapgood, 388.
v. Smith, 772.
Lincoln Rapid Transit Co. v. Nichols, 711.
Lincoln St. Ry. Co. v. Adams, 585.
Lind v. San Luis Obispo, 597, 609, 611.
Linden v. Anchor Min. Co., 705.
Lindley v. Horton, 213.
v. Polk County, 81.
Lindsay v. New York, etc., R. R. Co., 532.
v. Tioga Lumber Co., 522.
Lindsley v. Chicago, etc., Co., 650.
Lindvall v. Woods, 546, 553.
Line v. Mills, 638.
Linfield v. Old Colony, etc., R. R. Co., 677.
Lining v. Bentham, 377.
v. Illinois Cent. R. R. Co., 39, 710.
Link v. Harrington, 331.
Linn v. Duquesne, 26.
Linnehan v. Rollins, 484.
v. Sampson, 709.
Linney v. Maton, 203.
Lipe v. Eisenlerd, 262.
Lippincott v. Lesher, 604.
Lipscomb v. Shofner, 185, 186.
v. Tanner, 133.
Liptrot v. Holmes, 423.
v. Jones, 430.
Liquid Carbonic Acid Mfg. Co. v. Convert, 188.
Lisonbee v. Monroe Irr. Co., 579.
Listman Mill Co. v. Wm. Listman Mill Co., 357, 360.
Litchfield v. Hutchinson, 461, 462.
v. Simpson, 145, 148.
Litchfield Coal Co. v. Taylor, 707.

[REFERENCES ARE TO PAGES.]

Litchins v. Frostburg, 585.
Little v. Brockton, 702.
v. Chicago, etc., Railroad Co., 135.
v. Hackett, 720.
v. Holyoke, 733, 741.
v. Lathrop, 338, 342.
v. Madison, 80.
v. Moore, 377, 386.
v. Southern Ry. Co., 678.
v. Swafford, 120.
Little Miami R. R. Co. v. Stevens, 544.
v. Westmore, 68, 489.
Little Rock, etc., R. R. Co. v. Barker, 284.
v. Barry, 521.
v. Brooks, 610.
v. Conatser 648.
v. Duffy, 525.
v. Eubanks, 535.
v. Hunter, 650.
Little Schuylkill, etc., Co. v. Richards, 95, 621, 624.
Littlewood v. Mayor, etc., 280.
v. New York, 281.
Liverman v. Roanoke, etc., R. R. Co., 745.
v. Batchelder, 349.
Liverpool, etc. Ass'n v. Fairhurst, 60.
Liverpool, etc., Co. v. Phenix Ins. Co., 723.
Livezey v. Schmidt, 578.
Livingston v. Bishop, 101, 102.
v. Cox, 59.
v. Hardin, 185.
v. Jefferson, 134.
v. McDonald, 584, 585, 586.
v. Reynolds, 336.
v. Van Ingen, 144.
Lloyd v. Albermarle, etc., R. R. Co., 40, 708.
v. Jones, 128.
Load v. Green, 444.
Loague v. R. R. Co., 270.
Loan v. Boston, 771.
Lobdell v. Simpson, 590.
Lock v. Turnpike Co., 68.
Locke v. Bradstreet Co., 239.
v. First Div., etc., R. R. Co., 338.
v. Streck, 429.
Lockenour v. Sides, 184.
Lockett v. Ft. Worth, etc., Ry. Co., 627.
Lockhart v. Lichtenthaler, 718.
Lockwood v. Lockwood, 257.
v. Manhattan Storage, etc., Co., 639, 640.
Lockwood, etc., Co. v. Lawrence, 597, 623.
Lodge v. O'Toole, 202, 203.
v. Unverzagt, 186.
Loeb v. Flash, 436.
Loeser v. Chicago, etc., Ry. Co., 725.
v. Humphrey, 715.
Loewe v. Cal. State Federation of Labor, 297.
Loftus v. Dehail, 738.
Logan v. Austin, 51, 152.
v. North Carolina R. R. Co., 97, 539, 544.
Logansport v. Dick, 80, 482.
Logwood v. Memphis, etc., R. R Co., 304.
Lohmiller v. Indian Ford, etc., Co., 620, 625.
Lohr v. Philipsburg, 772.
Loibl v. Breidenbach, 199.
Lombard v. Lennox, 291.
Lomerson v. Johnston, 442.
Londegan v. Hammer, 377.
London, etc., Bank v. Lempriere, 466.
London, etc., Ins. Co. v. Rome, etc., R. R. Co., 651.
London, etc., Ry. Co. v. Truman, 614, 615.
London G. & A. Co. v. Horn, 43, 291, 292.

[REFERENCES ARE TO PAGES.]

Long v. Booe, 252, 254.
v. Chicago, etc., R. R. Co., 608.
v. Coronado R. R. Co., 559.
v. Ellerton, 576.
v. Long, 388.
v. McDow, 334.
v. Moon, 478.
v. Morrison, 670.
v. Neville, 105.
v. Richmond, 491, 494.
v. State, 163.
v. Swindel, 624.
v. Tribune Printing Co., 200, 222, 223, 249.
v. Woodman, 452.
Longa v. Stanley Hod Elevator Co., 472.
Longacre v. State, 403.
Longan v. Weltmer, 673.
Longendyke v. Longendyke, 255.
Longenecker v. Penn. R. R. Co., 699.
Longey v. Leach, 63.
Longmeid v. Holiday, 774.
Lonsdorf v. Lonsdorf, 258.
Look v. Dean, 166.
v. Norton, 320.
Loomis v. Green, 115.
v. Hollister, 494.
v. Reimers, 636.
v. Spencer, 438, 439.
v. Terry, 52, 348, 349.
Looney v. McLean, 739.
Loop v. Litchfield, 750, 774.
Loper v. West. U. Tel. Co., 25, 667.
Lopes v. Sahuque, 702.
Lorance v. Hillyer, 338.
Loranger v. Loranger, 218.
Lord v. Buchanan, 420, 435.
v. Carbon Iron Co., 579.
v. French, 130.
v. Goddard, 462.
v. Langdon, 2, 10, 21, 44, 45.
v. Meadville W. Co., 592.
v. Mobile, 766.
v. Tiffany, 102.
Lord v. Wormwood, 338, 342, 343.
Lord & P. Chemical Co. v. Board of Agriculture, 82.
Lorick v. Atlantic Coast Line R. R. Co., 68.
Lorillard v. Monroe, 80.
Lorman v. Benson, 8.
Lorthem v. Fort Wayne, etc., R. R. Co., 763.
Losee v. Buchanan, 20, 749.
v. Clute, 774.
Lott v. Hubbard, 438.
v. Sweet, 166.
Loucks v. Chicago, etc., Ry. Co., 761.
v. Galloghy, 421.
Lough v. Davis, 563.
v. Outerbridge, 303.
Loughran v. Ross, 410.
Louisville Coffin Co. v. Warren, 601.
Louisville, etc., Co. v. Allen, 561.
Louisville, etc., Ferry Co. v. Nolan, 32, 653, 691.
Louisville, etc., Mail Co. v. Barnes, 103.
Louisville, etc., R. R. Co. v. Ader, 707.
v. Allen, 525, 526.
v. Banks, 533, 559.
v. Barkhouse, 425, 652.
v. Bean, 274, 277.
v. Bigger, 650.
v. Black, 736, 758.
v. Bryant, 700.
v. Buck, 49, 283.
v. Case, 285.
v. Caven, 513.
v. Clark, 142, 282.
v. Collins, 544.
v. Colston, 765.
v. Com., 702.
v. Coulton, 513.
v. Cowherd, 647.
v. Creek, 719.
v. Earl's Admx., 708.

[REFERENCES ARE TO PAGES.]

Louisville, etc., R. R. Co. v. Falvey, 127.
v. Faylor, 653, 690, 727.
v. Gerson, 632.
v. Gilbert, 722, 726.
v. Goetz, 760, 763.
v. Goody Koontz, 259, 264.
v. Hall, 317.
v. Hart, 745.
v. Hays, 583.
v. Hine, 13.
v. Johnson, 503, 525.
v. Jones, 691.
v. Keeper, 646.
v. Kelly, 657.
v. Lahr, 550, 554.
v. Lawson, 425, 434.
v. Lucas, 658.
v. Malone, 745.
v. Marbury Lumber Co., 744.
v. Martin, 678.
v. McElwain, 274.
v. Mississippi, 304.
v. Nitshe, 36, 742.
v. Northington, 544.
v. Orr, 512.
v. Owens, 724.
v. Petty, 542.
v. Phillips, 686.
v. Reese, 744.
v. Ritter's Admr., 653, 690.
v. Robinson, 544.
v. Rush, 284.
v. Sherrod, 724.
v. Sides, 735.
v. Smith, 47.
v. State, 304.
v. Stowell, 725.
v. Stutts, 531, 560.
v. Sullivan, 39.
v. Treadway, 655.
v. Utz, 511.
v. Webb, 760, 761.
v. Whitlow, 275.
v. Wilson, 303, 702.
v. Wynn, 650, 722, 723, 724.
Louisville, etc., T. Co. v. Jacobs, 606, 614.
Louisville Gas Co. v. Kaufman, 68, 699.
Louisville Press Co. v. Tennelly, 222, 249.
Louthan v. Hewes, 478.
Love v. Am. Mfg. Co., 536.
v. Atlanta, 74, 77, 79.
Lovejoy v. Campbell, 494.
v. Murray, 437.
v. Whitcomb, 208, 209.
Loveland v. Burke, 649.
v. Gardner, 609.
Loveless v. Fowler, 425.
Lovell v. DeBardelaben, etc., Co., 528, 717.
Loveridge v. Plaistow, 190.
Lovick v. Atlantic Coast Line R. R. Co., 169, 474, 488, 497.
Low v. Martin, 117.
Lowe v. Prospect Hill Cem. Ass'n, 579.
Lowell v. Boston, etc., R. R. Co., 484.
v. Gathright, 349.
v. Spaulding, 771.
Lower v. Franks, 673.
v. Segal, 275.
Lower Macungie v. Merkhoffer, 773.
Lowery v. Cate, 59.
v. Manhattan R. R. Co., 693.
v. Rowland, 143.
Lowremore v. Berry, 422.
Lowry v. Guilford, 670.
Lowther v. Earl of Radnor, 377.
Loyacano v. Jurgens, 490.
Lubricating Oil Co. v. Standard Oil Co., 69.
Luby v. Bennett, 185.
Lucas v. New Bedford, etc., R. R. Co., 701.
v. N. Y. Cent. R. R. Co., 278.
v. Sheridan, 423.
Lucey v. Hannibal Oil Co., 528.

[REFERENCES ARE TO PAGES.]

Lucke v. Clothing C. & T. Assembly, 291, 293.
Luckel v. Century Building Co., 663.
Lucy v. Chicago Gt. Western Ry. Co., 657.
Ludwig v. Cramer, 206.
Lueck v. Heister, 162, 170, 175, 179.
Lufton v. White, 116.
Luhrig Coal Co. v. Ludlum, 444.
Lukens v. Freiund, 445.
Lull v. Davis, 595.
v. Fox & Wis. Imp. Co., 95, 624.
Lumbard v. Stearns, 305.
Lumley v. Gye, 292.
Lummis v. Stratton, 441.
Lund v. Tyler, 152, 155.
Lunn v. Shermer, 443.
Lunsford v. Dietrich, 170, 179.
Lunt v. Brown, 414, 417.
v. London, etc., R. R. Co., 678.
v. Philbrick, 262.
Lupton v. Janney, 468.
Lurssen v. Lloyd, 606, 626.
Luther v. Arnold, 320.
v. Winnisimmet Co., 582.
v. Worcester, 771.
Luttin v. Benin, 190.
Luttrell v. Hazen, 493.
Lux v. Hagin, 591.
Lybe's Appeal, 589.
Lyberg v. Northern Pac. R. R. Co., 517, 533, 555.
Lyenberger v. Paul, 181.
Lyford v. Tyrrel, 190.
Lyke v. Van Leuven, 340.
Lyle v. Palmer, 409.
Lyman v. Boston, etc., R. R. Co., 746.
v. Phila., etc., R. R. Co., 701.
Lyme Regis v. Henley, 67.
Lynch v. Kineth, 344, 345.
v. Met. St. Ry. Co., 68, 70.
v. Nurdin, 31.
v. Smith, 715.
Lynchburg Cotton Mills v. Stanley, 523, 713.
Lynn v. Adams, 401.
v. Polk, 374.
Lyon v. Cleveland, etc., R. R. Co., 278.
v. Detroit, etc., R. R. Co., 559.
v. Fairbank, 119, 319.
v. Fishmongers Co., 371.
v. Lenon, 637.
v. Smith, 640.
v. Waldo, 469.
Lyons v. Cleveland, etc., R. R. Co., 278, 283.
v. Merrick, 338, 342.
v. Stratton, 204, 217.

M.

Mabie v. Mattieson, 594.
Mabry v. City Elec. Ry. Co., 656.
Macauley Bros. v. Tierney, 300.
Macdonald v. O'Reilley, 713.
Maci v. Boedker, 538, 700.
Mack v. Kelsey, 83, 157.
v. Sharp, 172.
Mackaboy v. Commonwealth, 162.
Mackenzie v. Mineral Spring Co., 195.
Mackey v. Com. Bank, 70.
v. Griffin, 165.
v. Vicksburg, 734.
Mackin v. Boston, etc., R. R. Co., 547.
v. Haven, 145.
Macklin v. Richardson, 353.
Madean v. Scripps, 224.
Macon v. Cook, 386.
v. Dykes, 32, 37.
v. Holcomb, 712.
v. Paducah St. Ry. Co., 751, 752.
Macon, etc., R. R. Co. v. Davis, 707.
v. Winn, 711.
Macullar v. McKinley, 459.
Macungie Tp. v. Mutchofer, 38.

[REFERENCES ARE TO PAGES.]

MacVeagh v. Hanford, 83, 90.
Madden v. Brown, 332.
v. Lancaster Co., 141, 147.
v. Occidental, etc., S. S. Co., 561.
Maddon v. Neal, 307.
Maddox v. Brown, 62.
Madigan v McCarthy, 412.
Madison v. Copper Co., 602.
v. Ducktown, etc., Co., 628, 629.
v. Pennsylvania R. R. Co., 170.
Madras R. Co. v. The Zemindar, 581.
Mad River, etc., R. R. Co. v. Barber, 518, 560.
Magar v. Hammond, 139, 736.
Maggart v. Freeman, 456.
Magee v. Holland, 259.
v. Pacific Imp. Co., 643.
v. Scott, 419.
Maglio v. N. Y. Herald Co., 247.
Magnay v. Burt, 192.
Magner v. Frankford Baptist Church, 736.
Magowan v. Rickey, 178.
Magrane v. St. Louis, etc., Ry. Co., 661, 663, 689.
Makepeace v. Worden, 333.
Mahaffy v. Byers, 171.
Mahan v. Brown, 2, 9, 21, 44.
Maher v. McGrath, 549.
v. Thropp, 514, 527.
Mahlen v. Lake Shore, etc., Ry. Co., 762.
Mahler v. New York, etc., Trans. Co., 134.
Mahon v. New York Cent. R. R. Co., 616.
Mahoney v. Cook, 49.
v. Dwyer, 344.
v. Libbey, 623.
v. San Francisco, etc., Ry. Co., 763, 764.
v. Whyte, 9.
Mahoning Val. Ry. Co. v. De Pascale, 155, 487, 657.
Maia v. Eastern State Hospital, 71.
Maine Water Co. v. Knickerbocker Steam Towage Co., 697.
Mains v. Whiting, 206.
Mainwaring v. Brandon, 105.
Mairs v. Manhattan R. E. Ass'n, 316.
Maisenbacker v. Soc. Concordia, 47.
Maitinez v. Bernhard, 343, 344.
Maitland v. Gilbert Paper Co., 517, 556.
Major v. Burlington, etc., Ry. Co., 271.
Malachy v. Soper, 248.
Malbie v. Belden, 546, 561.
Malcolmson v. O'Dea, 315.
v. Scott, 165.
Mali v. Lord, 489.
Malins v. Freeman, 48.
Malmberg v. Bartos, 62.
Malone v. Hathaway, 546.
v. Hawley, 560, 733.
v. Pittsburgh, etc., R. R. Co., 711.
v. Robinson, 424, 637
Maloney v. Bacon, 643, 645.
v. Taft, 639.
Malory v. Ferguson, 402.
v. Pioneer Press Co., 243
Malott v. Skinner, 272.
Maloy v. Wabash, etc., Co., 758.
Maltbie v. Belden, 505.
Maltby v. Chapman, 645.
Manby v. Scott, 57, 58.
Manchester v. Ericsson, 79, 767.
v. Hartford, 771.
Mangam v. Brooklyn R. R Co., 715.
v. Peck, 64.
Mangan v. Atterton, 323, 717.
Mangold v. Thorpe, 377.

[REFERENCES ARE TO PAGES.]

Mangum v. Bullion, etc., M. Co., 560.
Manhattan Bank v. Walker, 634.
Manitowoc M. Co. v. Milw. M. Co., 361.
Mann v. Locke, 130.
v. O'Sullivan, 552.
v. Weiand, 345, 346.
v. White River, etc., Co., 646.
v. Williamson, 341.
Manning v. Albee, 447, 448.
v. Brown, 157.
v. Louisville R. R. Co., 659.
v. Mitchell, 165.
v. Mitcherson, 413.
v. Wells, 642.
Manser v. Collins, 672.
Mansfield v. Balliett, 597.
v. Richardson, 706.
Mansfield Coal Co. v. McEnery, 287, 532.
Manthey v. Rauenbuehler, 709.
Montonya v. Emerich Outfitting Co., 435.
Manufacturers' Outlet Co. v. Longley, 293.
Manufacturing Co. v. Trainer, 357.
Manvell v. Thomson, 260.
Manwaring v. Jenison, 405.
Manwarren v. Mason, 257.
Manwell v. Briggs, 53.
Mapstrick v. Ramage, 298.
Mara v. Holbrook, 273.
Marble v. Ross, 52.
Marble Co. v. Black, 711.
Marbourg v. Smith, 185.
Marbury v. Madison, 375.
Marbury Lumber Co. v. Wesbrook, 522, 523.
Marcey v. Howard, 53.
Marcott v. Marquette, etc., R. R. Co., 699.
Marcus v. Bernstein, 181.
v. Rovinsky, 66.
Marion v. Chicago, etc., Ry. Co., 489, 496.
Mark v. Hudson, etc., Co., 110.
v. St. Paul, etc., Co., 711.
Markey v. Queens County, 766.
Markham v. Brown, 641.
v. Houston Direct Nav. Co., 720.
v. Jandon, 436.
Markin v. Priddy, 339.
Markley v. Snow, 171, 173, 183, 497.
Markoe v. Tiffany, 425.
Marks v. Cotton Mills, 533.
v. Hastings, 175.
v. Jaffa, 195.
v. Petersburg R. R. Co., 760, 762.
v. Robinson, 429.
v. Ryan, 410.
v. Sullivan, 161, 167, 378, 381.
v. Townsend, 158.
Marland v. Pittsburg, etc., R. R. Co., 762.
Marlin Fire Arms Co. v. Shields, 250.
Marlowe v. Rogers, 412.
Marmon v. Camden Interstate Ry. Co., 662.
Marquet v. La Duke, 350.
Marquette v. Chicago, etc., R. R. Co., 658.
Marquette, etc., R. R. Co. v. Spear, 706.
Marr v. Western Union Tel. Co., 729.
Marretta Casting Co. v. Hiestand Thuma, 293.
Marsan v. French, 605.
Marsel v. Bowman, 346, 347.
Marsh v. Billings, 357, 361.
v. Bristol, 319.
v. Chickering, 526.
v. Ellsworth, 225.
v. Falker, 462.
v. Gt. Nor. Paper Co., 33, 35.
v. Handy, 347.
v. Jones, 347.

[REFERENCES ARE TO PAGES.]

Marsh v. Lehigh Valley R. R. Co., 548.
v. Loader, 163.
v. Pier, 437.
Marshall v. Blackshire, 349.
v. Cohen, 578, 604, 620.
v. Gilman, 464.
v. Gunter, 227.
v. Hamilton, 403.
v. Hosmer, 91, 399.
v. Macon, etc., Co., 279.
v. Nicholls, 147.
v. Pinkham, 359.
v. Pontiac, etc., R. R. Co., 661.
v. Schricker, 128.
v. Steam Nav. Co., 315.
v. Stewart, 506.
v. Street Com., 111.
v. Thames, etc., Ins. Co., 222.
v. Welwood, 20, 749.
v. Wing, 57.
Marshelsea, Case of the, 379.
Marston v. Gale, 325.
Martell v. White, 299, 302.
Martens v. Reilly, 85, 86, 292, 296.
Martin v. Bigelow, 590.
v. Brooklyn, 80.
v. Collins, 161, 439.
v. Courtney, 672, 673.
v. Eagle Development Co., 461.
v. Gainesville, etc., R. R. Co., 109.
v. Golden, 83, 165, 167.
v. Jordan, 456.
v. Louisville, etc., R. R. Co., 559.
v. Mason, 429.
v. Martin, 468.
v. McCrary, 683, 744.
v. Paine, 207, 241.
v. Payne, 261.
v. Platt Val. Sheep Co., 339.
v. Press Pub. Co., 221.
v. Railway Co., 683.
v. Richards, 740.
v. Riddle, 583, 584, 595.
Martin v. Robson, 66, 255.
v. Southern Pac. Co., 253.
v. Waddell, 314.
Martinovitch v. Wooley, 683.
Marvin Safe Co. v. Ward, 775.
Marx v. Nelms, 426.
Maryland Steel Co. v. Marney, 39, 516, 709.
Marzetti v. Williams, 14, 210.
Maskell v. Barker, 184.
Masson v. Bovel, 467.
Mason v. Hawes, 321.
v. Hill, 23, 590.
v. Hoyle, 594.
v. Ide, 91.
v. Mason, 247.
v. Morgan, 340.
v. Thompson, 642, 643.
v. Union Pac. Ry. Co., 272.
Masonic Fraternity Temple Ass'n v. Collins, 663.
Massam v. Thorley's, etc. Co., 359.
Massey v. Goyder, 365.
v. Seller, 697, 731.
Massillon E. & T. Co. v. Akerman, 639.
Massuere v. Dickens, 215.
Mast v. Kern, 501, 539, 543, 546, 553, 559.
Mastad v. Swedish Brethren, 732.
Master v. Ill. Cent. R. R. Co., 546.
Master Builders' Ass'n v. Domascio, 289, 300.
Masters v. Miller, 11.
Masterson v. Eldridge, 530.
v. New York, etc., Co., 720.
Mastin v. Levagood, 731.
Mateer v. Brown, 642, 643.
v. Mo. Pac. Ry. Co., 139.
Matheis v. Mazet, 252.
Mather v. Hood, 162.
v. Ollerton, 152.
v. Rillston, 501, 519.
Matheson v. Kansas City, etc. R. R. Co., 276.
Mathew v. Ollerton, 51, 138.

[REFERENCES ARE TO PAGES.]

Mathews v. Beasel, 736.
v. Bliss, 464.
v. Case, 546.
v. Coe, 436.
v. Cowan, 60.
Mathewson, etc., Church v. Shepard, 369.
Mathis v. Southern Railway Co., 648.
Matta v. Chicago, etc., Ry. Co., 701, 712.
Matteson v. N. Y. Cent. R. R. Co., 253.
Matthew v. Centr. Pac. R. R. Co., 253, 256.
Matthews v. Belfast Mfg. Co., 594.
v. Clough, 558.
v. Delaware, etc., R. R. Co., 92, 93.
v. Huntley, 221.
v. Miss., etc., Ry. Co., 623.
v. Stillwater G. & E. I. Co., 614.
v. Treat, 314, 414.
v. Warner, 715.
Mattice v. Scutt, 157.
v. Wilcox, 206.
Mattingly v. Paul, 428.
Mattock v. Shaffer, 454.
Matts v. Hawkins, 367, 368.
Mauch Chunk v. Kline, 771.
Mauk v. Brundage, 230, 235.
Maulsby v. Reifsneider, 227.
Maurice v. Warden, 237.
Maury v. Coyle, 635.
Maus v. Springfield, 78, 767, 773.
May v. Anaconda, 145, 767.
v. Burdett, 350.
v. Jones, 399.
v. Smith, 524.
v. Walters, 191.
v. West Jersey, etc., R. R. Co., 285.
v. Wood, 291.
Mayall v. Higbey, 353.
Mayer v. Brensinger, 639, 640.
v. Salozar, 462.
v. Schleichter, 204.
v. Thompson-Hutchinson Bldg. Co., 96, 563.
v. Walter, 181, 187.
Mayhew v. Burns, 66, 717.
v. Herrick, 432, 433.
Maynard v. Maynard, 445.
v. Sigman, 174, 176.
Mayo v. Wright, 672.
Mayor v. Graham, 314.
Mayor of Colchester v. Brooke, 109, 702.
Mayor, etc., of Litchfield v. Simpson, 145, 148.
Mayo's Estate, 272, 273.
Mayott v. Norcross Bros., 518.
Mayrant v. Richardson, 240.
Mayton v. Texas, etc., R. R. Co., 473.
Max Meadows L. & L. Co. v. Bradley, 447.
Maxmillian v. New York, 74, 77.
Max Morris, The, 123, 703.
Maxwell v. Bay City, etc., Co., 324, 328.
v. Brown Shoe Co., 443.
v. Clarke Tp., 770.
v. Gerard, 644.
v. Hannibal, etc., R. R. Co., 516.
v. McAtee, 364.
v. Palmerston, 349.
McAdam v. Central Ry. & Elec. Co., 751, 752, 753.
McAdams v. Cates, 443.
v. Sutton, 346.
McAdoo v. Richmond, etc., R. R. Co., 689, 707, 712, 762.
McAleer v. Horsey, 9, 449, 455.
McAllister v. Clement, 400.
v. Simon, 638.
McAndrews v. Collerd, 607.
v. Elec. Tel. Co., 728.

[REFERENCES ARE TO PAGES.]

McAndrews v. Hamilton County, 71, 72, 474.
v. Mont. U. Ry. Co., 531.
McArthur v. St. Louis Piano Co., 147.
McAulay v. Birkhead, 261.
McAuley v. Boston, 771.
McAunich v. Mississippi, etc., R. R. Co., 276.
McBee v. Fulton, 221, 242.
McBride v. Ellis, 215.
v. Scott, 93, 103.
McCabe v. Montana Cent. Ry. Co., 503.
v. O'Connor, 53.
McCafferty v. Dock Co., 549.
v. Pa. R. R. Co., 32.
v. Spuyten Duyvil, etc., R. R. Co., 478.
McCaffery v. Mossberg & G. Mfg. Co., 774, 775.
McCaffrey's Appeal, 571, 606.
McCaffrey v. Smith, 333.
McCahill v. Kipp, 31.
McCaig v. Burr, 381.
McCaleb v. Smith, 205.
McCall v. Capehart, 311.
v. Chamberlain, 676.
v. Cohen, 374.
McCampbell v. Cunard S. S. Co., 507.
McCandless v. McWha, 670.
McCann v. Consolidated Traction Co., 491.
v. Hamilton, 573.
v. Strong, 573, 574, 575.
v. Tillinghast, 491.
v. Waltham, 80.
McCarragher v. Rogers, 523.
McCarrier v. Hollister, 480, 481.
McCarvell v. Sawyer, 734.
McCartney v. Garnhart, 355.
McCarty v. Rosewald, 417.
McCarthy v. Boise City Canal Co., 579, 706.
v. Chicago, etc., Co., 274.
McCarthy v. DeArmit, 100, 164.
v. McCarthy, 432.
v. Mulgrew, 529.
v. Niskern, 642.
v. Parish, 478.
v. Timins, 491, 494.
v. Whitcomb, 133.
McCaskill v. Elliott, 346.
McCaughey v. Tripp, 80.
McCauley v. Logan, 688.
McCaw v. Union Traction Co., 663.
McCharles v. Horn Silver Min., etc., Co., 517.
McClafferty v. Phillips, 170, 175.
McClary v. Lowell, 49.
v. Sioux, etc., R. R. Co., 38.
McClellan v. Jenness, 335.
v. Scott, 457.
McClelland v. St. Paul, etc., Ry. Co., 93, 94.
McClung v. Dearborne, 492.
v. Ross, 334.
McClure v. Hill, 380.
v. McMartin, 66.
McColligan v. Pennsylvania R. R. Co., 477.
McComb v. C. R. Brewer Lumber Co., 453.
McConeghy v. McCow, 420.
McConnel v. Lemley, 740.
McConnell v. Blood, 405.
v. Dewey, 401.
v. Kennedy, 166.
v. Norfolk, etc., R. R. Co., 651.
v. Wilcox, 467.
McCoon v. Smith, 57.
McCordle v. McGinley, 185.
McCorkle v. Burriss, 213.
McCormick v. Detroit, etc., Ry. Co., 655.
v. Kansas City, etc., R. R. Co., 585.
v. Malin, 469.
v. Sisson, 181.
v. Terre Haute, etc., R. R. Co., 146.

[REFERENCES ARE TO PAGES.]

McCormick Co. v. Willan, 185.
McCormick H. M. Co. v. Burandt, 537.
McCoy v. California, etc., R. R. Co., 676.
v. Trucks, 263.
McCracken v. Smathers, 673.
v. West, 457.
McCrary v. Beaudry, 305.
McCrea v. Marsh, 305.
McCready v. Phillips, 444.
v. So. Car. R. R. Co., 743.
McCrillis v. Cole, 408, 410.
McCrills v. Hawes, 104.
McCue v. Klein, 137, 138, 152.
v. National Starch Mfg. Co., 514.
McCullough v. Greenfield, 168.
v. Irvine, 337.
v. Rice, 174.
McCulloch v. Scott, 468.
McCutchen v. Currier, 142.
McCutcheon v. Homer, 72, 79.
McDade v. Chester, 76.
v. Washington, etc., R. R. Co., 508.
McDaniel v. Adams, 426.
v. Baca, 466.
v. Edwards, 262.
v. Tebbetts, 385.
McDavitt v. Boyer, 225, 226.
McDermott v. Am. Br. Co., 498.
v. San Francisco, etc., Co., 697.
v. State, 698.
v. Union Credit Co., 206.
McDonald v. Bayha, 423.
v. Buckley, 547.
v. Central of Ga. Ry. Co., 504.
v. Chicago, etc., R. R. Co., 655.
v. Eagle, etc., Co., 281.
v. Edwards, 291.
v. Franchere, 159, 488, 498.
v. Hazeltine, 542.
v. Hovey, 142.
v. Ill. Cent. R. R. Co., 290.
McDonald v. International, etc., Ry. Co., 681, 712.
v. Lane, 117.
v. Lindall, 363.
v. Lord, 219.
v. Mallory, 122.
v. Mich. Cent. R. R. Co., 511, 527, 558.
v. Norfolk, etc., R. R. Co., 532.
v. Nugent, 205, 224.
v. Oceanic Steam Nav. Co., 525.
v. Pittsburg, etc., Ry. Co., 274, 279.
v. Pittsfield, etc., R. R. Co., 343, 676.
v. Postal Tel. Co., 501, 503, 560.
v. Press Pub. Co., 215.
v. Red Wing, 329.
v. Snelling, 490, 775.
v. Southern Ry. Co., 279.
v. Standard Oil Co., 501, 529.
v. Sun Printing & Pub. Co., 245, 246.
v. Western R. R. Co., 651.
v. Wilkie, 440.
McDonough v. Gilman, 621.
v. Great Northern Ry. Co., 501, 519, 554.
McDougall v. Ashland, etc., Co., 698.
v. Cent. Pac. R. R. Co., 703.
McDuff v. Detroit Evening Jour. Co., 214.
McDuffee v. Railroad Co., 647.
McElfresh v. Kirkendall, 66.
McElhannon v. Farmers' Alliance, 422.
McElligott v. Randolph, 274, 520, 553, 561.
McEntee v. Bonacum, 269, 270.
McFadden v. Crawford, 406.
v. Jewell, 77, 79, 475.
v. Mo. Pac. Ry. Co., 724.
v. Robison, 442.

[REFERENCES ARE TO PAGES.]

McFadden v. Santa Ana, etc., Ry. Co., 255, 720.
McFarlan Carriage Co. v. Potter, 555.
McGahon v. Indianapolis Nat. Gas Co., 757.
McGarriety v. New York, etc., R. R. Co., 509.
McGarry v. Healey, 232.
McGary v. West Chicago St. R. R. Co., 31.
McGattrick v. Wason, 514.
McGaw v. Hamilton, 230, 234.
McGehee v. Insurance Co., 229.
v. Shafer, 98, 101, 103.
McGettigan v. Potts, 365.
McGill v. Chilhowee L. Co., 435.
McGilvray v. West End. St. Ry. Co., 489.
McGinn v. McCormick, 503, 558.
McGinnis v. Can. Sou. Bridge Co., 522.
v. Knapp, 218.
v. Missouri Car, etc., Co., 147, 275.
McGinty v. Athol Reservoir Co., 555.
McGonigle v. Atchison, 135.
McGorty v. Southern New Eng. Tel. Co., 504.
McGough v. Wellington, 382.
McGovern v. Central Vt. R. R. Co., 501, 520, 539.
McGowan v. Independent Order of Foresters, 455.
v. St. Louis, etc., R. R. Co., 555.
McGowen v. Morgan's La., etc., Co., 659.
McGown v. International, etc., Ry. Co., 283.
McGrath v. New York, etc., R. R. Co., 685.
McGraw v. Balt., etc., R. R. Co., 649.
McGregor v. Hall, 390.
McGrell v. Buffalo Office Bldg. Co., 664.
McGruder v. Russell, 394.
McGuinty v. Herrick, 88, 438.
McGuire v. Bell Tel. Co., 503.
v. Grant, 364, 478.
v. Kiveland, 12.
v. Ringrose, 345.
v. Spence, 768.
v. Vicksburg, etc., R. R. Co., 708.
McHenry v. Sneer, 86.
McHugh v. Northern Pac. Ry. Co., 96.
v. Schlosser, 285, 287, 642.
McIlvaine v. Lantz, 347.
McInerney v. Delaware & H. C. Co., 475.
McIntire v. Blakely, 428.
v. Roberts, 609, 733.
McIntyre v. Sholty, 55, 56.
v. Southern Ry. Co., 96.
v. Trumbull, 91.
v. Weinert, 214, 234.
McIver v. Estabrook, 411.
v. Reagan, 141.
McKay v. N. E. Dredging Co., 272, 285, 286, 287.
v. Southern Bell Tel Co., 753.
v. State, 150.
McKee v. Delaware, etc., Co., 594.
v. Eaton, 450.
v. Ingalls, 63.
v. Tourtellotte, 533, 541.
v. Wilson, 200.
McKeen v. Converse, 119.
McKeever v. Homestake M. Co., 528, 697.
McKelvey v. McKelvey, 157, 264
McKenna v. Boessler, 37, 746.
v. Bridgewater Gas Co., 756
v. Heinlen, 185.
McKenzie v. Cheetham, 741.
v. Chovin, 401.
v. Denver Times, 209.
v. Rothschild, 443, 444.

[REFERENCES ARE TO PAGES.]

McKeon v. Chicago, etc., Ry. Co., 665.
v. See, 605, 606.
McKeowan v. Johnson, 63.
McKibbin v. Great Northern Ry. Co., 660.
McKillop v. Reich, 639.
McKimble v. Boston, 703.
McKinney v. Monon Nav. Co., 146.
v. Neil, 691.
McKinnon v. Riter-Conley Mfg. Co., 535, 540.
McKinster v. Sager, 289.
McKnight v. Thompson, 447.
McKnown v. Hunter, 179.
McKone v. Mich. Center R. R. Co., 323, 732.
McKune v. Santa Clara, etc., Co., 679.
McLaine v. Head, etc., Co., 521, 542, 546, 552, 553.
McLane v. Perkins, 704.
McLaughlin v. Camden Iron Works, 514.
v. Charles, 228.
v. Corry, 771.
v. Cowley, 228.
v. Fisher, 217, 220.
v. Kemp, 348.
v. Louisville Elec. Lt. Co., 751, 753.
v. Schnellbacker, 197, 219.
v. Waite, 416, 419.
McLean v. Cook, 439.
v. Fleming, 355, 360.
McLeod v. Fortune, 87.
v. Ginther, 547.
v. Jones, 113.
v. R. R. Co., 136.
McLimans v. Lancaster, 766.
McMahon v. Davidson, 516.
v. Dubuque, 81.
v. Nor. Cent. R. R. Co., 700.
v. O'Donnell, 559.
McManus v. Crickett, 62, 489.
v. Lee, 98.
McMaster v. Ill. Cent. R. R. Co., 542, 548.
McMenomy v. Band, 628.
McMillan v. Birch, 206, 227.
v. Michigan, etc., R. R. Co., 648, 652.
v. Spider Lake, etc., Co., 279.
v. Staples, 44.
McMorran v. Fitzgerald, 601.
McMurrin v. Rigby, 151.
McNab v. Bennett, 190.
v. Robertson, 587.
McNally v. Burleigh, 241.
McNamara v. N. P., etc., R. R. Co., 699.
McNamee v. Christhelf, 186.
McNee v. Coburn Trolly Track Co., 663.
McNeil v. Crucible Steel Co., 749.
McNeil v. Dunham, etc., R. R. Co., 727.
v. Railroad Co., 655.
McNemar v. Cohn, 96.
McNevins v. Lowe, 675.
McNulta v. Lockbridge, 654.
McNulty v. Walker, 171.
McOsker v. Burrell, 386.
McPartland v. Read, 429.
McPheeters v. Hannibal, etc., R. R. Co., 689.
McPherson v. Ackee, 364.
McPherson v. District of Columbia, 766, 773.
v. James, 119.
v. Runyon, 185.
v. State, 154, 156.
McPheters v. Moose River, etc., Co., 610.
McQueen v. Fulghman, 203.
v. Mechanics Institute, 520.
v. New, 133.
McQuilken v. Cent. Pac. R. R. Co., 703.
McQuire v. Western Morning News Co., 245.
McRickard v. Flint, 679, 685.

[REFERENCES ARE TO PAGES.]

McVey v. Manatt, 99, 102.
McWhirten v. Newell, 267.
McWilliams v. Hoban, 171.
Meacham v. Galloway, 641.
Mead v. Bunn, 457.
v. Pollock, 119.
Meader v. Stone, 321.
Meador v. Lake Shore, etc., Ry. Co., 531, 558.
Meagher v. Driscoll, 267, 269.
Means v. Southern Cal. Ry. Co., 735.
Mears v. Dole, 579.
v. New York, etc., R. R. Co., 649.
Meas v. Johnson, 209.
Medbury v. Matson, 449, 460.
Meegan Bros. v. McKay, 344.
Meehan v. Morewood, 498.
Meeker v. Van Rennsselaer, 110, 111.
Meeks v. So. Pac. R. R. Co., 716.
Meers v. McDowell, 259, 747.
Meibus v. Dodge, 565.
Meier v. Morgan, 482.
v. Pennsylvania R. R. Co., 654, 691.
v. Shrunk, 345, 679.
Meig's Appeal, 407.
Meigs v. Lister, 603, 604.
Meill v. Eastern R. R., 281.
Meixell v. Kirkpatrick, 436.
Meixhall v. Morgan, 584.
Melchert v. Smith Brewing Co., 518.
Mellick v. Pennsylvania R. R. Co., 609.
Mellott v. Louisville, etc., R. R. Co., 509.
Melody v. Chandler, 420.
v. Reab, 120.
Melville v. Brown, 439.
Memphis, etc., R. R. Co. v. Greer, 563.
v. Thomas, 516.
v. Womack, 753.
Memphis News Pub. Co. v. Southern Ry. Co., 303.
Memphis St. Ry. Co. v. Haynes, 678, 685.
Mendenhall v. Klinck, 324.
v. North Car. R. R. Co., 287.
v. Stewart, 85, 87.
Meneely v. Meneely, 358.
Meneley v. Carson, 109.
Menger v. Laur, 701.
Menster v. Sargeant, 462.
Mentzer v. West. U. Tel. Co., 6, 8, 25.
Mercer v. Corbin, 151.
v. McWilliams, 329.
v. Walmsley, 261.
Merchant v. Pielke, 175.
Merchants' Despatch Co. v. Smith, 649.
Merchants' Dispatch Trans. Co. v. Boch, 646, 722, 723.
v. Leysor, 724.
Merchants, etc., Oil Co. v. Burns, 521.
Merchants Ins. Co. v. Buckner, 212.
Merchants' Nat. Bank v. Carhart, 634.
v. Guilmartin, 633, 634.
Merchants & Planters Bank v. Meyer, 421, 424, 428.
Meredith v. Cranberry Coal & I Co., 701.
v. Reed, 347.
Mergenthaler v. Kirby, 735.
Meriden Britannia Co. v. Parker, 355, 358.
Meridian Fair, etc., Ass'n v. North Birmingham St. Ry. Co., 639.
Merkle v. Bennington, 276.
Mernin v. Cory, 673.
Merriam v. Cunningham, 61.
v. Mitchell, 179.
Merrick's Estate, 437.
Merrick v. Wallace, 390.
Merrifield v. Lombard, 596, 599,

[REFERENCES ARE TO PAGES.]

Merrifield v. Worcester, 597, 599.
Merrill v. Bassett, 682, 687.
v. Berkshire, 143.
v. Goodwin, 413.
v. Grinnell, 659.
v. Hampden, 704.
v. Oregon Short Line, 520, 535, 554.
v. St. Louis, 66.
Merrillat v. Plummer, 448.
Merrills v. Tarriff Manufacturing Co., 126.
Merritt v. Brinkerhoff, 592, 594.
v. Claghorn, 642, 643.
v. Earle, 13.
v. Hill, 339.
v. Judd, 410.
v. McNally, 392.
v. Niles, 398.
v. Parker, 595.
Merryweather v. Nixon, 99, 104.
Mershon v. Hobensack, 646.
Mesher v. Iddings, 174.
Messenger v. Gordon, 683.
v. Penn. R. R. Co., 647.
v. State, 306.
Messinger's Appeal, 593.
Metcalf v. Hess, 643.
v. Times Pub. Co., 242, 243, 244.
Metcalfe v. Cunard S. S. Co., 735.
v. Dickman, 431.
Meteye v. Times D. Pub. Co., 228.
Metropolitan Ass'n v. Petch, 371.
Metropolitan Life Ins. Co. v. Miller, 171.
Metropolitan Sav. Bank v. Marrien, 603.
Metropolitan St. R. R. Co. v. Powell, 719.
Metzger v. Hochrein, 10, 21, 45.
v. Post, 315.
v. Schnabel, 641.
Mewhirter v. Hatten, 66, 67.
Mexican Central Ry. Co. v. Jones, 133.
Mexican Nat. Ry. Co. v. Mussette, 516.
Meyer v. Metzler, 578, 606.
v. Milwaukee, etc., Co., 32.
Meyrose v. Adams, 248.
Michalover v. Moses, 439.
Michael v. New York Cent. R. R. Co., 649.
v. Roanoke M. Works, 539.
v. Stanley, 522.
Michigan City v. Boeckling, 766, 769.
Michigan Cent., etc., R. R. Co. v Smithson, 512.
v. Coleman, 256.
v. Dolan, 516.
v. Hale, 647.
Mich., etc., R. R. Co. v. Fisher, 75, 339.
v. Shurtz, 650.
Michoud v. Girod, 468.
Mickel v. York, 607.
Middlebury v. Haight, 394.
Middendorf v. Schulz, 706.
Middleton v. Booming Co., 613.
v. Nichols, 262.
Middlesex Co. v. McCue, 569, 570.
Midland Ins. Co. v. Smith, 11.
Midland Pub. Co. v. Implement T. J. Co., 214.
Mielke v. Chicago, etc., Ry. Co., 506, 530.
Mighell v. Stone 261, 262.
"Mikado" Case, The, 353.
Mikoljczak v. N. Am. Chem. Co., 507, 553.
Milam v. Burnsides, 236.
Milburn v. Cedar Rapids, 612.
Miles v. Postal Tel. Cable Co., 751, 754.
Millar v. Allen, 428.
v. Taylor, 8.
Miller v. Barber, 469.
v. Beck, 84, 103, 104.
v. Black Rock, etc., Co., 46, 587, 588.

[REFERENCES ARE TO PAGES.]

Miller v. Bradford, 390.
v. Brown, 368.
v. Burch, 109, 111.
v. Burlington, etc., R. R. Co., 68.
v. Casco, 19.
v. Central R. R. Co., 548.
v. Chicago, etc., R. R. Co., 140.
v. Fano, 167.
v. Fenton, 98.
v. Hahn, 161, 439.
v. Hancock, 741.
v. Highland Ditch Co., 95, 623.
v. Horton, 374.
v. Hyde, 437.
v. Inman, 560.
v. King, 131.
v. Louisville, etc., Ry. Co., 719.
v. Martin, 742.
v. Miller, 131, 317, 591.
v. Missouri Pac. R. R. Co., 503.
v. Newport News, 75.
v. Ocean S. S. Co., 690.
v. Ouray Elec. L. & P. Co., 754.
v. Parish, 202.
v. Peeples, 645.
v. Phoenix Ins. Co., 97.
v. State, 113, 154.
v. St. Louis, etc., Ry. Co., 744.
v. Sweitzer, 64.
v. Thomas, 507.
v. Thompson, 426.
Millhiser v. Willard, 603, 611.
Millett v. Puget Sound I. & S. Works, 543.
Milligan v. Wehinger, 341.
Milliken v. Long, 261, 262.
Mills v. Armstrong, 719.
v. Brooklyn, 77, 79.
v. Collett, 377.
v. Graham, 56, 61.
v. Hall, 626.
v. U. S. Printing Co., 293.
v. Wooten, 112.
Milman v. Shockley, 565.
Milner & Kettig Co. v. DeLooch Mill Mfg. Co., 428.
Milwaukee, etc., R. R. Co. v. Arms, 127, 689.
v. Kellogg, 36.
Millwood v. DeKalb County, 766.
Mims v. Mims, 390.
Miner v. Buffalo, etc., R. R. Co., 585.
v. Connecticut Riv. R. R. Co., 139.
v. Detroit, etc., Co., 241.
Ming v. Woolfolk, 22.
Minneapolis v. Lundin, 539.
Minneapolis Mill Co. v. Wheeler, 105.
Minnich v. Lancaster, etc., Ry. Co., 100.
Minnis v. Johnson, 104.
Minor v. Sharon, 607.
v. Staple, 642.
Minshall v. Lloyd, 410.
Minter v. Bradstreet Co., 69, 209.
Minty v. Union Pac. Ry. Co., 528, 561.
Mirkil v. Morgan, 628.
Missano v. New York, 77, 79.
Mississinewa Min. Co. v. Patton, 756.
Miss. Cent. R. R. Co. v. Caruth, 595.
v. Mason, 595, 704.
Mississippi, etc., Co. v. Dwyer, 547.
Mississippi etc., R. R. Co. v. Archibald, 595.
Mississippi Riv. Logging Co. v. Schneider, 513, 532.
Missouri, etc., Ry. Co. v. Edwards, 739.
v. Haning, 536, 560.
v. Lyde, 512.
v. Prickett, 529, 555, 557.
v. Rodgers, 713.
v. Warner, 497.

[REFERENCES ARE TO PAGES.]

Missouri Malleable Iron Co. v. Dillon, 503, 504, 558.
Missouri Pac. Ry. Co. v. Baxter, 512, 529, 532.
v. Brazil, 140.
v. Callbreath, 522.
v. Columbia, 697.
v. Cornwall, 726.
v. Douglass, 650.
v. Edwards, 723, 726.
v. Harris, 650.
v. Ivy, 726.
v. Lee, 763.
v. McElyer, 528.
v. Moffatt, 286.
v. Renfro, 583.
v. Richmond, 231, 232, 234.
v. Rodgers, 495, 711.
v. Watts, 524.
v. Williams, 520, 544.
Missouri Val. R. R. Co. v. Caldwell, 724.
Mitchell v. Allen, 103.
v. Billingsley, 412.
v. Bradstreet Co., 209, 239.
v. Charleston L. & P. Co., 752.
v. Cockburne, 104.
v. Commonwealth, 395.
v. Crassweller, 491.
v. Darley M. C. Co., 141.
v. Galen, 381.
v. Gambill, 155.
v. Hindman, 671.
v. Jenkins, 180.
v. Logan, 171.
v. Marker, 654.
v. McDougall, 443.
v. Mitchell, 319.
v. N. Y. Cent., etc., R. R. Co., 285, 585,
v. Rochester Ry. Co., 28.
v. Rome, 366.
v. Southern Pac. R. R. Co., 690, 711.
v. S. W. R. R. Co., 186.
v. Thomas, 419, 423, 428.
Mitchinson v. Cross, 178.
Mizell v. McGowan, 584.
Mizner v. Kussell, 444.
Moberly v. Preston, 247.
Mobile, etc., R. R. Co. v. Ashcroft, 700.
v. Copeland, 651.
v. Hopkins, 722.
v. Malone, 679.
v. Prewitt, 637.
v. Stinson, 744, 745.
v. Stroud, 686.
v. Thomas, 510, 517.
v. Vallowe, 537.
v. Wilson, 705.
Mobile Ins. Co. v Brame, 271.
Mobile Life Ins. Co. v. Randall, 12, 14.
Mock v. Santa Rosa, 387.
Modisett v. McPike, 252.
Moeller v. Philadelphia, 611.
Moellering v. Evans, 365.
Moffatt v. Kenny, 736.
Moffett v. Brewer, 109, 111.
Moffit v. Asheville, 73, 80, 474.
Mogul S. S. Co. v. McGregor, 302.
Mohr v. Gault, 566.
v. Williams, 674.
Mohry v. Hoffman, 261.
Moir v. Hopkins, 493.
Moiser v. Caldwell, 590.
Molm v. Barton, 428.
Monaghan v. Cox, 175.
Monat v. Wood, 83, 99.
Monell v. Colden, 453.
Money v. Lower Vein, etc., Co., 531.
Monies v. Lynn, 772.
Monk v. New Utrecht, 769.
v. Packard, 576, 577.
Monks v. Monks, 205.
Monmouth M. & M. Co. v. Erling, 513.
Monongahela v. Fischer, 701.
Monroe v. Collins, 388.
v. Pritchett, 461.

[REFERENCES ARE TO PAGES.]

Monson v. Lathrop, 198.
v. Rouse, 83, 99.
Monson Mfg. Co. v. Fuller, 580.
Montieth v. Kokomo W. E. Co., 536.
Montfort v. Hughes, 96.
Montgomery v. Brush, 420, 421.
v. Knox. 213.
Montgomery Coal Co. v. Baringer, 533, 562.
Montgomery, etc., Co. v. Chambers, 703.
Montgomery, etc., Ry. Co. v. Kolb, 650.
Montreal Riv. L. Co. v. Mihills, 461.
Monument Nat. Bank v. Globe Works, 68, 69.
Moody v. Baker, 211.
v. Deutsch, 188.
v. Drown, 430, 435.
v. Hamilton Mfg. Co., 539, 542.
v. State Prison, 71.
Moon v. McKinstry, 450.
v. Towers, 62.
Mooney v. Broadway, 395.
v. Luzerne, 751, 754.
v. Miller, 443, 447, 449.
Moore v. Allegany City, 439.
v. Ames, 377.
v. Appleton, 99, 106.
v. Bowman, 116.
v. Boyd, 321.
v. Cains, 455.
v. Central R. R. Co., 701.
v. Crawford, 55.
v. Dispatch Print. Co., 242.
v. Douglas, 317.
v. Eastman, 57, 59.
v. Eldred, 426.
v. Erie R. R. Co., 117.
v. Fitchburg R. R. Co., 486.
v. Francis, 208, 209, 212, 218.
v. Gadsden, 148.
v. Goedel, 580.
v. Howe, 456, 467, 468.
Moore v. Jarrett, 399.
v. Kansas City, etc., R. R. Co., 764.
v. Langdon, 621.
v. Leader Pub. Co., 244.
v. Logan, etc., Co., 617.
v. Long Beach Development Co., 641.
v. Manuf. Nat. Bank, 225, 229, 232.
v. Met. R. Co., 486.
v. Monroe Refrigerator Co., 430.
v. Northern Pac. R. R. Co., 174, 175.
v. Pickering Lumber Co., 561.
v. Recek, 447, 456.
v. Rowbotham, 248.
v. Stevenson, 224.
v. Townshend, 337, 482.
v. Wabash Ry. Co., 527.
v. Walker, 419, 432.
v. Webb, 602.
v. White, 145.
Moore Lime Co. v. Johnston, 562.
v. Richardson, 521, 546.
Moores v. Winter, 397, 440.
Moorman v. Wood, 670.
Mootry v. Danbury, 80.
Morain v. Devlin, 55.
Moran v. Brown, 514.
v. Corliss Steam Engine Co., 509, 751.
v. Dunphy, 291.
v. Pullman Palace Car Co., 739.
v. Rockland, etc., St. Ry. Co., 520.
v. Smell, 46.
Morasse v. Brocher, 207.
Morbach v. Home Min. Co., 531.
More v. Perry, 312.
Morehouse v. Terrill, 292.
Moressey v. Prov., etc., R. R. Co., 677.
Moret v. Mason, 118, 437.

[REFERENCES ARE TO PAGES.]

Moreton v. St. Anthony, 766.
Morewood v. Wakefield, 349.
Morey v. Fitzgerald, 329.
v. Morning Jour. Ass'n, 215, 222.
Morgan v. Andrews, 213, 292.
v. Bowman, 484.
v. Chester, 91, 101.
v. Dinges, 447.
v. Dudley, 388.
v. Duffy, 180.
v. Gregg, 436.
v. Hudnell, 338, 340.
v. Kendall, 151.
v. Kennedy, 66, 202.
v. Martin, 258.
v. Penn., etc., Co., 734.
v. Railway Co., 543, 547.
v. Ross, 262.
v. Saks, 663.
v. Skiddy, 458.
v. Smith, 484, 549.
v. So. Pac. Co., 284, 285.
v. Vale of Neath Ry. Co., 552.
Morgan Envelope Co. v. Walton, 359.
Morgridge v. Providence Tel. Co., 546, 554.
Morier v. St. Paul, etc., Ry. Co., 492.
Morison, etc., Co. v. Fuller, 579.
Moriss Bros. v. Bowers, 501.
Morley v. Pragnal, 603.
Morningstar v. Cunningham, 429.
Morrill v. Palmer, 265.
Morris v. Board of Com'rs, 81.
v. Brokley, 105.
v. Brown, 682, 683.
v. Carey, 386.
v. Chicago, etc., Co., 275.
v. Fraker, 339.
v. Hall, 430.
v. Lake Shore, etc., Ry. Co., 710.
v. Missouri Pac. Ry. Co., 134, 135.
Morris v. Morris, 266.
v. People, 376.
v. Platt, 20, 158.
v. Spartenburg, etc., Co., 277.
v. Western Union Tel. Co., 48.
Morris Bros. v. Bowers, 504.
Morris Canal v. Ryerson, 621.
Morris, etc., R. R. Co. v. Ayres, 652.
v. Newark, 612.
Morriseti v. Canadian Pac. Ry. Co., 133, 134.
Morrissey v. Bridgeport Traction Co., 696, 701.
Morrison v. Adoue, 460, 461, 462.
v. Burgess Sulphite Fibre Co., 519.
v. Berry, 408.
v. Bucksport, etc., R. R. Co., 587.
v. Burgess S. F. Co., 500.
v. Davis, 38, 648.
v. McDonald, 377, 386.
v. Northern Pac. Ry. Co., 96.
v. Rogers, 130.
v. Smith, 215, 221.
Morrison, etc., Co. v. Lingane, 210.
Morrow v. Atlanta, etc., R. Co., 659.
v. Wood, 160, 308.
Morse v. Benson, 362, 363.
v. Chesapeake, etc., Ry. Co., 28.
v. Copeland, 326.
v. Nixon, 344, 565.
v. Reed, 162.
v. Richmond, 770.
v. Times Rep. P. Co., 209, 213, 218, 244.
Morseman v. Manhattan Ry. Co., 693.
Mortin v. Shoppe, 150.
Morton v. Detroit, etc., R. R. Co., 508, 525, 527.
v. Met. Life Ins. Co., 69.

[REFERENCES ARE TO PAGES.]

Morton v. New York, 614.
v. W. U. Tel. Co., 26.
v. Young, 181.
Moses v. Arnold, 132.
v. Boston, 652.
v. Louisville, etc., R. R. Co., 655.
v. Mead, 445.
v. Pittsburgh, etc., R. R. Co., 612.
v. State, 569, 603.
Mosher v. Jewett, 120.
v. Post, 448.
Mosier v. Stoll, 218.
Mosley v. Yearwood, 177.
Mosnat v. Snyder, 206.
Moss v. Cummings, 373.
v. Harwood, 213, 220.
v. Pacific R. R. Co., 516.
v. Pardridge, 343.
Mostyn v. Fabrigas, 133, 377.
Motes v. Bates, 176.
Motley v. Warehouse Co., 637.
Mott v. Comstock, 208.
v. Consumers' Ice Co., 488.
v. Dawson, 232.
Mottram v. Heyer, 652.
Moulton v. Ball, 175.
v. Libbey, 314, 315.
v. Moore, 340.
v. Norton, 398.
v. Sanford, 769.
v. Searborough, 81.
v. St. Paul, etc., R. R. Co., 722, 724.
Mound City, etc., Co. v. Coulon, 492.
Mountain v. Day, 447.
Mountain Copper Co. v. United States, 629.
Mouton v. Louisville, etc., R. R. Co., 721.
Mouson v. Boehm, 356.
v. Lathrop, 206.
Mower v. Leicester, 72, 766.
v. Watson, 227.
Mowers v. Fethers, 643.
Mowry v. Chaney, 253.
v. Raabe, 209.
v. Whipple, 172, 179.
Moyle v. Drake, 181.
Moynihan v. Hills Co., 508, 527.
Mudd v. Rogers, 204, 210, 217.
Mueller v. Mil. St. Ry. Co., 41.
Muetze v. Tuteur, 215.
Mugford v. Richardson, 318.
Muhl v. Southern, etc., R. R. Co., 279.
Muhs v. Fire Ins. Salvage Corps, 709.
Mulberry v. Fuelhart, 165, 167.
Mulcahy v. Washburn Car Wheel Co., 283.
Mulchey v. Methodist R. Soc., 778.
v. Washburn, etc., Co., 273.
Muldoon v. Rickey, 187.
v. Seattle City Ry. Co., 727.
Mulhall v. Fallon, 279.
Mulherrin v. Delaware, etc., R. R. Co., 559, 686, 707.
Mullan v. Phila., etc., R. R. Co., 514.
Mullen v. Brown, 158.
v. Ensley, 637.
v. Old Col. R. R. Co., 140.
v. Owasso, 718.
v. St. John, 685.
Muller v. McKesson, 139, 345, 348.
Mulligan v. New York, etc., R. R. Co., 487, 497.
Mullin v. Cal. Horseshoe Co., 500, 508, 528, 533.
v. Flanders, 672.
Multnomah Co. v. Kelly, 147.
Mulvehall v. Millward, 261.
Mumford v. McKay, 433.
v. Tolman, 448.
v. Whitney, 324, 326.
Mumpower v. Bristol, 599.
Munday v. Landry, 155.
Mundt v. Glakner, 278.
Munger v. Hess, 62.

[REFERENCES ARE TO PAGES.]

Munn v. Reed, 349.
Munns v. Dupont, 180.
Munos v. So. Pac. Co., 142.
Munro v. Pacific C. D. & R. Co., 272, 273.
Munster v. Lamb, 227.
Murchison v. Sergent, 644.
Murdock v. Warwick, 769.
Murphy v. Chicago, etc., R. R. Co., 702, 704.
v. Deane, 702.
v. Fond du Lac, 125.
v. Greeley, 683.
v. Hobbs, 127, 179.
v. Indianapolis, 78.
v. Kelly, 583.
v. Larson, 174.
v. Marston Coal Co., 531, 537.
v. Martin, 158.
v. New York, 688.
v. New York, etc., R. R. Co., 273.
v. Ramsey, 388.
v. Sioux City, etc., Co., 415.
v. Smith, 521.
v. St. Louis Transit Co., 561, 711.
v. Wilson, 99.
v. Beckwith, 452.
Murray v. Boston Ice Co., 31.
v. Boyne, 155.
v. Burling, 421.
v. Chicago, etc., Ry. Co., 141.
v. Clarke, 645.
v. Commonwealth, 154.
v. Denver, etc., R. R. Co., 561.
v. Dwight, 471.
v. Lithographic Co., 195.
v. Lovejoy, 87, 90, 102.
v. Mace, 89.
v. Marshall, 645.
v. McShane, 608, 634.
v. Mills, 377.
v. Omaha, 73, 474.
v. Railroad Co., 541, 543.
v. Sou. Car. R. R. Co., 339.
Murray v. Tolman, 448.
v. Usher, 563.
v. Young, 345.
Murtagh v. St. Louis, 77.
Murtha v. Lovewell, 616.
Musgrave v. Sherwood, 367.
Musgridge v. Eveleth, 414.
Mushinski v. Vincent, 529.
Muskegon Booming Co. v. Evart Booming Co., 612, 613.
Musselman v. Galligher, 256.
Musser's Executor v. Chase, 675.
Mussey v. Scott, 157, 318.
Mussman v. Ihlenfeldt, 171.
Mutual Fire Ins. Co. v. Showalter, 56.
Myer v. Hobbs, 366, 478.
Myers v. Chicago, etc., Ry. Co., 275.
v. Cottrill, 643.
v. Fritz, 581.
v. Holborn, 271.
v. Kaichen, 239.
v. Longstaff, 241.
v. Malcolm, 607.
Myhan v. La. Elec. L. & P. Co., 504, 519, 533.
Mykleby v. Chicago, etc., Ry. Co., 659.
Mylander v. Beimschla, 618.
Myning v. Detroit, etc., R. R. Co., 285.
Myrick v. Mich. Cent. R. R. Co., 651.

N

Nadan v. White Riv. Lumber Co., 503, 523.
Nagel v. Missouri Pac. R. R. Co., 280, 737.
Nagle v. Cal. So. R. R. Co., 653, 654.
Navin v. Ewalt, 454.
Nall v. Louisville, etc., Ry. Co., 527, 544, 553.

[REFERENCES ARE TO PAGES.]

Nanson v. Jacob, 430.
Napier v. Bulwinkle, 366, 369.
Narramore v. Cleveland, etc., Ry. Co., 537.
Nash v. Jewett, 61.
v. Minn. Title Ins. & T. Co., 454.
v. Muldoon, 395.
Nashua I. & S. Co. v. Worcester, etc., R. R. Co., 106.
Nashville, etc., R. R. Co. v. Carroll, 547, 712.
v. Comans, 679.
v. Jones, 100.
v. Smith, 281, 677, 712.
v. Stone, 722.
Nass v. Schulte, 687.
Nat. Bank v. Graham, 633.
v. Mackey, 453.
v. North, 406.
v. Taylor, 465.
Nat. Biscuit Co. v. Nolan, 525.
National Copper Co. v. Minn., etc., Co., 22, 579.
National Fertilizer Co. v. Travis, 517, 555.
National Fire Ins. Co. v. Denver Con. Elec. Co., 755.
Nat. Line, etc., Co. v. Smart, 652.
National Protective Ass'n v. Cumming, 18, 295.
National Surety Co. v. Mabrey, 170, 174, 176.
National Syrup Co. v. Carlson, 504.
National Tel. Co. v. Baker, 755, 782.
National Transit Co. v. Weston, 423.
Naulty v. Bulletin Co., 220.
Nauman v. Oberle, 460, 461.
Navarino v. Dudrop, 182.
Nave v. Flack, 733.
Naxon v. Remington, 257.
Naylor v. Dennie, 653.
Neaf v. Palmer, 566.
Neal v. Gillett, 57.
Neal v. Henry, 604.
v. Joyner, 163.
v. Northern Pac. R. R. Co., 542, 549, 555.
v. Ohio Riv. R. R. Co., 533.
Nebraska v. Campbell, 767.
Necker v. Bates, 174.
v. Harvey, 776.
Neeb v. Hope, 241.
Needham v. Hill, 433.
v. Grand Trunk, etc., Co., 274, 285.
v. King, 742.
Neely v. Ft. Worth, etc., Ry. Co., 37.
v. S. W. Cotton S. O. Co., 528, 562.
Negley v. Farrow, 241, 244.
v. Lindsay, 469.
Negus v. Becker, 369.
Nehrbus v. Central Pac. R. R. Co., 761.
Nehrling v. Herald Co., 207.
Neighbors v. Neighbors, 269, 270.
Neill v. Duke of Devonshire, 315.
Neiler v. Kelley, 435.
Neilson v. Brown, 273.
v. Hillside C. & I. Co., 523.
v. Slade, 433.
Neily v. S. W. Cotton Seed Oil Co., 501.
Nelson v. Anderson, 429.
v. Borchenius, 208.
v. Branford L. & W. Co., 751, 752.
v. Brown, 637.
v. Canisteo, 767.
v. Carlson, 451.
v. Chesapeake, etc., R. R. Co., 275.
v. Chicago, etc., Ry. Co., 20.
v. Cook, 89, 98, 105.
v. Crawford, 26.
v. Galveston, etc., Ry. Co., 277.
v. Great Northern R. R. Co., 723.

[REFERENCES ARE TO PAGES.]

Nelson v. Harrington, 673.
v. Helena, 705.
v. Iverson, 429.
v. Kilbridge, 130.
v. McLellan, 748.
v. Shaw, 557.
v. Southern Pac. Co., 726.
v. Vermont Central R. R. Co., 676.
v. Whetmore, 424.
v. Willey S. S. & Nav. Co., 521.
Nelson County v. Northcote, 441.
Nesbit v. Garner, 719.
Neth v. Crofut, 438.
Nettleton v. Sikes, 113, 114.
Neufeld v. Rodeminski, 170, 172, 174, 175.
Nevada Water Co. v. Powell, 590.
Neven v. Sears, 515.
Nevill v. Fine Arts, etc., Ins. Co., 234.
Neville v. Gile, 258.
v. Viner, 401.
Nevin v. Pullman P. C. Co., 13, 655.
Nevins v. Nevins, 257.
New Albany, etc., R. R. Co., v. Peterson, 587.
Newall v. Bartlett, 731.
Newark Coal Co. v. Upson, 184, 185
Newark Elec. Lt. Co. v. Garden, 751, 754.
v. McGilvery, 751, 752.
v. Ruddy, 693, 752.
Newark Elec. L. & P. Co. v. Garden, 751, 754.
Newark R. R. Co. v. Block, 763.
Newhold v. Sabler, 115.
New Brunswick, etc., R. R. Co. v. Tiers, 649.
New Brunswick R. Co. v. Conybeare, 448.
Newby v. Gunn, 165, 167.
Newcomb v. Boston Protective Dept., 51, 72.
Newcomb v. New York Cent., etc., R. R. Co., 31.
Newcombe v. Irwin, 318.
Newell v. Horn, 14.
v. Whitcher, 150.
v. Woodruff, 334.
v. Wright, 403.
New England Express Co. v. Maine Cent. R. R. Co., 647.
Newhall v. Ireson, 592.
v. Kingsbury, 420.
New Haven, etc., Co. v. Vanderbilt, 700.
Newkirk v. Sabler, 318.
N. J. Cent. R. R. Co. v. Moore, 700.
New Jersey Elec. Ry. Co. v. Miller, 763.
New Jersey, etc., Co. v. Merchants' Bank, 723.
New Jersey, etc., R. R. Co. v Young, 556.
New Jersey Exp. Co. v. Nichols, 705.
New Jersey Steam Nav. Co. v. Merchants' Bank, 647, 648.
Newlin Tp. v. Davis, 38.
Newman v. Alvord, 359.
v. Earl of Hardwicke, 380.
v. Mercantile Trust Co., 422.
v. Phillipsburg H. R. R. Co., 717.
New Omaha T. H. Elec. Lt. Co. v. Johnson, 754.
New Orleans, etc., R. R. Co., v. Barton, 449.
v. Hughes, 516, 701.
v. Jopes, 657.
v. Lumber Co., 19.
v. Norwood, 475, 484.
v. Statham, 126.
New Orleans Gas Lt. Co. v. Paulding, 304.
New Orleans Ins. Co. v. New Orleans, etc., R. R. Co., 724.
Newport News, etc., Co. v. Dentzel, 274.

[REFERENCES ARE TO PAGES.]

Newport News, etc., R. R. Co. v. Griffin, 25.
Newport News P. Co. v. Beaumeister, 556, 558.
New River Co. v. Johnson, 21, 586.
New Salem v. Eagle Mills Co., 617, 626.
Newsom v. Anderson, 316.
v. Thornton, 652.
Newton v. Harland, 318, 321.
v. Locklin, 164.
v. Weaver, 172.
Newton, etc., Co. v. White, 435.
New Windsor v. Stockdale, 319.
New World, The v. King, 669, 689.
New York v. Lord, 328.
v. Bailey, 580, 581.
New York B. L. B. Co. v. Fisher, 61.
New York, etc., Co. v. Rogers, 508, 511.
New York, etc., R. R. Co. v. Ansonia, 129.
v. Bell, 547.
v. Cooper, 720.
v. Haring, 487.
v. Kistler, 721, 762.
v. O'Leary, 536, 537, 561.
v. Sayles, 722.
v. Schaffer, 289, 290.
v. Schuyler, 70.
v. Thomas, 745.
New York, etc., Tel. Co. v. Bennett, 751, 753.
New York Life Ins. Co. v. White, 390.
New York Rubber Co. v. Rothery, 125, 591.
New York M. L. Ins. Co. v. Armstrong, 48.
Nichols v. Barnes, 420, 428.
v. Boston, 621.
v. Crystal Plate Glass Co., 511.
v. Duluth, 365.
v. Eaton, 231, 232, 234, 235, 238.
Nichols v. Gray, 205.
v. Goodheart, 190.
v. Hayes, 143.
v. Marshland, 581.
v. Michael, 444, 468.
v. Nichols, 66, 257, 258.
v. Pinner, 443, 444.
v. Pitman, 353.
v. Pittsfield Tp., 38.
v. Todd, 319.
v. Union Pac. Ry. Co., 128.
v. Washington, etc., R. R. Co., 731.
Nicholson v. Detroit, 77, 81.
v. Merritt, 204, 246.
v. Sternberg, 177.
Nickerson v. Harriman, 271.
v. Nickerson, 255.
v. Thompson, 392.
v. Wheeler, 106.
Nickleson v. Stryker, 261.
Nicklin v. Williams, 371.
Nicol v. Ill. Central R. R. Co., 318.
Nierenberg v. Wood, 95.
Niles v. Howe, 134.
Niniger v. Norwood, 583.
Nissen v. Cramer, 227.
Nitro-Glycerine Case, 18, 19, 749.
Niven v. Boland, 228.
Nix v. Texas Pac. Ry. Co., 544.
Nixon v. Selby Smelting Co., 513, 545.
N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 361.
N. N. & N. V. Co. v. Eifort, 730.
Noble v. Adams, 427.
v. Bessemer, S. S. Co., 508, 558.
v. Milliken, 660.
v. Sylvester, 407.
v. White, 170.
Noblesville G. & I. Co. v. Loehr, 68.
Noblett v. Bartsch, 97, 183.
Noeninger v. Vogt, 209, 224.
Nofsinger v. Goldman, 533.

[REFERENCES ARE TO PAGES.]

Nohrden v. Northeastern R. R. Co., 285.
Nolan v. Brooklyn Heights R. R. Co., 693.
v. Jones, 60.
v. New Britain, 568, 597.
v. Traber, 64.
Noland v. Bushby, 438, 439.
Nolin v. Pearson, 257.
Nolte v. Reichelm, 456.
Noonan v. Consol. Traction Co., 719.
v. Orton, 239.
Norcross v. Otis Bros., 187.
v. Thoms, 601, 602.
Nord v. Boston, etc., Min. Co., 703, 705.
Norden v. Jones, 131.
Nord Deutscher Lloyd Steamship Co. v. Ingebregsten, 500, 512, 525, 554.
Nordyke, etc., Co. v. Van Sant, 516.
Norfolk, etc., Ry. Co. v. Amply, 511, 528, 533, 558.
v. Carter, 583, 585.
v. Cottrell, 702.
v. Cromer, 509, 513, 525, 559.
v. Donnelly, 543, 548, 551, 554.
v. Galliher, 655.
v. Groseclose, 717.
v. Hoover, 516.
v. Irvine, 660.
v. Jackson, 509, 525.
v. Marpole, 506.
v. McDonald, 532.
v. Nuckol's Admr., 501, 550, 551, 552, 554, 558.
v. Nunnally, 511, 536, 561.
v. Ormsby, 716.
v. Phillips, 509, 528, 548, 554.
v. Stevens, 478, 483.
v. Ward, 540.
v. Wyson 659.
Norfolk, etc., Terminal Co. v. Morris, 662.
Norfolk Ry. & Lt. Co. v. Spratley, 694.
Norfolk & W. Steamboat Co. v. Davis, 235.
Norman v. Bartholomew, 739.
v. Teel, 687, 772.
Normile v. Oregon Navigation Co., 726.
Norris v. Casel, 149, 155.
v. Corkhill, 66.
v. Litchfield, 49, 707, 773.
v. Vance, 61.
Norristown v. Fitzpatrick, 76.
North v. Merchants, etc., Co., 652.
North Baltimore Pass. Ry. Co. v. Arnreich, 708.
North Cheshire, etc., Co. v. Manchester B. Co., 359.
North Chicago Elec. Ry. Co. v. Penser, 764.
North Chicago, etc., R. R. Co. v. Johnson, 506, 547.
North Chicago Ry. Co. v. Louis 704.
North Chicago St. R. R. Co. v. Brodie, 283, 285.
v. Cotton, 690.
v. Williams, 662.
Northcott v. Smith, 120, 339.
Northern Ala., etc., R. R. Co. v. Beacham, 522.
Northern Cent. R. R. Co. v. Canton Co., 407.
v. Husson, 559.
v. O'Connor, 304, 658.
v. Price, 701.
v. State, 681, 682.
Northern Ohio, R. R. Co. v. Rigby, 539.
Northern Pac. Coal Co. v. Richmond, 523, 534.
Northern Pac. Ry. Co. v. Adams, 272.
v. Babcock, 136, 509.
v. Charliss, 551, 554.
v. Dixon, 525, 526, 543.

[REFERENCES ARE TO PAGES.]

Northern Pac. Ry. Co. v. Hambly, 543.
v. Herbert, 528.
v. Hess, 705.
v. Mares, 705.
v. Mase, 548.
v. Peterson, 546, 551, 554.
v. Poirier, 548.
Northern Penn. R. R. Co. v. Mahoney, 709, 716.
Northern R. R. Co. v. Miller, 145.
Northern Trust Co. v. Palmer, 83. 99.
North Fork W. Co. v. Edwards, 364.
North Haverhill, etc., Co. v. Metcalf, 132.
North Manheim v. Arnold, 770.
North Penn. Co. v. Kirk, 287.
North Penn. R. R. Co. v. Commercial Bank, 652.
v. Mahoney, 717.
Northrup v. Wright, 334.
North Tex. Con. Co. v. Bostick, 739.
North Vernon v. Voegler, 22, 77.
Northwestern El. R. R. Co. v. O'Malley, 738.
Northwestern S. S. Co. v. Horton, 461.
Northwestern Fertilizer Co. v. Hyde Park, 22, 614.
Northwood v. Raleigh, 585.
Norton v. Eastern R. R. Co., 677.
v. Kumpe, 391.
v. Ladd, 205.
v. Livingston, 218.
v. Nye, 91, 395.
v. Sewall, 750, 775.
v. Shelby, 374.
v. Woodruff, 637.
Nortwick v. Holbine, 669.
Nosler v. Coos Bay R. R. Co., 711.
Nostrum v. Halliday, 447, 448.
Novello v. Sudlow, 352.
Novotney v. Danfurth, 365.
Nowell v. Tripp, 438, 439.
v. Wright, 387.
Nowlin v. Snow, 456.
v. Whipple, 328.
Noxon v. Hill, 383.
Noyes v. Boscawen, 719.
v. Cosselman, 586.
v. Loring, 132.
v. Rutland, etc., R. R. Co., 68
v. Shepherd, 684.
v. Smith, 514.
v. Southern Pac. R. R. Co., 699, 700.
v. Stillman, 622.
v. Wood, 545.
Nugent v. Boston, etc., R. R. Co., 97, 618, 697, 700.
v. Vanderveer, 702.
Null v. Whitewater, etc., Co., 146
Nyback v. Champagne Lumber Co., 513, 527.
Nye v. Merriam, 464.
v. W. U. Tel. Co., 198.

O.

Oakdale v. Gamble, 104.
Oakes v. Mase, 548.
v. Me. Cent. R. R. Co., 287.
v. Northern Pac. R. R. Co. 659, 660.
v. Spaulding, 344.
v. St. Louis Candy Co., 355.
v. Turquand, 458.
Oakland R. R. Co. v. Fielding, 716
Oakley v. Farrington, 210.
v. Randolph, 425.
Oakman v. Belden, 253.
Oates v. Bullock, 167.
v. Union Pac. R. R. Co., 275
Obendorfer v. Pabst, 663.
Oberfelder v. Doran, 663.
Oberlander v. Spiess, 460.
Obernalte v. Johnson, 178.
Oberne v. O'Donnell, 497.
Obert v. Dunn, 365, 366.

[REFERENCES ARE TO PAGES.]

Obertoni v. Boston, etc., R. R. Co., 496, 748.
O'Brien v. Am. Dredging Co., 546.
v. Central Iron & S. Co., 611, 613.
v. Chicago, etc., Ry. Co., 140.
v. Cunard S. S. Co., 137.
v. McGlinchy, 708.
v. Pennsylvania, etc., R. R. Co., 611.
v. St. Louis Transit Co., 487, 657.
v. Traynor, 562.
v. Vaill, 645.
Occum Co. v. Sprague Co., 110.
Ocean Grove Ass'n v. Com'rs of Ashbury Park, 587.
Ochsenbein v. Shapley, 489.
O'Connell v. B. & O. R. R. Co., 545.
v. Lamb, 143.
v. Samuel, 156, 332.
v. Strong, 491.
O'Connor v. Brucker, 738.
v. Fond du Lac, etc., Ry. Co., 583.
v. Golden Gate, etc., Co., 522.
v. Rich, 507, 508, 542.
O'Dell v. Leyden, 637.
Odell v. New York Central, etc., R. R. Co., 532.
Odin Coal Co. v. Tadlock, 556.
Odiorne v. Bacon, 210.
v. Lyford, 335.
Odom v. Gill, 399.
O'Donaghue v. McGovern, 237.
O'Donnell v. Hitchcock, 407.
v. McIntyre, 156.
v. Providence, etc., R. R. Co., 677, 686.
v. Segar, 466.
O'Donnell, etc., Brewing Co. v. Farrar, 448.
Offerman v. Waterman, 361.
Offutt v. World's C. Exposition, 539, 540.
Ogborn v. Francis, 261.
Ogburn v. Connor, 583.
Ogden v. Claycomb, 52, 154.
v. Riley, 205.
Ogg v. Lansing, 77, 374.
Ogle v. Atkinson, 419, 430.
v. Barnes, 417.
Ogletree v. McQuaggs, 628.
Ogston v. Aberdeen Dist. Tramways Co., 610.
O'Hare v. Jones, 475.
O'Hara v. Wells, 670.
Ohio, etc., R. R. Co. v. Clutter, 745.
v. Collarn, 698.
v. Eaves, 685.
v. Press Pub. Co., 210.
v. Ramey, 595.
v. Tindall, 273, 281, 285.
v. Voight, 287.
Ohio Oil Co. v. Indiana, 571, 589.
Ohio Riv., etc., Ry. Co. v. Edwards, 554.
Ohio Valley Ry. Co. v. Lander, 304.
Ohnmacht v. Mount Morris Elec. Lt Co., 260, 271.
Oil City Land & Imp. Co. v. Porter, 452.
Oil Creek, etc., R. R. Co. v. Keighron, 36.
Oklahoma City v. Meyers, 609.
Okonski v. Pa., etc., Coal Co., 554.
v. Pennsylvania, etc., Fuel Co., 546.
Old Colony R. R. Co. v. Miller, 128.
v. Slavens, 105.
Old Dominion S. S. Co. v. McKenna, 293.
Oldfield v. New York, etc., R. R. Co., 278.
Olds v. Chicago Open Board of Trade, 422, 436.
Oldstein v. Firemen's Bldg. Ass'n, 369.

[REFERENCES ARE TO PAGES.]

O'Leary v. Board of Commissioners, 81.
v. Brooks Elevator Co., 736.
v. Brown, 124.
v. Glens Falls Gas, etc., Co., 694.
Oles v. Pittsburg Times, 214.
Olive v. Olive, 130.
v. Whitney Marble Co., 749.
Oliver v. Houghton Co. St. Ry. Co., 274.
v. McClellan, 57.
v. Ohio Riv. R. R. Co., 525, 532.
v. Perkins, 15.
Ollet v. Pittsburg, etc., Ry. Co., 159.
Olmstead v. Miller, 211.
v. Morris Aqueduct, 305.
v. Partridge, 173, 174.
Olney v. Boston, etc., R. R. Co., 508, 534, 557.
Olsen v. Meyer, 607.
v. Oregon Short Line, 760, 761.
Olson v. Orton, 454, 457.
v. St. Paul, etc., Ry. Co., 546, 585.
Omaha v. Bowman, 739.
v. Richards, 738.
Omaha Auction, etc., Co. v. Rogers, 428.
Omaha, etc., Refining Co. v. Tabor, 423, 426, 435, 436.
Omaha, etc. Ry. Co. v. Chollette, 254, 256.
v. Krayonbuhl, 709.
v. Standan, 617.
v. Talbot, 718, 762.
Omaha Fair Ass'n v. Missouri Pac. R. R. Co., 745.
Omaha St. R. R. Co. v. Cameron, 763, 764.
Omaha Water Co. v. Schamel, 711.
O'Maley v. South Boston G. L. Co., 536, 538.
O'Malley v. St. Paul, etc., Ry. Co., 737, 738.
v. Twenty-five Associates, 741.
Ombony v. Jones, 410.
Omrad v. Hurth, 462.
Omstead v. Raleigh, 549.
Onderkirk v. Central National Bank, 634.
O'Neal v. McKenna, 161, 174, 182.
v. Wilson, 398.
O'Neil v. Dry Dock, etc., R. R. Co., 764.
O'Neill v. Chicago, etc., Ry. Co., 697.
v. James, 777.
v. Johnson, 185.
v. New Orleans, 78, 767.
v. New York, etc., Ry. Co., 36.
Ophir S. M. Co. v. Carpenter, 590.
Oppenheimer v. U. S. Exp. Co., 725.
Opsahl v. Judd, 49.
Orange, etc., R. R. Co. v. Ward, 700.
Orchardson v. Cofield, 266.
Orcutt v. Kittery Point Bridge Co., 768.
v. Moore, 412.
O'Reer v. Strong, 130.
Oregon Iron Co. v. Trullinger, 592, 594.
Oregon R. & N. Co. v. Egley, 737.
Oregon Short Line v. Tracy, 538.
O'Reilly v. New York, etc., R. R. Co., 276.
Orgall v. Chicago, etc., R. R. Co., 283.
Orient Ins. Co. v. Northern Pac. Ry. Co., 705.
Orland's Case, 412.
Orlando v. Pragg, 474.
Orman v. Day, 369.
v. Mannip, 523.
Ormsbee v. Boston, etc., Corp., 762.
Ormsby v. Douglass, 239.
Orndorff v. Adams Exp. Co., 722.

O'Rourke v. Sioux Falls, 75, 474.
Orr v. Box, 439.
v. Home Mut. Ins. Co., 293, 299.
v. Quimby, 329, 374.
v. Skofield, 208, 209.
v. Southern Bell Tel. Co., 514.
Ortmayer v. Johnson, 580.
Ortt v. Minn., etc., R. R. Co., 651.
Osage City v. Larkin, 737.
Osborn v. Bank of U. S., 82.
v. Gillett, 271.
v. Knox, etc., Co., 473.
v. Leach, 207.
v. Norwalk, 593.
v. Schenck, 433.
Osborne v. Cargill El. Co., 116, 117.
v. Knox, etc., Co., 538.
v. Lehigh V. C. Co., 530.
v. McMasters, 491, 675, 750.
v. Morgan, 562.
v. Troup, 249.
Osgood v. Howard, 422.
v. Los Angeles Traction Co., 661, 690.
O'Shields v. Ga. Pac. Ry Co., 142.
Oskamp v. Southern Express Co., 652.
O'Sullivan v. Knox, 20.
Oswald v. McGehee, 457
Oswego, etc., Co. v. Lendrum, 444.
Otis v. Janesville, 718.
v. Morgan, 339.
Otisfield v. Mayberry, 421.
O'Toole v. Pittsburgh, etc., R. R. Co., 720.
Ottersbach v. Philadelphia, 756.
Outerbridge v. Phelps, 363.
Ouverson v. Grafton, 705, 720.
Over v. Hildebrand, 237.
Overacre v. Blake, 669, 697.
Overby v. McGee, 415.
Overholser v. National Home, 71.
Overholt v. Viths. 734.
Overhouser v. Am. Cereal Co., 484.
Overland M. & E. Co. v. Carroll, 725.
Overman v. May, 333.
v. Sasser, 407.
Overstreet v. Moser, 645.
Overton v. Williston, 410.
Oviatt v. Pond, 128.
Owen v. Cook, 746.
v. Henman, 576.
v. Hyde, 336.
v. Ogilvie Pub. Co., 198.
v. Phillips, 627.
Owens v. Lewis, 325, 326.
v. New Rochelle, etc., Co., 173.
v. Richmond, etc., R. R. Co., 705.
v. Weedman, 419, 420.
Owensboro v. Knox, 754.
Owings v. Jones, 618.
Owsley v. Montgomery, etc., R. R. Co., 69.
Oxley v. Watts, 415.
Oystead v. Shed, 330.

P.

Pace v. Aubrey, 177.
v. Potter, 339.
Pacific Exp. Co. v. Foley, 724.
v. Wallace, 721.
Pacific L. S. Co. v. Murray, 339.
Pack v. New York, 254, 484.
Packard v. Getman, 424.
v. Northcraft, 642, 643.
v. Ryder, 314.
v. Valtz, 79.
Packer v. Taylor, 649.
Paddock v. Cameron, 91.
v. Fletcher, 458.
v. Somes, 585.
v. Strobridge, 443, 445.
v. Watts, 170, 174, 179.
Padgett v. Cleveland, 406.
Padmore v. Lawrence, 233.
Paducah, etc., R. R. Co. v. Hoebl, 701, 703.

[REFERENCES ARE TO PAGES.]

Page v. Battle Creek Pure Food Co., 553.
v. Bent, 461, 462.
v. Citizens' Banking Co., 181.
v. Cushing, 180.
v. Fowler, 436.
v. Freeman, 98, 101.
v. Merwin, 203.
v. Mille Lacs Lumber Co., 610.
v. Parker, 17, 85.
v. Sumpter, 715.
v. Urick, 407.
v. Wells, 669.
Pagels v. Meyer, 549.
Paine v. Delhi, 78, 79.
v. Elec. Ill., etc., Co., 753.
Painton v. Nor. Centr., etc., Co., 510, 561.
Paisley v. Freeman, 470.
Palatine v. Kruger, 332.
Palin v. Reid, 645.
Palm v. Iverson, 62, 473, 747.
Palmateer v. Robinson, 409.
Palmer v. Adams, 223.
v. Andover, 769.
v. Bennett, 219.
v. Broder, 174, 175.
v. Carroll, 379.
v. Chicago, etc., R. R. Co., 707, 758.
v. Concord, 241.
v. Crook, 252.
v. Del. & H. Canal Co., 653, 656.
v. DeWitt, 353.
v. Mahn, 202.
v. Maine Cent. R. R. Co., 163, 164, 165.
v. Palmer, 362, 363.
v. Smith, 222.
v. St. Albans, 492, 493.
v. Winston S. R. & E. Co., 155, 489.
Palmer Brick Co. v. Chenall, 695.
Palmeri v. Manhattan Ry Co., 487, 497.
Palmore v. Morris, 609, 620.
Pancoast v. Burnell, 66, 256.
Pandjiris v. Hartman, 163.
Pandow v. Eichsted, 217.
Pangburn v. Bull, 179, 187.
v. Ramsay, 383.
Panley v. Draine, 62.
Panoski v. Gollberg, 436.
Panton v. Holland, 44, 335.
Paolino v. McKendall, 684, 738, 739.
Pappa v. Rose, 385.
Pardridge v. Brady, 100.
Parham v. Randolph, 453.
Parish v. Morey, 113.
Paris Med. Co. v. W. H. Hill & Co., 361.
Park v. Detroit Free Press Co., 243, 244.
v. New York, etc., R. R. Co., 518.
v. O'Brien, 704.
v. Preston, 722.
Parker v. Cutler M. D. Co., 314.
v. Foote, 369.
v. Griswold, 2, 124, 125, 592.
v. Hotchkiss, 590, 594, 598.
v. Lanier, 12.
v. Lowell, 403, 596.
v. Macon, 770.
v. Manco, 193.
v. McQueen, 246.
v. Mise, 350, 417.
v. Parker, 176.
v. Republican Co., 235.
v. Rolls, 670.
v. Wallis, 317.
v. Walrod, 418.
Parkerton v. Verberg, 165.
Parkham v. Randolph, 453.
Parkhurst v. Johnson, 524, 646.
v. Masteller, 172, 178.
Parkins v. Coxe, 336.
Parks v. Boston, 320.
v. Greenville, 73, 474.
v. Pratt, 324.

[REFERENCES ARE TO PAGES.]

Parks v. Telegraph Co., 666.
Park & Sons Co. v. Hubbard, 297.
v. Nat. W. Druggists' Ass'n, 297.
Parlett v. Dunn, 519.
Parmalee v. Baldwin, 386.
Parmelee v. Fischer, 660.
v. Lawrence, 103.
Parmenter v. Barstow, 101.
Parr v. Spartenberg, etc., R. R. Co., 98.
Parrett v. Shauhut, 390.
Parrish v. Pensacola, etc., R. R. Co., 542.
v. Thurston, 444.
Parrot v. Knickerbocker Ice Co., 129.
Parry v. Smith, 780.
Parsons v. Brown, 318.
v. Camp, 324, 325.
v. Charleston Con. Ry., etc., Co., 751, 753.
v. Clark, 314.
v. Lloyd, 88, 380, 438.
v. Mauser, 350.
v. McKinley, 467, 468.
v. Mo. Pac. Ry. Co., 284, 704.
v. Winchell, 96.
Partenheimer v. Van Order, 346.
Partlett v. Dunn, 501.
Partridge v. First Indp. Church, 268.
v. Gilbert, 368, 369.
v. Lyon, 369.
v. Scott, 365.
Pasley v. Freeman, 6, 8, 447, 460.
Passiac Print Works v. Ely & Walker Dry Goods Co., 301.
Passamaneck v. Louisville Ry. Co., 765.
Passenger R. R. Co. v. Young, 69, 487.
Passmore v. West. U. Tel. Co., 668, 728.
Patapsco Guano Co. v. Magee, 128.
Patch v. Covington, 75.
Patch Mfg. Co. v. Protection Lodge, 297.
Patnode v. Warren Cotton Mills, 523.
Patoka Tp. v. Hopkins, 585
Patrick v. Colerick, 113.
Patten v. Belo, 222.
v. Gurney, 85, 91.
v. Wiggin, 670.
Patterson v. Burlington, etc., R. R. Co. 702.
v. D'Anterive, 388.
v. Detroit, etc., R. R. Co., 678.
v. Marine Nat. Bank., 210.
v. McIver, 633.
v. Nutter, 160.
v. Pittsburgh, etc., R. R. Co., 510, 523, 557, 560.
v. Schlitz Brewing Co., 608, 618.
v. Thompson, 262.
v. Wallace, 557.
Pattison v. Jones, 239.
v. Syracuse Nat. Bank, 633.
Patton v. Cruce, 214.
v. People, 155.
v. Texas, etc., Ry. Co., 526.
Patzack v. Von Gerichten, 162.
Paukett v. Livermore, 179.
Paul v. Fargo, 186.
v. Hazelton, 315.
v. Summerhayes, 313.
Pauley v. Steam Guage, etc., Co 678, 680.
Paulmier v. Erie R. R. Co., 492 558.
Pavesich v. New Eng. Life Ins. Co., 2, 9, 195.
Pawlowski v. Jenks, 185, 188, 384.
Paxton v. Boyer 20, 158.
Payne's Appeal, 265.
Payson v. Caswell, 177.
v. Chicago, etc., R. R. Co., 718.
v. Elliot, 418, 422.
v. Railroad Co., 46, 68, 300.
v. Smith, 447.

[REFERENCES ARE TO PAGES.]

Payson v. Tancil, 221.
v. Terre Haute, etc., R. R. Co., 727.
Peacock v. Terry, 48.
Peannan v. Peannan, 254.
Pearce v. Needham, 169.
v. Scotcher, 314.
Pearsoll v. Board of Supervisors, 615.
v. Chapin, 130, 467.
Pearson v. Skelton, 104, 106.
Pease v. Hubbard, 394.
Peavey v. Ga. B. & R. R. Co., 659.
Peavy v. Robbins, 388.
Peay v. Salt Lake City, 594.
Peck v. Hutchinson, 672, 673.
Peck Bros. Co. v. Peck Bros. Co., 359.
Peckham v. Holman, 445.
Peddicord v. Miss., etc., Ry. Co., 676.
Peden v. Mail, 179.
Pederson v. Seattle Con. St. Ry. Co., 139.
Peek v. Roe, 45.
Peffley v. Noland, 450.
Pegram v. Railroad Co., 710.
Peigue v. Sutcliffe, 57, 61, 62.
Pekin v. McMahon, 738.
Pelky v. Palmer, 672.
Peltier v. Bradley D. & C. Co., 696.
Pence v. Carney, 589.
v. Langdon, 467.
Pendergast v. Adams Ex. Co., 651.
Peninsular Trust Co. v. Grand Rapids, 739.
Penland v. Leatherwood, 421.
Penn v. Ward, 160.
Pennington v. Meeks, 224.
Pennock v. Dialogue, 352.
Pennoyer v. Saginaw, 80.
Pennsylvania Co. v. Congdon, 41.
v. Ellett, 97.
v. Langendorf, 709, 710.
v. McCaffrey, 542, 545, 553.
Pennsylvania Co. v. Myers, 712.
v. Miller, 661.
v. Raney, 709
v. Sloan, 97.
Pennsylvania Coal Co. v. Kelly, 508, 536, 560.
v. Sanderson, 579, 589.
Pennsylvania, etc., Co. v. Whitcomb, 559.
Pennsylvania Lead Co's. Appeal, 604.
Pennsylvania R. R. Co. v. Bantom, 288
v. Beale, 763.
v. Butler, 727.
v. Henderson, 285.
v. Hope, 36.
v. Kerr, 36.
v. Kilgore, 711.
v. Knight, 660, 661.
v. Lewis, 686.
v. Lippincott, 606.
v. McCloskey, 726.
v. Miller, 593.
v. Peters, 697.
v. Raiordan, 722.
v. Righter, 720.
v. Stein, 652.
v. Vandiver, 283, 487.
v. Weber, 705.
v. Weddle, 68, 69.
v. Zebe, 285.
Penny v. New York Cent., etc., R. R. Co., 497.
Penrose v. Curren, 59.
Penruddock's Case, 110, 622.
Pensacola Gas. Co. v. Pebley, 578.
Penso v. McCormick, 738.
Penton v. Robart, 410.
People v. Alton, 308.
v. Bartels, 384, 387, 400.
v. Board of Education, 307, 308.
v. Board of Health, 109.
v. Burtleson, 577.
v. Cicott, 310.

[REFERENCES ARE TO PAGES.]

People v. Colerick, 394.
v. Cunningham, 626.
v. Detroit White Lead Works, 573, 574, 577, 604, 625.
v. Ferry Co., 612.
v. Fisher, 294.
v. Foss, 332.
v. Gallagher, 307.
v. Gaslight Co., 612.
v. Gold Run, etc., Co., 624.
v. Gordon, 389.
v. Haley, 165.
v. Healy, 444.
v. Hubbard, 190, 330.
v. Irwin, 618.
v. Jerome, 216.
v. Kerr, 613.
v. King, 306.
v. Lilley, 149.
v. Manhattan Gas Lt. Co., 305.
v. Mayor, etc., of Alton, 306.
v. McLean, 154, 165.
v. Mich. Sou. R. R. Co., 146.
v. Park, etc., R. R. Co., 568.
v. Pease, 310, 389.
v. Platt, 313.
v. Rose, 359.
v. Sergeant, 605.
v. Smith, 162.
v. Supervisors of San Francisco, 452.
v. Suhre, 377.
v. Warren, 440.
v. Winters, 254.
v. Yslas, 150.
Peoples v. Railroad Co., 700.
People's Bank v. Morgolofski, 731, 741.
People's B. & L. Ass'n v. McElroy, 89.
People's Gas Co. v. Tyner, 587.
People's Nat. Bank v. Central Trust Co., 461.
Peoria, etc., R. R. Co. v. Barton, 676.
v. Rice, 549, 711.
Pepke v. Grace Hospital, 71.
Pepper v. Telegraph Co., 729.
Percival v. Hickey, 122.
Percy v. Clary, 104.
Perdue v. Harwell, 14.
Perham v. Portland Elec. Co., 273, 751, 754.
Perkins v. Dacon, 637.
v. Mitchell, 215, 230.
v. Mossman, 346.
v. New York Cent. R. R. Co., 689, 727.
v. Pendleton, 291, 293, 296.
v. Proctor, 88.
v. Rice, 450, 464.
v. Spaulding, 177.
Perley v. Chandler, 332.
v. Eastern R. R. Co., 36, 746.
Perlstein v. Am. Exp. Co., 491, 494.
Perrault v. Gauthier, 293.
Perrenoud v. Helm, 175.
Perrett v. Times Newspaper, 199, 244, 247.
Perry v. Carr, 337.
v. Fitzhowe, 109, 110.
v. House of Refuge, 71.
v. Marsh, 502.
v. Phelps, 349.
v. Phipps, 417.
v. Reynolds, 388.
v. Rogers, 456, 507.
v. S. P., etc., R. R. Co., 699.
v. St. Joseph, etc., Co., 276.
v. Truefitt, 355.
Persinger v. Allegheny Ore & Iron Co., 525.
Person v. Wilson, 433.
Pesterfield v. Vickers, 76.
Peter v. Caswell, 592.
Peters v. Bowman, 738.
v. Johnson, 750.
v. Land, 383.
v. Lewis, 580.
v. Lindsberg, 76, 475.
v. Peters, 255.

[REFERENCES ARE TO PAGES.]

Peterson v. Am. Grass Twine Co., 515, 544.
v. Haffner, 57, 138, 152, 153.
v. New York, etc., R. R. Co., 553.
v. Polk 116, 118, 119.
v. Reisdorph, 179.
v. Sherry L. Co., 697.
v. W. U. Tel. Co., 68, 69, 198, 212, 214.
v. Whitebreast, etc., Co., 545.
Peton v. Nichols, 13.
Petrel, The, 550, 552.
Petrie v. Columbia, etc., R. R. Co., 677.
Pettibone v. Simpson, 211.
Petticolas v. Richmond, 101.
Pettigrew v. Evansville, 586.
v. Lewis, 672.
v. Pettigrew, 268, 270.
Pettingill v. Rideout, 12.
v. Yonkers, 767, 773.
Pettit v. May, 120.
v. Mercer, 145.
Pew v. Robinson, 206.
Peyton v. Texas, etc., Ry. Co., 709.
Pfefferle v. Lyon Co., 81.
Pfeiffer v. Brown, 571, 579.
v. Dialogue, 542, 549.
Pfitzinger v. Dubs, 213.
Phelan v. Fitzpatrick, 619.
Phelin v. Kenderdine, 262.
Phelps v. Cousins, 341.
v. James, 451, 456, 460.
v. Nowlen, 46, 588.
v. Sill, 379.
v. Wait, 96.
Phelps, Dodge & Palmer Co. v. Halsell, 430.
P. H. & F. M. Roots Co. v. Meeker, 32, 33.
Phifer v. Cox, 332.
Philadelphia, etc., Co. v. Wiseman, 652.
v. Anderson, 653, 658.
v. Boyer, 718.
Philadelphia, etc., Co. v. Davis, 583.
v. Derby, 68, 486, 489, 492, 493, 727.
v. Hendrickson, 706, 745.
v. Hogeland, 719.
v. Hughs, 525, 532, 548.
v. Kelly, 716.
v. Kerr, 684.
v. Quigley, 68.
v. Smith, 622.
v. Spearen, 716.
v. State, 626.
v. Stebbing, 678.
v. Stinger, 681.
v. Towboat Co., 49.
Phila. M. & T. Co. v. Miller, 406.
Philber v. Matson, 109.
Philbrick v. Foster, 154.
Philip v. Squire, 253.
Phillips v. Allen, 336.
v. Barnet, 255.
v. Bordman, 368.
v. Commonwealth, 403.
v. Coudon, 63.
v. Denver, 566, 603.
v. Dickerson, 29, 30.
v. Eyre, 134.
v. Fadden, 164
v. Hoefer, 208.
v. Hayle, 262.
v. Kalamazoo, 177.
v. Kelly, 127.
v. Lawrence, 570, 602.
v. Library Co., 731.
v. New York Cent., etc., R. R. Co., 31.
v. Railroad Co., 32, 36.
v. Shackford, 425.
v. Sherman, 143.
v. Southern Ry. Co., 304, 658
v. Trull, 164.
Philo v. Ill. Cent. R. R. Co., 281
Philpot v. Pennsylvania R. R. Co, 282.
Phinzy v. Augusta, 595.

[REFERENCES ARE TO PAGES.]

Phipps v. Buckman, 464.
Picard v. McCormick, 450.
Pickard v. Smith, 731.
Pickens v. Diecker, 491.
Pickering v. Coleman, 424.
v. Moore, 116, 434.
Pickett v. Wilmington, etc., R. R. Co., 708.
Piedmont, etc., Co. v. Columbia, etc., Co., 651.
Pierce v. Benjamin, 397, 435.
v. Clavin, 532.
v. Conners, 284, 490.
v. Dart, 112.
v. German, etc., Soc., 618.
v. Gilson, 421.
v. Hubbard, 162.
v. Kile, 562.
v. Oard, 228, 237.
v. Proprietors, etc., 269, 270.
v. Union District Trustees, 307.
v. Whitcomb, 733, 735.
v. Wilson, 469.
Pierre v. Fernald, 369.
Pierson v. Glenn, 622.
v. Post, 413.
v. Speyer, 594.
Pierson L. Co. v. Hart, 710.
Pigott v. East Counties R., 744.
Pike v. Bright, 131.
v. Brittan, 620.
v. Carter, 377.
v. Fay, 450.
v. Housinger, 672.
v. Megoun, 386, 388.
Pile v. Pedrick, 578.
Pilkenton v. Gulf, etc., Ry. Co., 559.
Pilling v. N. Machine Co., 537.
Pillsbury v. Moore, 595, 616, 621.
v. Pillsbury W., etc., Co., 360.
Pillsbury W. F. M. Co. v. Eager, 361.
Pine Bluff W. & L. Co. v. McCain, 756.
Pine Bluff W. & L. Co. v. Schneider, 756.
Pingree v. Leyland, 561.
Pinkerton v. Pennsylvania Traction Co., 98.
v. Woodward, 640.
Pinkstaff v. Steffy, 583.
Pinkston v. Aarrington, 670.
Pintorelli v. Horton, 529, 535.
Pioneer Fireproof Construction Co. v. Hansen, 483.
Piper v. Pearson, 379, 381.
v. Spokane, 771.
v. Woolman, 237.
Pippin v. Sheppard, 670, 675.
Pitcher v. Bailey, 99.
v. Lennon, 481.
Pitford v. Armstrong, 156.
Pitkin v. N. Y. Cent., etc., R. R. Co., 277.
Pitkin County v. Ball, 72, 474.
Pitt v. Petwey, 433.
v. Yalden, 670.
Pittard v. Oliver, 230.
Pittock v. O'Neill, 242.
Pitts v. Lancaster Mills, 593, 601.
Pittsburg v. Grier, 81.
Pittsburg Bridge Co. v. Walker, 544.
Pittsburg, etc., Co. v. Henderson, 558.
Pittsburg, etc., R. R. Co. v. Adams, 473, 538.
v. Collins, 686.
v. Devinney, 543, 544, 546.
v. Donahue, 490.
v. Hive, 142.
v. Hosea, 272, 282.
v. Kirk, 490.
v. Lightheiser, 683.
v. Lynch, 710.
v. Pearson, 699.
v. Pillow, 657.
v. Ruby, 516.
v. Russ, 659.
v. Sheppard, 723, 725.

[REFERENCES ARE TO PAGES.]

Pittsburg, etc., R. R. Co. v. Shields, 40, 491, 493, 496, 747.
v. Spencer, 713.
v. Vandyne, 656.
v. Vining, 715.
v. Wakefield H. Co., 184, 189.
Pittsburg So. Ry. Co. v. Taylor, 128.
Pixley v. Clark, 580, 595.
Place v. Minster, 86.
v. Taylor, 383.
Plant v. Woods, 47, 293, 294.
Planters W. & C. Co. v. Taylor, 604.
Plant System Relief & Hospital Dept. v. Dickerson, 71.
Plassan v. Louisiana Lottery Co., 178.
Platt v. Johnson, 590, 594.
v. Tuttle, 418.
Platte, etc., Co. v. Dowell, 679, 685.
Pleasants v. Raleigh, etc., R. R. Co., 525.
Plessy, Ex parte, 304.
Plessy v. Ferguson, 307.
Plimpton v. Gardiner, 124.
Ploof v. Burlington Trac. Co., 281.
Plouty v. Murphy, 27, 149.
Plumley v. Birge, 349.
Plummer v. Dill, 734.
v. Harper, 622.
v. Johnson, 173.
v. Webb, 12, 259.
Poag v. Charlotte Oil, etc., Co., 445.
Podgitt v. Moll, 662.
Poeppers v. Miss., etc., Ry. Co., 36.
Pokrok Zapader Pub. Co. v. Zizkoosky, 201, 217, 222.
Polk v. Allen, 435.
v. Cosgrove, 390.
v. Melenbacker, 641.
Poland v. Brownell, 464.
Poland v. Union R. R. Co., 714.
Pollard v. Lyon, 201, 203.
Pollasky v. Minchener, 231, 239.
Pollick v. Sellars, 532.
Pollitt v. Long, 594.
Pollock v. Hastings, 205.
v. Pennsylvania R. R. Co., 702.
v. Pollock, 253.
Polzen v. Morse, 742.
Pond v. Leman, 91.
v. Peoples, 156.
Ponder v. Quitman Ginnery, 601.
Pontiac v. Carter, 374.
Pontiac, etc., R. R. Co. v. Hilton, 108, 109.
Pontifix v. Bignold, 458.
Ponton v. Wilmington, etc., R. R. Co., 543.
Pool v. Columbia, etc., R. R. Co., 653.
v. Lewis, 591, 594, 598.
v. Southern Pac. Co., 501, 519.
Poole v. Northern Pac. R. R. Co., 304, 658.
Poor v. Oakman, 409.
v. Poor, 255.
v. Woodburn, 469.
Poorman S. Mines v. Devling, 506.
Pope v. Curl, 354.
v. Pollock, 6, 8, 187.
v. Skinkle, 407.
Popham v. Cole, 360.
Popiswill v. Pierce, 344.
Popplewell v. Hodkinson, 587.
Porell v. Cavanaugh, 430.
Portance v. Lehigh Val. Coal Co., 521.
Porter v. Botkins, 221.
v. Durham, 584, 592.
v. Fletcher, 454, 457.
v. Gilkey, 646.
v. Hannibal, etc., R. R. Co., 525.
v. Johnson, 185, 187.
v. Mack, 86, 185.

[REFERENCES ARE TO PAGES.]

Porter v. North Missouri R. R. Co., 612.
v. White, 170, 171.
v. Steamboat New England, 656.
v. Thomas, 46.
Portland Nat. Gas Co. v. State, 305.
Portsmouth St. R. R. Co. v. Peed, 765.
Posnett v. Marble, 201, 202, 234, 236.
Post v. Buffalo, etc., R. R. Co., 706.
Postal Tel. Co. v. Brantley, 492.
Postlewaite v. Postlewaite, 257, 258.
Post Pub. Co. v. Hallam, 241.
v. Maloney, 214, 235, 241.
Potter v. Faulkner, 472.
v. Flint, etc., R. R. Co., 762.
v. New York Central, etc., R. R. Co., 562.
v. N. Y. Evening Jour P. Co., 206.
v. Warner, 670.
v. White, 368.
Potts v. Imlay, 186.
v. School Directors, 308.
v. Shreveport Belt Ry. Co., 751, 754.
v. W. U. Tel. Co., 25.
Pottstown Gas Co. v. Murphy, 578, 603, 604.
Poucher v. N. Y. Central R. R. Co., 655, 726.
Poulton v. London, etc., R. R. Co., 70.
Powell v. Augusta, etc., R. R. Co., 12.
v. Bentley, etc., Co., 573, 575, 628.
v. Bradlee, 444.
v. Bunger, 610.
v. B. V. Brewing Co., 361.
v. Cheshire, 336.
Powell v. Construction Co., 475, 477, 483.
v. Deveney, 31, 493.
v. Furniture Co., 568, 571, 628.
v. Koehler, 141.
v. Mills, 648.
v. Penn. R. R. Co., 724.
v. Powell, 430, 435.
v. Rees, 130.
v. Salisbury, 342.
Power v. Tazewells, 315.
Powers v. Harlow, 323, 325, 737.
v. Kindt, 346.
v. Standard Oil Co., 556.
v. Tilley, 118, 423, 424, 426, 435, 436.
Prather v. Lexington, 80.
Pratt's Appeal, 355, 360.
Pratt v. Atlantic, etc., R. R. Co., 746.
v. Davis, 674.
v. Gardner, 377.
v. Lamson, 592.
v. Phelbrook, 465.
v. Pioneer Press Co., 243.
v. Weymouth, 770.
Pratt Coal & Iron Co. v. Brawley, 259, 716, 717.
Pray v. W. U. Tel. Co., 25.
Preble v. Brown, 314.
Prescott v. Ball Engine Co., 514, 515, 543.
v. Ottman Lithograph Co., 512.
v. Tousey, 228.
v. Williams, 323, 595.
Prescott, etc., R. R. Co. v. Rees, 408.
Presnill v. Moore, 63, 64.
Press Co. v. Stewart, 245.
Pressly v. Yarn Mills, 532.
Press Pub. Co. v. McDonald, 215.
Preston v. Bowers, 251.
v. Frey, 203, 247.
v. Prather, 634.
v. Sabine, 408.

[REFERENCES ARE TO PAGES.]

Preston v. Witherspoon, 117.
Pretty v. Bickmore, 619.
Prevost v. Citizens' Ice, etc., Co., 546, 554.
Prewitt v. Trimble, 458, 461.
Price, In re, 357.
Price v. Atchison Water Co., 739.
v. Conway, 208, 220.
v. Ga Nun, 669.
v. Grantz, 573, 574, 575, 602, 604.
v. Hewett, 60.
v. McConnell, 368.
v. Oakfield, etc., Creamery Co., 579.
v. Price, 257.
v. Richmond, etc., R. R. Co., 280.
v. Riverside L. & I. Co., 305.
v. Stanley, 177.
v. Ward, 335.
v. Whitely, 212, 213.
Prichard v. Campbell, 134.
Prideaux v. Mineral Point, 718.
Priestley v. Johnson, 409.
v. Fowler, 541.
Prime v. Cobb, 431.
Primrose v. Western Union Tel. Co., 728.
Prince v. Ala. State Fair, 636, 639.
v. Case, 324, 328.
v. International, etc., R. R. Co., 727.
Prince Mfg. Co. v. Prince's M. P. Co., 356.
Princeton v. Gieske, 80.
Pringle v. Samuel, 451.
Pritchard v. Edison Elec. Ill. Co., 606.
Proctor v. Jennings, 586.
v. McCoid, 464.
v. San Antonio St. Ry. Co., 285.
v. Wells, 314.
Proffitt v. Missouri, etc., Ry. Co., 502.
Promer v. Milwaukee, etc., Ry. Co., 501, 519, 532.
Pronger v. Old Nat. Bank, 467.
Proprietors v. Wood, 649.
Proprietors, etc. v. Frye, 146.
Providence v. Clapp, 771, 772.
Prosser v. Callis, 213, 219.
v. Coots, 91.
Protheroe v. Mathews, 349.
Prough v. Entriken, 180.
Provident Loan Trust Co. v. Wolcott, 669.
Provost v. Cook, 445.
Pruden v. Love, 376.
Pruncer v. Pendleton, 603.
Pryor v. Morgan, 130.
Pueblo Elec. St. Ry. Co. v. Sherman, 490, 495, 713.
Pugh v. Arton, 410.
Pullman v. Hill, 197, 198, 233.
Pullman Co. v. Schaffner, 665.
Pullman, etc., Co. v. Bluhm, 32.
Pullman Pal. Car Co. v. Adams, 664, 665.
v. Fielding, 665.
v. Freudenstein, 664, 665.
v. Gardner, 664.
v. Gavin, 664, 665.
v. Gaylord, 664.
v. Hall, 664.
v. Hatch, 665.
v. Laack, 561, 710.
v. Lowe, 664.
v. Martin, 664, 665.
v. Matthews, 664, 665.
v. Pollock, 664.
v. Smith, 664, 665.
Pulsifer v. Douglass, 267, 269, 270.
Pundman v. St. Charles County, 766.
Puorto v. Chieppa, 370.
Purcell v. McNamara, 179.
v. Sowler, 241, 245.
v. St. Paul City Ry. Co., 27, 29.
v. Wilson, 334.

[REFERENCES ARE TO PAGES.]

Purdy v. Westinghouse, etc., Co., 19.
Purington v. Hinchliff, 296, 297.
Purlard v. Martin, 468.
Purrington v. Loring, 91, 395, 439.
Purves v. Landell, 670.
Purvis v. United Brotherhood, 298.
Puryear v. Thompson, 491.
Putnam v. Broadway, etc., R. R. Co., 658.
v. Man, 192.
v. Payne, 349.
v. Wise, 412.
v. Wyley, 414.
Putnam Sons v. MacLeod, 423.
Putzel v. Drovers, etc., Bank, 369.
Pye v. Faxon, 480.
Pyle v. Clark, 700, 720, 762.
Pym v. Gt. Nor. R. R. Co., 285.
Pynchon v. Stearns, 336.
Pyott v. Pyott, 266.

Q

Quarman v. Burnett, 621.
Quartz-Hill Co. v. Eyre, 183.
Quay v. Lucas, 12.
Quebec S. S. Co. v. Merchant, 548, 551, 555.
Queen v. Central, etc., R. R. Co., 531.
v. Dayton, C. & I. Co., 685, 714.
v. Metropolitan Board of Works, 587.
v. Price, 568, 576.
v. Waterhouse, 616.
Queen's College v. Hallett, 371.
Quick v. Miller, 63.
Quigley v. Del. & H. C. Co., 35.
v. Johns Mfg. Co., 740.
v. Levering, 511, 546.
v. Thompson, 494.
Quill v. So. Pac. Co., 713.
Quilty v. Battie, 348.
Quimby v. Boston, etc., R. R. Co., 727.
v. Lowell, 131.
v. Woodbury, 348.
Quincy v. Barker, 772.
v. Jones, 365.
Quincy Coal Co. v. Hood, 273.
Quinlan v. Noble, 371.
v. Phila., 38.
Quinn v. Chicago, etc., R. R. Co., 579.
v. Heisel, 165.
v. Leathern, 44, 292, 293, 294.
v. Moore, 283.
v. New York, etc., R. R. Co., 506.
v. Perham, 741.
v. Power, 491.
v. Prudential Ins. Co., 196, 216, 217, 220.

R.

Rabe v. Hanna, 251.
Rabeke v. Baer, 263.
Rachmel v. Clark, 685.
Rackliff v. Greenbush, 147.
Radde v. Norman, 360.
Rade v. Press Pub. Co., 205.
Radican v. Buckley, 604.
Radley v. Columbia Ry. Co., 665.
Raffel v. Epworth, 465.
Rafferty v. People, 162.
Raggett v. Findlater, 357.
Rahmel v. Lehendorff, 499, 645.
Rail v. Potts, 388.
Railroad Co. v. Acuff, 140.
v. Artist, 673.
v. Baldwin, 660.
v. Berry, 660.
v. Bowler, etc., Co., 660.
v. Bolling, 495.
v. Bolton, 554.
v. Bow, 468.
v. Cargille, 737.
v. Carr, 567.

[REFERENCES ARE TO PAGES.]

Railroad Co. v. Cox, 700.
v. Cravens, 648, 721.
v. Cullen, 760.
v. Davis, 287.
v. Deal, 408.
v. Delaney, 197.
v. Depew, 686.
v. Donnell, 430.
v. Ferguson, 683.
v. Fire Ass'n, 745.
v. Fitzpatrick, 547.
v. Fort, 543.
v. Gladman, 703, 705.
v. Hackett, 488.
v. Hall, 712.
v. Hanning, 480.
v. Harrell, 719.
v. Hatch, 652.
v. Hopkins, 609.
v. Houston, 762.
v. Howard, 762.
v. Hutchins, 436.
v. Jackson, 543. 550.
v. Jones, 681, 702.
v. Kassen, 40, 708.
v. Kellogg, 32.
v. Kenley, 556.
v. Lewis, 134.
v. Lockwood, 689, 726.
v. Lyman, 129.
v. Mfg. Co., 648.
v. McDaniel, 538.
v. Mitchell, 690.
v. Murphy, 521, 650.
v. Murray, 711.
v. O'Donnell, 425, 434.
v. Ray, 477, 487.
v. Reeves, 30, 648.
v. Ridley, 710.
v. Robbins, 287.
v. Roberts, 42.
v. Short, 745.
v. Spence, 286.
v. Stevens, 726.
v. Stout, 699, 737, 744.
v. Sweet, 287, 288, 653.
Railroad Co. v. Tankersley, 657.
v. Wallace, 128.
v. Weaks, 134.
v. Wells, 304.
v. Whitton, 762.
Railsback v. Railsback, 257, 258.
Rainbow v. Benson, 228.
Raines v. N. Y. Press Co., 247.
Raisler v. Oliver, 393.
Raisor v. Chicago, etc., Ry. Co., 276.
Rait v. New Eng. Furn., etc., Co., 483, 484.
Raleigh v. Cook, 178.
Raleigh Hosiery Co. v. Raleigh, etc., R. R. Co., 744.
Ralph v. Am. Bridge Co., 509.
Ramsbottom v. Railroad Co., 683.
Ramsdell v. Grady, 672.
Ramsden v. Boston, etc., R. R. Co., 69, 487, 657.
Ramsey v. Arrott, 175.
v. Cheek, 225, 236.
v. Louisville, etc., Ry. Co., 701.
v. Riley, 391.
v. Wallace, 451.
Rand v. Nesmith, 130.
Randa v. Detroit Screw Works, 539, 542, 546, 553.
Randal v. Elder, 325.
Randall v. Baltimore, etc., R. R. Co., 547, 699.
v. Cleveland, 320, 321.
v. Errington, 468.
v. Evening News Ass'n, 207, 213.
v. Hamilton, 229.
v. Silverthorn, 593.
Randeson v. Murray, 621, 731.
Randle v. Pacific R. R. Co., 612.
Randleson v. Murray, 621, 731.
Randolph v. New York Cent., etc., R. R. Co., 511.
v. Riordon, 719.
v. Pennsylvania S. V. R. R. Co., 596.

[REFERENCES ARE TO PAGES.]

Ranger v. Gt. Western R. R Co., 70.
Rankin v. Crane, 171, 178, 180.
Ranney v. Railroad Co., 274.
Ranson v. Chicago, etc., Ry. Co., 677.
Rapp v. Commonwealth, 150.
v. St. Louis Transit Co., 707.
Rarden v. Maddox, 155.
Rascher v. East Detroit, etc., Ry. Co., 763.
Rashdall v. Ford, 452.
Rasmussen v. Chicago, etc., R. R. Co., 559.
Ratcliff v. Evans, 209.
Rathbun v. Payne, 700.
Rattle v. Dawson, 739.
Rauenstein v. New York, etc., R. R. Co., 370.
Ravenga v. Mackintosh, 173.
Rawley v. Collian, 514.
Rawlings v. Bean, 458.
Rawson v. Morse, 325.
v. Putnam, 318.
Rawstron v. Taylor, 586.
Ray v. Jeffries, 531.
v. Jones & Adams Co., 93.
v. Law, 187.
v. Light, 85, 435.
Raycroft v. Tayntor, 43, 46, 292.
Raymond v. Lowe, 131, 378.
v. Lowell, 771.
v. Yarrington, 292, 296.
Raynsford v. Phelps, 22.
Rea v. Shepard, 114.
v. Simons, 633.
Read v. Amidon, 644.
v. Friendly Soc., etc., 293.
v. Gt. Eastern Ry. Co., 273, 280.
v. Leeds, 333.
v. New York, etc., R. R. Co., 510.
v. Nichols, 36.
v. Pennsylvania Railroad Co., 742.
Readhead v. Midland R. R. Co., 509, 656.
Reading v. Gazzam, 257, 258.
Reading Tp. v. Telfer, 719.
Reardon v. Thompson, 735.
Record v. Cooperage Co., 509, 511, 535.
Rector v. Clark, 383.
v. Smith, 226.
Reddaway v. Banham, 361.
Reddick v. Governor, 146.
v. Newburn, 340, 341.
Reddie v. Scoolt, 263.
Redding v. S. C. A. R. Co., 493.
v. Wright, 448.
Redfield v. Redfield, 156.
Redgate v. Roush, 234, 237.
Redington v. Pac. Postal Tel. Cable Co., 699, 729.
Redman v. Edolfe, 150.
v. Met. St. R. R. Co., 661.
Redpath v. West. U. Tel. Co., 668.
Redway v. Moore, 576.
Reece v. Miller, 314.
Reed v. Chicago, etc., Co., 317, 761.
v. City & Suburban Ry. Co., 720.
v. Conway, 385, 386.
v. Harper, 63.
v. Home Savings Bank, 69.
v. Madison, 768.
v. McRill, 432.
v. Minn. St. Ry. Co., 715.
v. Northfield, 772.
v. N. W. R. R. Co., 273.
v. Reed, 258.
v. Rich, 87.
v. Sidener, 447.
v. Southern Express Co., 344.
v. Stockmeyer, 539.
v. West. U. Tel. Co., 689, 729.
Reeden v. Evans, 151.
Reeder v. Harlan, 391.
v. Purdy, 321.
Reem v. St. Paul City Ry. Co., 663.
Reese v. Clark, 535.

[REFERENCES ARE TO PAGES.]

Reese v. W. U. Tel. Co., 25.
Reese River, etc., Co., v. Smith, 458.
Reeves v. Delaware, etc., R. R. Co., 701.
v. Treasurer, etc., 567.
Regan v. Chicago, etc., Ry. Co., 283.
v. New York, etc., R. R. Co., 128, 742.
v. St. Louis, etc., Co., 520.
Regina v. Button, 152.
v. Driscoll, 155.
v. Hanson, 152.
v. James, 150.
v. Lock, 152.
v. Sharpe, 267.
v. Shickle, 413.
v. Sinclair, 152.
v. St. George, 150.
v. Young, 152.
Rehberg v. New York, 768, 770. 772.
Reichert v. Geers, 603.
v. St. Louis, etc., R. R. Co., 332.
Reid v. Atlanta, 616.
v. Colcock, 423.
v. De Lorme, 236.
v. Evansville, etc., R. R. Co., 38.
v. Hood, 377.
v. King, 116.
v. Kirk, 412.
v. Prov. Journal Co., 216, 217.
v. State, 149.
v. Terwilliger, 123, 126.
Reid, Murdock & Co. v. Kempe, 459.
Reidel v. Philadelphia, etc., R. R. Co., 678, 685.
Reimer's App., 578.
Reinhardt v. Mentusti, 582.
Reinke v. Bentley, 492.
Reining v. New York, etc., R. R. Co., 370.
Reis v. Stratton, 350.
Reitan v. Goebel, 203, 224.
Reithmann v. Godsman, 89.
Relyea v. Kansas City, etc., R. R. Co., 548, 555.
Rembaugh v. Phipps, 423.
Remlinger v. Weyker, 91.
Renkert v. Title Guaranty Trust Co., 669.
Renneker v. So. Carolina, 681.
Renner v. Canfield, 29.
Rennyson's Appeal, 370.
Renwick v. Morris, 144, 145, 146, 147.
Reuck v. McGregor, 163.
Republican Pub. Co. v. Miner, 202, 217.
v. Mosman, 212, 213, 249.
Republican Val. R. R. Co. v. Fellows, 611.
Republic I. & S. Co. v. Ohler, 503, 539.
Rerick v. Kern, 327.
Respublica v. Montgomery, 164.
Respass v. Morton, 105.
Reston v. Promfeict, 211.
Revell v. People, 568.
Revis v. Smith, 45, 225.
Rex v. Brooks, 413.
v. Creevy, 243.
v. Fisher, 242.
v. Great Yarmouth, 382.
v. Hoseason, 382.
v. Huggins, 350.
v. Ivens, 641.
v. Lord Abingdon, 243.
v. Newman, 246.
v. Pagram, 2, 22.
v. Paffineau, 602.
v. Pease, 615.
v. Pedley, 618.
v. Wheatley, 11.
Rexter v. Starin, 128, 710.
Reynolds v. Ashby, 410.
v. Board of Education, 306, 307.

[REFERENCES ARE TO PAGES.]

Reynolds v. Boston, etc., R. R. Co., 524.
v. Buck, 473.
v. Clark, 585.
v. Commonwealth, 314.
v. Everett, 293.
v. Fitzpatrick, 420.
v. Graves, 670.
v. Hindman, 678, 685.
v. Hussey, 346.
v. Moore, 439.
v. Pierson, 153.
v. Phillips, 349.
v. Railroad, 653.
v. Reynolds, 266.
v. Stansbury, 380.
v. St. Louis Traction Co., 690
Rhea v. Forsyth, 372.
v. White, 99, 104.
Rhea County v. Sneed, 72.
Rhoades v. Booth, 143.
v. Varney, 518, 535.
Rhoda v. Annis, 456.
Rhode v. Alby, 453.
Rhodes v. Dunbar, 601, 605.
v. Otis, 327.
v. Rodgers, 126, 127.
Rhone v. Loomis, 305, 306.
Rhymer v. Fritz, 609.
Rhymes v. Jackson Elec., etc., Co., 707.
Ribich v. Lake Superior Smelting Co., 518, 537.
Rice v. Cottrell, 206.
v. Eureka P. Co., 556, 557.
v. Evansville, 77.
v. Flint, 78.
v. Kahn, 428.
v. King Phillip Mills, 512.
v. Manley, 293.
v. Miller, 439, 440.
v. Montpelier, 699.
v. Rice, 257.
v. Wood, 90.
Ricci v. Mueller, 66.
Rich v. Basterfield, 617, 621, 741.
Rich v. Cavenaugh, 206.
v. Keshena, etc., Co., 581.
v. McInerny, 158, 162
v. Minneapolis, 332.
v. New York, etc., R. R. Co., 1, 2, 17, 31.
v. Pierpont, 670.
Richard v. Scott, 365, 366.
Richard's Appeal, 628.
Richards v. Citizens' Nat. Gas Co., 128, 129
v. Connell, 739.
v. Dougherty, 604.
v. Jewett, 187.
v. London, etc., R. Co., 644.
v. Nye, 440.
v. Riverside I. Works, 529.
v. Rose, 367.
v. Rough, 20.
v. Waupun, 625.
v. Willard, 673.
Richardson, Matter of, 269.
Richardson v. Anthony, 113, 114.
v. Atkinson, 429.
v. Carbon Hill Coal Co., 72.
v. Copeland, 409.
v. Douglass, 744.
v. Millburn, 338.
v. N. Y. Cent. R. R. Co., 275, 677.
v. Vt. Cent. R. R. Co., 365.
v. York, 336.
v. Zuntz, 155.
Richberger v. Am. Express Co., 499.
Richels v. State, 150.
Richman v. Miss. Mills, 467.
Richmond v. Fisk, 151.
v. Loeb, 217.
v. Long, 73, 77.
v. McNeill, 745.
v. Post, 212.
v. Sitterding, 481.
v. Southern Pac. Co., 723.
Richmond City Ry. Co. v. Scott, 662.

[REFERENCES ARE TO PAGES.]

Richmond, etc., Elec. Ry. Co., v. Rubin, 751, 753.
Richmond, etc., R. R. Co. v. Farmer, 710.
v. George, 514.
v. Greenwood, 92, 93.
v. Martin, 281.
v. Moore, 731, 732.
v. Norment, 520, 533.
v. Payne, 723, 725.
Richmond Gas Co. v. Baker, 756.
Richmond Granite Co. v. Bailey, 544.
Richmond L. Works v. Ford, 506, 543.
Richmond Mfg. Co. v. Atlantic D. L. Co., 596.
Richmond Ry. & Elec. Co. v. Bowles, 256.
Richmond Traction Co. v. Martin, 708, 764.
Richmond Turnpike Co. v. Vanderbilt, 489.
Ricker v. Freeman, 31.
v. Kelly, 326, 327, 407.
Rickets v. Birmingham St. Ry. Co., 700.
Ricketts v. Chesapeake, etc., Ry. Co., 98.
Ricks v. Flynn, 554.
Riddle v. Driver, 118.
v. McGinnis, 261.
v. State, 154.
Riden v. Grimm Bros., 680, 685.
Rideout v. Knox, 45.
Rider v. Chick, 91.
v. Clark, 619.
v. Kite, 181.
v. Murphy, 171.
Reitman v. Stolte, 529.
Rigden v. Jordan, 174.
Rigs v. Boylan, 390.
v. Earl of Lonsdale, 414.
v. Palmer, 48.
Rigney v. Chicago, 611.
v. Tacoma L. & W. Co., 592.
Riley v. Bell, 461.
v. Lee, 212, 213.
v. Lidtke, 254.
v. Norton, 221.
Rincicotti v. O'Brien Contracting Co., 511.
Rindge v. Sargent, 569, 584.
Rinehart v. Bills, 253.
Ring v. Cohoes, 772.
v. Wheeler, 227.
Ringle v. Pa. R. R. Co., 140.
Ringue v. Oregon Coal Co., 476.
Ringwalt v. Wabash R. R. Co., 659
Ripka v. Sergeant, 23, 321.
Ripley v. Davis, 434, 435.
Riser v. Southern Ry. Co., 563.
Ritchie v. Waller, 490, 494.
v. Widdemer, 206.
Ritger v. Milwaukee, 718.
v. Parker, 362.
Ritter v. Ewing, 178.
v. Ritter, 266.
Rivers v. Augusta, 75.
Rivinus v. Langford, 422.
Roach v. Dumron, 115.
v. Lawrence, 341.
v. People, 154.
v. Western, etc., R. R. Co., 719 721.
Roanoke v. Shull, 713, 717, 767.
Roath v. Driscoll, 2, 21, 587, 589.
Robb v. Carnegie Bros., 597, 627.
Robbins v. Mount, 61.
v. Swift, 167.
v. Treadway, 207.
Roberson v. Rochester Folding Box Co., 2, 194.
Roberts v. Barrow, 469.
v. Boston, 307.
v. Breckon, 199.
v. Chicago, etc., R. R. Co., 547
v. Connelly, 261.
v. Graham, 124.
v. Morgan, 333, 334.
v. Ramsey, 202.
v. Rose, 110, 111.

[REFERENCES ARE TO PAGES.]

Roberts v. Spokane St. Ry. Co., 765.
v. Stuyvesant Safe Dep. Co., 639, 640.
Robertson v. Corsett, 407.
v. Edelstein, 204.
v. Louisville, etc., R. R. Co., 648.
v. Marion, 183.
v. Parks, 85, 86, 460, 461, 462.
v. Tramwell, 103.
Robinett v. McDonald, 143.
Robinson v. Baltimore, etc., Co., 282.
v. Baugh, 605, 606.
v. Bird, 426.
v. Brennan, 395.
v. Burleigh, 432.
v. Chamberlain, 403.
v. Clapp, 370.
v. Cone, 716.
v. Dininny, 506, 529, 530.
v. Eau Claire, etc., Co., 209.
v. Evansville, 76.
v. Gell, 402.
v. Georgia R. & B. Co., 279.
v. Greenville, 76.
v. Hartridge, 435.
v. Holt, 116, 117.
v. Kruse, 412, 420.
v. Larson, 453.
v. Marino, 345.
v. McNeill, 491, 494, 495.
v. New York Cent. R. R. Co., 720.
v. Rohr, 387, 401.
v. Storm, 355, 358, 361.
v. Welty, 130.
v. Wheeler, 337.
Roby v. Murphy, 204.
Rochdale Canal Co. v. King, 23.
Roche v. Llewellyn, 504.
v. Sawyer, 740.
Rochester v. Campbell, 147.
Rochester White Lead Co. v. Rochester, 383.
Rock v. Inr., etc., Mills, 522.
Rockafellow v. Baker, 455.
Rock Falls v. Wells, 37.
Rockford v. Tripp, 30, 43.
Rockford, etc., R. R. Co., v. Delaney, 285.
Rock Island L. & M. Co. v. Elliott, 72, 77, 474.
Roddy v. Missouri Pac. R. R. Co., 730.
Rodenhausen v. Craven, 606.
Rodgers v. Cent. Pac., etc., Co., 649.
v. Lees, 739.
v. Nowill, 358.
Rodick v. Coburn, 430.
Rodman v. Missouri Pac. R. R. Co., 282.
v. Thalheimer, 443, 444.
Roe v. Bank of Versailles, 210.
v. Birkenhead, etc., R. R. Co., 70, 88.
v. Deming, 308.
v. Winston, 475.
Roelm v. Striker, 481.
Rogers v. Coal River B. & D. Co., 337,
v. Duhart, 332.
v. Elliott, 573, 575, 605.
v. Hillhouse, 142.
v. Hughes, 280.
v. Kennebec Steamboat Co., 727.
v. Leyden, 525, 528, 558.
v. Ludlow Manufacturing Co., 512.
v. Moore, 437.
v. Overton, 562.
v. Place, 452.
v. Rogers, 109, 358.
v. Smith, 260.
v. Stewart, 624.
v. Taintor, 358.
Rohan v. Sawin, 163.
Rohloff v. Fairhaven, etc., R. R. Co., 713.

[REFERENCES ARE TO PAGES.]

Rohrbough v. Barbour Co. Ct., 37.
Roller v. Roller, 264.
Rolling Mill Co. v. Corrigan, 523, 714.
Rollins v. Chalmers, 262.
Romaine v. Decker, 257.
v. Van Allen, 436.
Rome G. L. Co., v. Meyerhardt, 364.
Rommel v. Schambacher, 732.
Roodhouse v. Christian, 99, 101.
Root v. Chandler, 89, 90.
v. King, 222.
v. McFerrin, 380.
v. New York, etc., Co., 665.
v. Rose, 177, 377.
v. Stevenson, 58.
Rose v. Des Moines Val. R. R. Co., 727.
v. King, 678, 685.
v. Lane, 91.
v. Miles, 610.
Rosenan v. Syring, 434.
Rosenbaum v. Schaffner, 31, 733.
Rosenberg v. Durfee, 733.
v. Hart,, 180.
Rosenfield v. Peoria, etc., R. R. Co., 725.
Rosenheimer v. Standard G. L. Co., 601.
Rosenthal v. Davenport, 402.
v. Weir, 425.
Rosenweig v. Frazer, 430, 435.
Rossney v. Erie Railroad Co., 548.
Ross v. Butler, 575, 601.
v. Estates Investment Co., 447.
v. Fitch, 204.
v. Hixon, 177.
v. Leggett, 164.
v. Langworthy, 180.
v. Mellin, 641.
v. Philbrick, 91, 397.
v. Shanley, 503, 560.
v. Walker, 501, 509, 520, 527, 554.
Ross v. Ward, 241.
v. W. U. T. Co., 31, 38.
Rosse v. St. Paul, etc., Ry. Co., 677.
Rossell v. Cotom, 340.
Rossiter v. Peck, 380.
Roswell v. Prior, 618, 620.
Rotan v,. Fletcher, 419.
Rotch v. Hawes, 424, 637.
Roth v. District of Col., 603.
v. Eccles, 530.
v. Northern Pac. Lumbering Co., 527, 532.
v. Shupp, 90, 378.
v. Union Depot Co., 714, 717.
Rothenberger v. N. W. Consol. M. Co., 556, 557.
Rothholz v, Dunkle, 234, 235.
Rothschild v. Am. Cent. Ins. Co., 222.
Rouker v. St. John, 750.
Roul v. East Tenn., etc., Ry. Co., 540.
Rounds v. Delaware, etc., R. R. Co., 488, 493.
Roundtree v. Brantley, 371.
Rounsaville v. Kohlheim, 603.
Rourke v. White Moss Colliery Co., 484.
Rouse v. Detroit Elec. Ry. Co., 283.
v. Martin, 627, 628.
Rousey v. Wood, 161, 440.
Roussin v. Benton, 312.
Rourke v. Elk Drug Co., 299.
Roux v. Blodgett, etc., Co., 555.
Rowe v. Addison, 379.
v. Ehrmantraut, 346.
v. New York, etc., Tel. Co., 753.
v. Rochester, 585.
v. Rugg, 157.
v. Taylorville Elec. Co., 751, 752.
Rowell v. Railroad, 746.
Rowland v. Anderson, 409.
v. Kalamazoo, 73, 81.

[REFERENCES ARE TO PAGES.]

Rowland v. Philadelphia, 100.
v. Rowland, 319.
Rowning v. Goodchild, 393.
Roworth v. Wilkes, 352.
Roy v. Goings, 176, 179.
v. Manchester, 770.
v. Stuckey, 342.
Royal Aquarium, etc., v. Parkinson, 230.
Royal, etc., Co., v. Sherrell, 357.
Royce v. Oakes, 418.
Rozell v. Anderson, 79.
Ruan v. Perry, 329.
Ruberg v. Brown, 450.
Ruch v. New Orleans, 329.
Rudd v. Darling, 377.
v. Meriden Elec. R. R. Co., 679.
Rude v. Nass, 232.
v. St. Louis, 611.
Rudder v. Koopman, 607, 679.
Rudgeair v. Reading Traction Co., 489.
Ruggles v. Lesure, 324.
v. Sands, 317.
Ruloff v. People, 163.
Rummel v. Dillworth, 523.
Rumney v. Worthley, 197.
Rumsey v. New York, etc., R. R. Co., 371.
Rundle v. Del. & Rar. Canal, 135.
Runge v. Brown, 464.
Ruohs v. Backer, 227.
Rush v. Buckley, 161, 167, 380, 381, 382.
Rushin v. Tharpe, 634.
Rushville v. Adams, 770.
v. Rushville Nat. Gas Co., 305.
Russ v. Hanchett, 116.
v. Wabash Western Ry. Co., 544.
Russell v. Bancroft, 21.
v. Branham, 452.
v. Brown, 616.
v. Canastota, 772.
v. Cole, 428, 435.
v. Erie R. R. Co., 722, 723.
Russell v. Hubbard, 327.
v. Men of Devon, 766.
v. Minn., etc., Co., 534.
v. Monroe, 772, 773.
v. New York, 75.
v. Pacific Can. Co., 504.
v. Palmer, 670.
v. Polk County Abstract Co., 669.
v. Richards, 409.
v. Shenton, 617.
v. Tillotson, 540.
v. Tomlinson, 345.
v. Turnpike Co., 147.
v. W. U. Tel. Co., 25.
Russell Creek C. Co., v. Wells, 506, 530, 546.
Russell's Heirs v. Mark's Heirs, 334.
Russo v. Improvement Ass'n, 663
v. Maresca, 87.
Rust v. Conrad, 324.
v. Low, 120, 338, 342.
Ruth v. St. Louis Transit Co., 169, 474, 497.
v. Zimbleman, 257.
Rutherford v. Paddock, 218.
Ryers, Matter of, 382.
R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 358, 359.
Ryalls, v. Mechanics Mills, 145.
v. Leader, 242.
Ryan v. Brown, 611, 613.
v. Chelsea P. M. Co., 529.
v. Chicago, etc., R. R. Co., 547.
v. Curran, 478.
v. Fowler, 503.
v. Fralich, 263
v. Gallatin Co., 148.
v. Los Angeles I. & C. S. Co., 524.
v. McCully, 549.
v. N. Y. Cent. R R. Co., 36.
v. Sun Sing Chow Poy, 319.
v. Towar, 738, 739.
v. Wilson, 619.

[REFERENCES ARE TO PAGES.]

Ryder v. Hathaway, 116, 117.
v. Kinsley, 608.
v. Nietge, 445.
Ryerson v. Bathgate, 733.
Rylands v. Fletcher, 581.

S.

Sabre v. Mott, 112.
Sack v. Dolese, 562.
Sacker v. Waddell, 476, 477.
Sackrider v. Beers, 592.
Sadgrove v. Hole, 198.
Sadler v. Henlock, 484.
Sadowski v. Michigan Car Co., 553, 697.
Safford v. Grout, 464.
Sage v. Laurian, 385.
Sager v. Portsmouth, etc., R. R. Co., 722.
Sahr v. Scholle, 374.
St. Claire v. Cash G. M. & M. Co., 436.
St. Helens Chemical Co. v. St. Helens, 578.
St. Helens Smelting Co. v. Tipping, 572, 625.
St. John v. Antrim Iron Co., 130.
v. Van Santvoord, 649.
St. Johnsbury, etc., Co. v. Hunt, 174.
St. Johns, etc., R. R. Co. v. Ransom, 745.
St. Joseph, etc., Co. v. Leland, 400.
St. Joseph, etc., R. R. Co. v. Hodge, 39, 711.
St. Louis v. Hill, 615.
St. Louis Cordage Co. v. Miller, 532, 533, 534, 536.
St. Louis, etc., Co. v. Harper, 547.
v. Weaver, 547.
St. Louis, etc., R. R. Co. v. Ayers, 744.
v. Battle, 655.
v. Britz, 530, 560.
v. Brown, 133, 134.
St. Louis, etc., R. R. Co. v. Clure, 288.
v. Colum, 716, 717.
v. Dalby, 69.
v. Dawson, 281.
v. Dillard, 761.
v. Dunn, 678.
v. Finley, 654.
v. Freeman, 717.
v. Halst, 275.
v. Harper, 561.
v. Hopkins, 93.
v. Kilpatrick, 655.
v. Lesser, 725.
v. McClain, 537, 558, 706
v. Montgomery, 650.
v. Needham, 548.
v. Norton, 415.
v. Philpot, 703.
v. Rice, 542, 545, 559
v. Smith, 449.
v. Trigg, 98.
v. Valirius, 714.
v. Weakley, 725.
St. Louis S. W. Ry. Co. v. Ford 742.
v. Harvey, 495.
v. Pope, 684.
St. Ores v. McGlashen, 63, 249.
St. Peter v. Denison, 316.
St. Paul v. Kuby, 704, 716, 772.
v. Seitz, 484.
St. Paul, etc., R. R. Co. v. Minn., etc., Ry. Co., 636.
v. Olson, 141.
St. Paul Typothetæ v. St. Paul P. B. Union, 143.
Sala v. Railway Co., 731.
Sale v. Aurora, etc., Co., 704.
Salem Iron Co. v. Hyland, 628.
Salem Traction Co. v. Anson, 422.
Salem Turnpike, etc., Co. v. Hayes, 148.
Salisbury v. Barton, 458.
v. Erie R. R. Co., 495.
v. Herchenroder, 685.

[REFERENCES ARE TO PAGES.]

Salliolte v. King Bridge Co., 775.
Salmon v. Delaware, etc., R. R. Co., 706.
Samonset v. Mesnager, 669.
Samples v. Carnahan, 232.
Sampson v. Burnside, 327.
v. Graham, 409.
Samuels v. Evening Mail Ass'n, 69.
San Antonio, etc., Ry. Co. v. Bowers, 680.
v. Morgan, 684, 737.
San Antonio Gas Co. v. Robertson, 20, 528.
v. Singleton, 100.
Sanborn v. Hamilton, 428.
v. Madura, etc., Co., 527
v. Morrill, 433.
v. Sanborn, 256.
v. Webster, 129.
Sanches v. San Antonio, etc., Ry. Co., 41, 697.
Sandeen v. R. R. Co., 132.
Sandell v. Sherman, 171.
Sanderlin v. Baxter, 364.
Sanders v. Aiken Mfg. Co., 501.
v. Hamilton, 131.
v. Hughes, 145.
v. Palmer, 180.
Sanderson v. Caldwell, 101.
v. Collins, 492, 494.
v. Frazier, 691.
v. Haverstick, 333.
v. Nor. Pac. Ry. Co., 28, 29.
Sandford v. Pawtucket St. Ry. Co., 478, 482.
Sandoz v. Veazie, 170, 175.
Sandusky, etc., R. R. Co. v. Sloan, 701.
Sandwich v. Fish, 403.
Saner v. Bilton, 323.
Sanford v. Eighth Ave. R. R. Co., 487, 491.
v. Handy, 451.
v. Rowley, 202, 221.
v. Standard Oil Co., 549.
Sangster v. Prather, 451.
San Jose Ranch Co. v. Brooks, 611.
Sann v. Johns Manufacturing Co., 710.
Sans v. Joerris, 246.
Santa Fe Pac. R. R. Co. v. Holmes, 504.
Sanger v. Craigue, 390.
Sappenfield v. Main St., etc., R. R. Co., 508, 512, 524, 526.
Sargeant v. Franklin Ins. Co., 435.
Sargent v. ———, 263.
v. Mathewson, 259.
v. St. Louis, etc., Ry. Co., 655.
Sartin v. Oregon Short Line R. R. Co., 134.
Sartor v. Schaden, 361
Sartwell v. Parker, 171.
Sasseen v. Clark, 642.
Satterfield v. Rowan, 597.
Saunders v. Baxter, 242.
v. Chicago, etc., Ry. Co., 691.
v. City, etc., R. R. Co., 764.
v. Southern Pac. Co., 726.
v. Southern Ry. Co., 660.
Sauter v. N. Y. Cent., etc., R. R. Co., 280.
Savacool v. Boughton, 439.
Savage v. Brewer, 188.
v. Chicago, etc., Ry. Co., 32.
Savannah v. Mulligan, 566, 608.
Savannah, etc., Ry. Co. v. Quo, 657.
Savignac v. Roome, 416.
Savil v. Roberts, 179.
Saville v. Roberts, 85.
v. Welch, 130, 131.
Savings Bank v. Ward, 774.
Savings Society v. Philadelphia, 74.
Savoie v. Scanlan, 202, 224.
Saxlehuer v. Eisner & M. Co., 361.
Saxon v. Boyce, 394.
Saxton v. N. W. Tel. Exch. Co., 504.
v. Williams, 392.

[REFERENCES ARE TO PAGES.]

Sawdey v. Spokane Falls, etc., Ry. Co., 72.
Sawtell v. West. R. R. Co., 12.
Sawyer v. Corse, 393.
v. Kenan, 429.
v. Perry, 274.
v. Wilson, 397.
Sayles v. Briggs, 181.
Saylor v. Montesano, 767.
v. Parsons, 561, 709.
Sayward v. Carlson, 543.
Scaling v. Pullman Pal. Car Co., 664.
Scanlan v. Turner, 191, 382.
Scarlett v. Norwood, 261.
Scammon v. Chicago, 772.
Schaaf v. Fries, 425, 636.
Shade v. Gehner, 669.
Schaffner v. Ehrman, 210.
Scharenbroich v. St. Cloud F. W. Co., 530.
Schartz v. Gilmore, 478.
Schattgen v. Holnback, 170, 171, 173, 175.
Schauf's Admr. v. Paducah, 739.
Scheffer v. Railroad Co., 32, 280.
v. Wash. City, etc., R. R. Co., 273.
Schell v. Stein, 390, 391.
Schenk v. Strong, 59.
Schermer v. Neurath, 633.
Schill v. Brockhahus, 368.
Schilling v. Abernethy, 733.
Schillinger v. Smith, 529, 553.
Schindler v. Westover, 637.
Schinotti v. Bumsted, 402.
Schippel v. Norton, 175, 181, 182.
Schlereth v. Missouri Pac. R. R. Co., 678, 685.
Schliger v. Northern T. Co., 714.
Schlitz Br. Co. v. Crompton, 580.
Schloss v. Wood, 303.
Schlossberg v. Lahr, 62.
Schlossnagle v. Kolb, 317.
Schmalzried v. White, 740.
Schmeer v. Gas Lt. Co., 756, 757.
Schmidt v. Bauer, 733.
v. Chicago, etc., Ry. Co., 650, 699.
v. Kansas City, etc., Co., 734.
v. Leistekow, 508.
v. Menasha W. Co., 277.
v. Milwaukee, etc., R. R. Co., 676.
v. Missouri Pac. Ry. Co., 762.
v. Mitchell, 32.
v. N. Y. Union Ins. Co., 222.
v. Weidman, 180.
Schmuck v. Hill, 198.
Schnable v. Providence Pub. Market, 285.
Schneider v. Second Ave. R. R. Co., 711.
Schoefer v. Osterbrink, 63.
Schoeffer v. Jackson Tp., 38.
Schoepflin v. Coffey, 196.
Schofield v. Chicago, etc., Ry. Co., 762.
v. Cooper, 585.
v. Wood, 732.
Scholfield v. G. & P. Co. v. Sholfield, 461, 462.
Schomberg v. Walker, 207.
School v. Bradstreet Co., 209.
School District v. Boston, etc., R. R. Co., 724.
v. Bragdon, 57.
Schooler v. Arrington, 384, 401.
Schooner Norway v. Jensen, 503.
Schoonmaker v. Gilmore, 122.
Schoonover v. Irwin, 114, 326.
Schornberg v. Walker, 213.
Schrader v. Wolfin, 398.
Schroeder v. Baraboo, 81.
v. Chicago, etc., R. R. Co., 520, 539.
v. Multnomah County, 72.
Schroth v. Prescott, 771.
Schroyer v. Lynch, 393.
Schrunk v. St. Joseph, 687.
Schubert v. J. R. Clark Co., 777.
Schulte v. N. P. T. Co., 611.

[REFERENCES ARE TO PAGES.]

Schulten v. Bavarian Brewing Co., 299.
Schultz v. Bowen, 365.
v. Byers, 365.
v. Huebner, 161, 166, 202, 439.
v. Milwaukee, 75.
v. Rohe, 557.
v. Shultz, 255.
v. Strauss, 226.
Schulwitz v. Delta L. Co., 495.
Schum v. Penn. R. R. Co., 704.
Schumaker v. St. Paul, etc., Ry. Co., 39, 500, 519.
Schumpert v. Southern Ry. Co., 96, 97, 559, 563.
Schuster v. Albrecht, 579, 586.
Schuter v. Jacobs, 397.
Schutte v. United Elec. Co., 775.
Schuyler v. Curtis, 195.
Schwab v. Cleveland, 580.
v. Mabley, 86.
Schwabacker v. Riddle, 455.
Schwanewede v. North Hudson Co. Ry. Co., 765.
Schwarting v. Van Wie, etc., Co, 474, 497.
Schwartz v. Atlantic, etc., Co., 668.
v. Gilmore, 484.
v. Adsit, 607.
Schwarzchild & S. Co. v. Weeks, 519.
Schwarzschild v. Drysdale, 558.
Schlick v. Hall, 95.
Scofield v. Lake Shore, etc., Co., 647.
Scoles v. Wilsey, 391.
Scollard v. Brooks, 423.
Scott v. Allegheny Val. R. R. Co., 32.
v. Bay, 608.
v. Chicago, etc., Ry. Co., 553.
v. Donald, 126.
v. Eldridge, 165.
v. Fishblate, 378.
v. Fleming, 149.
v. Grover, 340.
Scott v. Hodges, 430.
v. Home Ins. Co., 222.
v. Hunter, 40.
v. Iowa Tel. Co., 516.
v. Lord Seymour, 133.
v. Manchester, 81.
v. McKinnish, 221.
v. Shepherd, 40, 153.
v. Shufeldt, 266.
v. Stansfield, 231.
v. Wahan, 166.
v. Watson, 58.
Scotten v. Fegan, 400.
Scott Tp. v. Montgomery, 38.
Scougale v. Sweet, 207.
Scoville v. Salt Lake City, 771.
Scranton v. Baxter, 635.
Screws v. Watson, 397.
Scripps v. Reilly, 199, 242, 244.
Scudder v. Anderson, 428.
Seaboard, etc., R. R. Co. v. Joyner, 737, 758
Seabridge v. McAdams, 171, 174, 175, 176.
Seabrook v. Gregg, 61.
Seager v. Sligerland, 263.
Seale v. Gulf, etc., Co., 39.
Seaman v. Bear, 448.
v. Netherclift, 225, 226.
v. Patten, 385, 392.
Seamans v. Hoge 180.
Searcy v. Sudhoff, 218.
Seare v. Prentice, 670.
Searl v. School District, 408.
Searle v. Park, 490.
Searles v. Scarlet, 243.
Sears v. Hathaway, 181.
v. Hicklin, 457.
v. Lydon, 440.
v. Seattle Consol. St. Ry. Co. 654.
Searson v. Robinson, 53.
Seaton v. Cordray, 90.
Seaver v. Adams, 257.
v. Bradley, 664.
v. Pierce, 91.

[REFERENCES ARE TO PAGES.]

Seawell v. Carolina Central R. R. Co., 487.
Sebastian v. Cheney, 175, 179.
Seefeld v. Chicago, etc., Co., 763.
Seeger v. Pettit, 408.
Seekins v. Goodale, 439.
Seeley v. Peters, 339.
Seery v. Viall, 202, 203.
Sego v. Southern Pacific Co., 700, 712.
Seibel v. Bath, 407.
Seibold v. Rogers, 435.
Seifert v. Brooklyn, 80, 816.
Seifried v. Hays, 603.
Seimers v. Eisen, 685.
Seip v. Deshler, 197, 215.
Seither v. Phila. Traction Co., 102, 103.
Seixo v. Provezende, 355, 360.
Selchow v. Baker, 357.
Selden v. Canal Co., 146.
v. Delaware, etc., Co., 326.
v. Jacksonville, 370, 615.
Seldomridge v. Chesapeake, etc. Ry. Co., 513, 530.
Selinas v. Vt. State Agricultural Soc., 68, 731, 732.
Sell v. Mississippi Riv. Logging Co., 467.
Sellar v. Clelland, 441.
Sellek v. Janesville, 254.
Sellick v. Hall, 623.
Selman v. Wolfe, 109.
Selz v. Unna, 104.
Semayne's Case, 330.
Semple v. Vicksburg, 80.
Seney v. Chicago, etc., Ry. Co., 271.
Senf v. St. Louis, etc., Ry. Co., 662.
Senior v. Ward, 281.
Sentenis v. Ladew, 135.
Serio v. Murphy, 365, 366.
Serry v. Knepper, 636.
Servatius v. Pichel, 237.
Service v. Shoneman, 510.
Sesler v. Montgomery, 199.
Severinglaus v. Beckman, 85, 87.
Severy v. Chicago, etc., Ry. Co., 701.
v. Nickerson, 735.
Sewall v. Catlin, 208.
Sewell v. Board of Education, 308.
v. Harrington, 415.
Sexton v. Bacon, 342.
v. Graham, 637.
Seybolt v. New York, etc., Co., 726.
Seyer v. Otoe, 697.
Seymour v. Greenwood, 487.
v. Ives, 436.
Shackleton v. Manistee, etc., R. R. Co., 556.
Shackford v. Coffin, 740.
Shadden v. McElwee, 226.
Shadwell v. Hutchinson, 616.
Shafer v. Harsh, 525.
v. Hertzig, 171.
v. Lacock, 695.
Shahan v. Herzberg, 411.
Shamleffer v. Peerless Mill Co., 591.
Shanks v. Whitney, 451, 456.
Shannon v. Jones, 174, 180.
v. Swanson, 252.
Shanny v. Androscoggin Mills, 510, 514.
Sharon v. Wooldrick, 119.
Sharp v. Bowler, 231, 234.
v. Erie R. R. Co., 698.
v. Gray, 101.
v. Johnston, 174.
v. Nat. Biscuit Co., 284.
v. Ponce, 468.
Sharpe v. Johnson, 180.
v. Johnston, 174, 178.
v. Larson, 207.
v. Stallwood, 53.
v. Williams, 83, 100.
Sharpley v. Wright, 513.
Shartel v. St. Joseph, 541.
Shattuck v. State, 394, 395.
Shaul v. Brown, 172.
Shaver v. Shaver, 357.

[REFERENCES ARE TO PAGES.]

Shaw v. Barnhart, 469.
v. Berry, 642.
v. Bowman, 411.
v. Chicago, etc., Ry. Co., 139.
v. Coffin, 62, 130.
v. Cooper, 352.
v. Cummiskey, 604.
v. Dennis, 438.
v. Gilbert, 451, 455, 464.
v. Hoffman, 123, 124.
v. New Year G. M. Co., 506.
v. Northern Pac. R. R. Co., 659, 661.
v. Peckett, 423.
v. Saline, 37.
v. Swope, 425.
Shawneetown v. Mason, 370.
Shay v. Thompson, 51, 138, 152.
Shea v. Cloquet Lumber Co., 176.
v. Gurney, 736.
v. Milford, 418.
v. St. Paul R. R. Co., 763.
Sheahan v. Collins, 246.
Sheanon v. Ins. Co., 140.
Shearer v. Buckley, 720, 767.
v. Evans, 426.
Shearin v. Rigsbee, 433.
Sheehan v. Boston, 48.
v. Flynn, 584.
v. New York, etc., Co., 520.
v. Sturges, 160.
Sheehey v. Cokley, 222.
v. Burger, 699.
v. Graves, 397.
Sheldon v. Asheville, 697.
v. Hudson Riv. R. R. Co., 743.
v. Kalamazoo, 68, 80.
v. Wright, 162.
Sheldrick v. Abery, 416.
Shell v. Haywood, 409.
Shellaberger v. Fisher, 714.
Shelton v. Pacific Lumber Co., 553.
Shemwell v. Owensboro, etc., R. R. Co., 530, 558.
Shepard v. Blossom, 406.
v. Buffalo, etc., R. R. Co., 676.
v. Creamer, 609.
Shepard v. Manhattan Ry. Co., 122.
v. Milwaukee Gas Lt. Co., 304.
v. People, 110.
v. Pettit, 433.
v. Pratt, 128.
Shepherd v. Baer, 240.
v. Burkhalter, 390.
v. Hess, 341.
v. Hills, 148.
v. Lincoln, 403.
v. McQuilkin, 98.
v. Piper, 204.
v. Taylor, 417.
v. Wakeman, 211.
Sheple v. Page, 17, 85, 86.
Sheppard v. Bryant, 227.
Sherfey v. Bartley, 52, 343, 348.
Sheridan v. Bean, 340.
v. New Quay Co., 430.
Sheriff v. Sheriff, 257, 258.
Sherley v. Billings, 657.
Sherlock v. Alling, 287.
Sherman v. Fall Riv. I. Works Co., 715.
v. Grenada, 80.
v. Hannibal, etc., R. R. Co., 473, 727.
v. Johnson, 271.
v. Lumber Co., 559.
v. Rochester, etc., R. R. Co., 543.
v. Vermillion, 72, 474.
v. Western Stage Co., 276, 282.
Sherred v. Cisco, 369.
Sherrill v. Western U. Tel. Co., 729.
Sherry v. Perkins, 293.
Sherwin v. Rutland R. R. Co., 762.
Sherwood v. Hall, 259.
v. Powell, 229.
v. Salmon, 447.
Shickle & Harrison & H. Iron Co. v. Beck, 527.
Shields v. Lawrence, 337.
v. Orr Extension Ditch Co., 579, 706.

[REFERENCES ARE TO PAGES.]

Shields v. Pflanz, 398.
v. Yonge, 542.
Shiells v. Blackburne, 670, 675.
Shillibeer v. Glyn, 632.
Shine v. Wilcox, 336.
Shinglemeyer v. Wright, 197, 237.
Shinkle W. & K. Co. v. Birney, 740.
Shipley v. Fifty Associates, 579, 619.
Shipman v. Fletcher, 166.
v. Seymour, 444.
Shipp v. McCraw, 203.
Shippy v. Au Sable, 713, 716.
Shirely v. Cedar Rapids, etc., R. R. Co., 614.
Shirley v. Waco Tap Ry. Co., 17.
Shively v. Hume, 592.
Shivery v. Streeper, 602.
Shockley v. Shepherd, 62.
Shoecraft v. Bailey, 640, 641.
Shoemaker v. Bryant, etc., Co., 534.
v. Nesbit, 386.
Shook v. Colohan, 593.
Shoeland v. Gorett, 397.
Short v. Spragins, 185.
v. Symmes, 164.
Showalter v. Fairbanks, 530, 535.
Shriever v. Stokes, 365, 366.
Shrimpton v. Culver, 422.
Shull v. Barton, 395.
Shute v. Princeton, 478.
Shultz v. Griffith, 347.
v. Hoagland, 466.
v. Wall, 642, 644.
Sibley v. Aldrick, 642.
Sickles v. Kling, 227.
Sidener v. Russell, 183, 384.
Siebrecht v. East River Gas Co., 757.
Siegel, C. & Co. v. Treka, 558.
Siegert v. Findlater, 360.
Siegrist v. Arndt, 635.
Sieveking v. Litzler, 452.
Sikes v. Johnson, 57.
Sikes v. Tippins, 252
Silbers v. Nerdlinger, 99.
Sillars v. Collier, 207.
Silsbury v. McCoon, 118.
Silva v. Garcia, 336.
Silveira v. Iverson, 531, 536.
Silver Spring, etc., Co. v. Wansukuck Co., 591, 596.
Silverwood v. Latrobe, 267.
Simmons v. Chicago, etc., R. R. Co., 512.
v. East Tenn., etc., Ry. Co., 41.
v. Everson, 92, 94, 95, 607, 624.
v. McConnell, 608.
v. New Bedford, etc., Steamboat Co., 654.
Simms v. Forbes, 704.
Simonds v. Henry, 670.
Simone v. Kirk, 507.
Simons v. Burnham, 209.
v. Busby, 263.
v. Cornell, 626.
Simpkins v. Rogers, 412.
Simpson v. Grayson, 261, 262.
v. Griggs, 347.
v. Keokuk, 127.
v. Press Pub. Co., 205.
Sims v. Lindsay, 534, 537.
Sinclair v. Eldred, 183.
v. Stanley, 318.
Singer v. Bender, 209.
Singer Mfg. Co. v. Hancock, 497.
v. Rohn, 476, 484.
v. Skillman, 437.
Singletary v. Carter, 191.
Singleton v. Bolton, 357.
v. Eastern Counties R. R. Co., 717.
v. Kennedy, 443.
Sioux Banking Co. v. Kendall, 464.
Sisk v. Crump, 609.
Six Carpenters' Case, 331.
Sjorgren v. Hall, 20.
Skelton v. Fenton E. L. & P. Co., 601.
v. London, etc., R. Co., 692.

[REFERENCES ARE TO PAGES.]

Skidmore v. Bricker, 172, 178, 180.
v. W. Va., etc., R. R. Co., 529.
Skiff v. Eastern Counties R. R. Co., 518.
Skinn v. Reutter, 777.
Skinner v. Central Vt. R. R. Co., 532.
v. Pinney, 437.
v. Powers, 247.
v. Wilder, 578.
Skipper v. Clifton Mfg. Co., 496.
Skottowe v. Oregon Short Line, 655.
Slade v. Joseph, 190, 191.
Slagle v. Goodnow, 444.
Slater v. Advance T. Co., 494.
v. Baker, 670.
v. Burlington, etc., Co., 718.
v. Jewett, 520.
v. Mesereau, 579.
v. So. Car. Ry. Co., 649.
Slattery v. Colgate, 780.
Slaughter v. Gerson, 455.
Slayton v. Barry, 61.
Sledge v. McLaren, 145.
v. Reid, 435.
Slight v. Gutzlaff, 616.
Sloan v. Herrick, 103.
Sloggy v. Dilworth, 95, 96, 622, 624.
Sloss Iron & Steel Co. v. Tilson, 731.
Sluder v. St. Louis Tr. Co., 719.
Small v. Allington, etc., Mfg. Co., 514, 545, 553.
v. Benfield, 89.
v. Chicago, etc., R. R. Co., 36.
v. Herkimer Mfg. Co., 145.
v. Howard, 670.
v. McGovern, 175.
v. Montgomery, 192.
Smalley v. Southern Ry. Co., 737, 758.
Smethurst v. Barton Sq. Church, 42, 609.
Smiley v. Bartlett, 269, 270.
Smith v. Adams, 589.
v. Agawam Canal Co., 595, 599.
v. American Express Co., 722, 724.
v. Backus L. Co., 516, 556, 557.
v. Bagwell, 126, 127.
v. Baker, 139, 501, 519, 535.
v. Benson, 409, 422.
v. Benton, 326.
v. Berry, 399.
v. Birmingham Gas. Co., 67.
v. Boston Gas. Co., 756.
v. Bradstreet Co., 209.
v. Brooklyn, 588.
v. Burrus, 185, 241.
v. Causey, 343.
v. Chadwick, 466.
v. Chicago, etc., R. R. Co., 339, 521.
v. Clark, 637.
v. Clarke, 52.
v. Clark Hardware Co., 683, 684.
v. Click, 444.
v. Condry, 134.
v. County Court, 37.
v. Countryman, 443.
v. Darby, 366.
v. Davenport, 57, 62.
v. Detroit, etc., Ry. Co., 701.
v. Dinkelspiel, 51.
v. Drew, 147.
v. Duffy, 465.
v. Eakin, 145.
v. Eastern B. & L. Ass'n, 174, 178.
v. Elliott, 618.
v. Erie R. R. Co., 504, 554.
v. Fletcher, 581.
v. Foran, 105.
v. Fordyce, 525.
v. Gates, 162, 397.
v. Hale, 323.
v. Hart, 394.
v. Heineman, 394.
v. Higgins, 237.

[REFERENCES ARE TO PAGES.]

Smith v. Hillside C. & I. Co., 524, 528.
v. Hintrager, 186.
v. Holmes, 391.
v. Howard, 225, 226.
v. Irwin, 523.
v. Jenks, 412.
v. Jernigan, 131.
v. Johnson, 46, 396.
v. Jones, 161, 167, 190, 192, 378, 381.
v. Kenrick, 581, 586.
v. Keokuk, 307.
v. King, 172.
v. Kingston City R. R. Co., 662.
v. London, etc., R. R. Co., 36.
v. Louisville, etc., R. R. Co., 272.
v. Lyke, 253.
v. Maine Cent. R. R. Co., 761, 762.
v. Mastin, 263.
v. McAdam, 146.
v. McCarthy, 130.
v. McConathy, 603.
v. McDowell, 568.
v. Meyers, 252.
v. Mich. Buggy Co., 186, 187.
v. Milwaukee, etc., Exchange, 478, 481.
v. Mitchell, 610, 613.
v. Morrill, 117.
v. Morse, 45.
v. Munch, 170, 488, 497.
v. New York Central, etc., R. R. Co., 720, 727.
v. Nippert, 166.
v. Nor. Car. R. R. Co., 648.
v. Norfolk, etc., R. R. Co., 715.
v. Occidental, etc., S. S. Co., 139, 703.
v. Osborn, 446.
v. Oxford Iron Co., 524.
v. Park, 410.
v. Pelah, 343.
Smith v. Pen. Car Works, 524.
v. Pierce, 647.
v. Potter, 547.
v. Powditch, 392.
v. Railroad Co., 34, 688.
v. Richards, 456.
v. Rochester, 76, 593.
v. St. Joseph, 253.
v. St. Louis, etc., R. R. Co., 512.
v. Savannah, etc., Ry. Co., 487 498, 659.
v. Schorne, 63, 64.
v. Selinsgrove, 76.
v. Sellers, 528.
v. Singleton, 100.
v. Smith, 130, 258, 312, 437 444, 469, 701.
v. Spitz, 491, 494.
v. State, 18, 149, 159.
v. Stewart, 203.
v. Story, 145.
v. Taylor, 63, 64.
v. Thackerah, 366.
v. Trawl, 383.
v. Trimble, 683, 734.
v. Utley, 200.
v. Walters, 175.
v. Webster, 491.
v. Wendell, 771.
v. Western Ry. Co., 649.
v. Western U. Tel. Co., 729.
v. Whittier, 681.
v. Wilson, 644.
v. Youmans, 237.
Smithwick v. Hall & Upson Co., 705, 715.
Smoot v. Mobile, etc., Ry. Co., 525, 526, 547.
Smothers v. Hanks, 670.
Smullen v. Phillips, 202.
Smurthwaite v. News Pub. Co., 240, 241.
Smyth v. Bangor, 770.
Snashall v. Metropolitan R. R. Co., 255.

[REFERENCES ARE TO PAGES.]

Sneed v. Bennoll, 167.
Snell v. Cornwell, 639.
v. Meachem, 408.
Snider v. St. Paul, 73, 74, 79, 81.
Snodgrass v. Carnegie Steel Co., 749.
Snook v. Anaconda, 78, 767.
Snow v. Adams, 769.
v. Chandler, 103.
v. Cowles, 622.
v. McCracken, 340.
v. Parsons, 590, 598.
v. Schomacher, etc., Co., 445.
v. Whitehead, 579.
Snowden v. Wilas, 327, 328.
Snydacker v. Brosse, 330, 439.
Snyder v. Cabell, 605.
v. Holt Mfg. Co., 775.
v. Natchez, etc., R. R. Co., 736. 758.
v. Patterson, 347.
v. Viola M. & S. Co., 514, 542.
v. Wheeling Elec. Co., 694.
v. Witt, 102.
Sohn v. Cambern, 610.
Solan v. Chicago, etc., Ry. Co., 726.
Solomon R. R. Co. v. Jones, 511.
Soltau v. De Held, 575, 605.
Solton v. Gerdon, 426.
Solverson v. Peterson, 215.
Somers v. Richards, 449.
Sommer v. Wilt, 188.
Sone v. Denny, 462.
Sonneborn v. Southern Ry. Co., 649.
Sopherstein v. Bertels, 705.
So Relle v. Tel. Co., 25.
Sorenson v. Balaban, 195, 249.
Sorgenfrei v. Schrader, 155.
Sorrell v. Titusville Elec. Traction Co., 754.
Soule v. New York, etc., R. R. Co., 280.
Soulard v. St. Louis, 146.
Souter v. Codman, 321.
South v. Denniston, 261.
Southard v. Brooklyn, 579.
South Australian Ins. Co. v. Randell, 637.
South Baltimore Car Works v. Schaeffer, 514, 562.
South Car, etc., R. R. Co. v. Steiner, 612.
South Chicago City Ry. Co. v. Kinnare, 711.
Southcote v. Stanley, 731.
South Covington, etc., St. Ry. Co. v. Herrklotz, 713, 716.
v. Ware, 124.
Southern Bell Tel. Co. v. Francis, 332.
Southern Bell T. & T. Co. v. Cassin, 280.
Southern B. & L. Ass'n v. Lawson, 663.
Southern Car & F. Co. v. Adams, 67, 68, 182.
Southern Chemical, etc., Co. v. Wolf, 236.
Southern Cotton Oil Co. v. Dukes, 513.
Southern Development Co. v. Silva, 441, 456.
Southern, etc., R .R. Co., v. Kendrick, 657.
Southern Exp. Co. v. Caperton, 648, 652.
v. Crook, 722.
Southern Ind. Ry. Co. v. Fine, 684, 687, 709.
Southern Kansas Ry. Co. v. Crocker, 555.
v. Moore, 529.
v. Pavey, 253.
v. Rice, 487, 656.
Southern Ohio R. R. Co. v. Morey, 480, 481.
Southern Pac. Co .v. Hetzer, 518.
v. McGill, 511.
v. Yeargin, 533.
Southern Pac. R. R. Co. v. Maddox, 724.

[REFERENCES ARE TO PAGES.]

Southern Ry. Co. v. Chambers, 296.
v. Cook, 595.
v. Crowder, 253, 254.
v. Jones, 725.
v. Manzy, 530, 554.
v. Resenbery, 13.
v. Roebuck, 657.
v. Sarratt, 397.
v. Scarrett, 440.
v. White, 721.
v. Williams, 681, 683
v. Wilson, 744, 745.
v. Yancey, 707.
Southern Trans. Co. v. Harper, 42.
South, etc., R. R. Co. v. Donovan, 678, 762.
v. Harlein, 725.
South Fla. R. R. Co. v. Weese, 531.
South Hetton C. Co. v. N. E. News Ass'n, 210, 245.
South Omaha v. Cunningham, 609.
South Royalton Bank v. Suffolk Bank, 45.
South Side Pass. Ry. Co. v. Irish, 32.
Southwestern R. R. Co. v. Mitchell, 180.
v. Paulk, 276.
Southwestern Tel. & Tel. Co. v. Beatty, 683, 684.
Southwick v. Estes, 489, 492.
v. Hopkins, 143.
Southwod v. Myers, 640.
Spade v. Lynn, etc., R. R. Co., 26, 28.
Spaids v. Barrett, 145, 228.
Spaits v. Poundstone, 197.
Spalding v. Archibald, 326.
v. Oakes, 104, 107, 344.
Spancake v. Philadelphia, etc., R. R. Co., 546.
Spangler v. Commonwealth, 105.
v. Davy, 172.
v. San Francisco, 78.
Sparhawk v. Salem, 769.
v. Union Pass. Ry. Co., 575, 576.
Sparks v. Dawson, 467.
Spaulding v. Allred, 439.
v. Barnes, 428.
v. Orcutt, 433.
v. Vilas, 237, 375.
Spead v. Tomlinson, 451, 673.
Spear v. Cummings, 308, 386.
v. Hiles, 180.
Speck v. Judson, 171.
Speed v. Atlantic, etc., R. R. Co., 484.
v. Hollingsworth, 451.
Spees v. Boggs, 543.
Spellman v. Lincoln Rapid Transit Co., 690, 691.
Spence v. Schultz, 481.
v. Union Marine Ins. Co., 116.
Spencer v. Campbell, 749.
v. Dearth, 421.
v. McManus, 619.
v. McGowen, 113.
v. St. Paul, etc., R. R. Co., 124.
Spicer v. Chesapeake, etc., Ry. Co., 758.
v. South Boston, etc., Co., 510.
Spiers v. Duane, 318.
Spira v. Osage C. & M. Co., 273, 281.
Spinks v. Clark, 464.
Spitze v. Baltimore, etc., R. R. Co., 140.
Spitznogle v. Ward, 386.
Spohn v. Davis, 366.
v. Mo. Pac. R. R. Co., 26.
Spokane T. & D. Co. v. Hooper, 47.
Spolek Denni Hlarated v. Hoffman, 246.
Spooner v. Brewster, 268.
v. Brooklyn, 699.
v. Manchester, 424.
v. Railroad Co., 709.
Sportono v. Fourichon, 200.
Spragins v. Houghton, 389.

[REFERENCES ARE TO PAGES.]

Sprague v. Birchard, 169, 440.
v. Kneeland, 84.
v. Worcester, 596.
Sprague Collecting Agency v. Spiegel, 431.
Sprague, Warner & Co. v. Kempe, 443, 444.
Spray v. Ammerman, 346.
Spriggs v. Camp, 420.
v. Rutland R. R. Co., 726.
Spring v. Delaware, etc., R. R. Co., 606, 614.
v. Hager, 644.
Spring Co. v. Edgar, 345.
Springer v. Ford, 663, 695.
v. Westcott, 661.
Springfield v. Harris, 594.
Springfield B. & M. Co. v. Parks, 539.
Springfield Con. Ry. Co. v. Puntenny, 719.
Springfield, etc., R. R. Co. v. Henry, 584.
Springfield F. & M. Ins. Co. v. Keesville, 73, 74, 82.
Springfield S. Co. v. Riley, 293.
Springfield W. W. Co. v. Jenkins, 46, 587, 588.
Spurrier v. Front St. Cable Ry. Co., 764.
Squier v. Gould, 123, 124.
Squire v. N. Y. Cent. R. R. Co., 725.
Squires v. Wason Manufacturing Co., 248.
Sroufe v. Moran Bros. Co., 521.
Staat v. Evans, 130.
Stack v. Harris, 739.
v. Nolte, 447.
Stackpole v. Healy, 333.
Stafford v. Chicago, etc., R. R. Co., 561.
v. Ingersoll, 145, 341.
v. Oskaloosa, 718.
Stager v. Troy Laundry Co., 528, 530, 534.
Stainback v. Meridian, 701.
Stalker v. Dunwick, 585.
Stall v. Wilbur, 434.
Stallard v. Cushing, 371.
Stallings v. Whittaker, 202, 223, 249.
Stamper v. Raymond, 170, 171, 179.
Standard Horseshoe Co. v. O'Brien, 443.
Standard Oil Co. v. Browker, 715.
v. Doyle, 296.
v. Eiler, 522.
v. Murray, 775, 776.
v. Parrish, 777.
v. Tierney, 748, 749.
v. Wakefield, 779.
Standard Plate G. Co., v. Butler, W. Co., 592.
Standish v. Lawrence, 368.
Stanfield v. Anderson, 687.
v. Boyer, 203.
Stanley v. Citizens C. & C. Co., 435.
v. Powell, 19.
v. Stanley, 257.
Stansbury v. Vogle, 182.
Stanton v. Hart, 174, 181.
v. Met. R. R. Co., 49.
v. Springfield, 770, 771.
Staple v. Spring, 595, 616, 620, 621.
Staples v. Dickson, 622.
v. Smith, 414, 415.
Stapley v. London, etc., R. Co., 676.
Starkweather v. Benjamin, 451, 457.
v. Smith, 255.
Starr v. Bennett, 443, 452.
v. Camden, etc., R. R. Co., 613.
v. Great Northern Ry. Co., 730.
v. Jackson, 312.
State v. Atlantic Coast Line, 303.
v. Anderson, 387.
v. Baker, 149, 150.
v. Baltimore, etc., R. R. Co., 686, 703.
v. Bates, 300, 446.

[REFERENCES ARE TO PAGES.]

State v. Beck, 152.
v. Board of Health, 602.
v. Bost, 157.
v. Boston, etc., R. R. Co., 719.
v. Boyer, 740.
v. Boyer, 157.
v. Boynton, 156.
v. Brown, 164.
v. Burnham, 230, 236.
v. Butnam, 247.
v. Buxton, 158.
v. Case, 394.
v. Cherry, 150.
v. Church, 150.
v. Citizens' Telephone Co., 303.
v. Clausmeier, 398.
v. Consolidated Gas Co., 683.
v. Crawford, 568.
v. Cumberland, 766.
v. Cumberland Tel. & Tel. Co., 303.
v. Dalton, 395.
v. Daniel, 149.
v. Davis, 390.
v. District Court, 705.
v. Donohue, 344.
v. Dooley, 112.
v. Duffy, 307.
v. Edwards, 145.
v. Elliot, 112, 113.
v. Forsythe, 113.
v. Franklin Falls Co., 626.
v. Gibson, 155.
v. Glen, 314.
v. Grundon, 399, 400.
v. Hall, 306.
v. Harris, 373.
v. Haskins, 234.
v. Hilmantel, 310.
v. Holmes, 163.
v. Horne, 150.
v. Housekeeper, 672.
v. Huegin, 298.
v. Jervey, 439.
v. Johnson, 155, 386, 387.
v. Judge, 626.
State v. Keenan, 241.
v. Keeran, 111.
v. Kennedy, 154.
v. King, 440.
v. Krider, 413.
v. Lawrence, 394.
v. Lozaretto Guano Co., 504, 531.
v. Lockwood, 156.
v. Long, 157.
v. Lonsdale, 239.
v. Louisville, etc., Co., 612.
v. Luce, 568.
v. Lunsford, 159.
v. Lutz, 459.
v. Maine Centr. R. R. Co., 281.
v. Manchester, etc., R. R. Co., 701, 708.
v. Martin, 150, 155.
v. Maryland Institute, 305.
v. Mathews, 640.
v. McCann, 307.
v. McDermott, 346.
v. McDonald, 388.
v. McIntyre, 198.
v. McNally, 439.
v. Medbury, 315.
v. Misner, 161.
v. Moffett, 111, 112.
v. Mooney, 18, 149.
v. Moore, 156.
v. Morgan, 112.
v. Mullen, 394.
v. Nebraska Tel. Co., 666.
v. Neeley, 150.
v. Nerland, 379.
v. Neville, 380.
v. Newland, 51.
v. O'Brien, 656.
v. Ohio Oil Co., 568, 571, 589.
v. Omaha Nat. Bank, 421, 422, 423.
v. Osborne, 199, 309.
v. Overton, 303, 658.
v. Parrott, 108, 110.
v. Paul, 109, 111.

[REFERENCES ARE TO PAGES.]

State v. Pendergrass, 160.
v. Phipps, 626.
v. Pittsburg, etc., Co., 275.
v. Planet Property, etc., Co., 394.
v. Porter, 388, 394.
v. Powell, 128.
v. Rankin, 604, 625.
v. Rawles, 150.
v. Rhodes, 255.
v. Roane, 163.
v. Robb, 389.
v. Roberts, 314, 414, 697.
v. Ross, 191.
v. Roulstone, 91.
v. Schar, 394.
v. School Commissioners, 72, 77.
v. Scott, 162.
v. Sears, 150.
v. Seymour, 329.
v. Shepard, 321.
v. Shippey, 154.
v. Sims, 150.
v. Society, 686.
v. South Baltimore Car Works, 521, 530.
v. Spencer, 395.
v. Syphrett, 197.
v. Taylor, 150, 158, 315.
v. Thornton, 157.
v. Underwood, 164.
v. Vermont, etc., R. R. Co., 677.
v. Wade, 398.
v. Weber, 308.
v. Weed, 439.
v. Wolever, 377, 381.
v. Wood, 154.
v. Yeaton, 318.
State Bank v. Gates, 448.
Staten v. State, 155.
State Sav. Bank v. Kercheval, 405.
Staton v. Norfolk, etc., R. R. Co., 584, 585.
Staub v. Van Benthuysen, 199.
Staubley v. Potomac E. P. Co., 531.
Staunton v. Goshorn, 170, 174, 180.
Stead v. Gascoigne, 397.
Steamboat Belfast v. Boon Co., 452.
Steamboat New World v. King, 689.
Steam Nav. Co. v. British, etc., Nav. Co., 477.
Steamship Co. v. Bryan, 660.
Stearns v. Atlantic, etc., R. R. Co., 746.
v. Dillingham, 130.
v. Ontario Spinning Co., 20.
v. Sampson, 157, 319, 321.
v. Vincent, 330.
Stebbins v. Central Vt. R. R. Co., 715.
Stecher v. People, 32.
Steel v. Kurtz, 278.
Steele v. Crabtree, 394.
v. Dunham, 386.
v. Edwards, 198.
v. Townsend, 648.
v. Walker, 438.
Steen v. Williamson, 19.
Steenburgh v. Tobias, 346.
Steers v. Liverpool, etc., S. S. Co., 725.
Steger v. Van Sicklen, 325.
Stegman v. Humbers, 539.
Stein v. Burden, 125.
Steinecke v. Marx, 226.
Steiner Brothers v. Clisby, 130.
Steinhauser v. Spraul, 529, 536, 539, 562.
Steinlein v. Halstead, 318.
Steinmetz v. Kelly, 52, 154.
Steketee v. Kimm, 209.
Stendal v. Boyd, 739.
Stepanck v. Kula, 143.
Stephani v. Southern Pac. Co., 543.
Stephens v. Doe, 545.
v. Hannibal, etc., R. R. Co., 540, 544.
v. Head, 438.
v. Koonce, 434.

[REFERENCES ARE TO PAGES.]

Stephenson v. Duncan, 532, 556, 557.
v. Hall, 308, 386.
v. Little, 117, 419.
v. Southern Pac. Co., 489, 495, 496.
v. Wright, 417.
Sterling v. Baldwin, 413.
v. Jackson, 313, 414.
v. Warden, 112, 113, 114, 321.
Sterling Bridge Co. v. Pearl, 712.
Sterling Rem. Co. v. Spermine Rem. Co., 361.
Stern v. Knowlton, 395.
v. Lanng, 672.
v. Rosey, 353.
Sternberg v. Willcox, 740.
Sterrett v. Northport M. & S. Co., 602.
Stetson v. Day, 337
v. Faxon, 611.
v. Riggs, 464.
Stevens v. Allen, 451, 456.
v. Boxford, 769.
v. Colby, 399.
v. Gordon, 332, 333.
v. Jeacocke, 147.
v. Kelley, 46, 47.
v. Middlesex, 146.
v. O'Neill, 159.
v. Sampson, 243.
v. San Francisco, etc., R. R. Co., 542.
v. Smathers, 83, 99.
v. Wiley, 425.
Stevenson v. Belknap, 262.
v. Morris, 256.
v. Newnham, 43, 295.
v. Smith, 123.
v. Wallace, 483.
v. Ward, 235, 237.
Steward v. Ferguson, 562.
Stewart v. Baltimore, etc., R. R. Co., 136, 275, 276.
v. Case, 384.
v. Cole, 189.
Stewart v. Cooley, 386.
v. Doughty, 412.
v. Emerson, 444.
v. Feeley, 165, 167.
v. Frasier, 633.
v. Gromett, 181.
v. Howe, 203.
v. International Paper Co., 542.
v. Louisville, etc., Co., 277.
v. Machias Port, 50.
v. Martin, 101.
v. Minn. Tribune Co., 206.
v. New Orleans, 76.
v. Ohio Riv. R. R. Co., 528.
v. Pierce, 214, 217.
v. Ripon, 771.
v. Sonneborn, 174, 178, 179, 180.
v. Southard, 377, 386.
v. Stearns, 450, 457.
v. Stone, 639.
v. Wyoming Ranch Co., 442.
Stickel v. Atwood, 459.
Stickney v. Salem, 768.
Steiwell v. Borman, 563.
Stiles v. Hooker, 626.
v. Tilford, 262.
Stiller v. Bohn Mfg. Co., 508, 512
Stilling v. Thorp, 766.
Stillman v. Flenneken, 409.
Stillson v. Hannibal, etc., R. R Co., 716.
Stillwater W. Co. v. Farmer, 46, 588.
Stillwell v. Duncan, 119.
Stimmel v. Brown, 365.
Stimpson v. Pierce, 91.
Stimson v. Jackson, 649.
Stinson v. Fishel, 585.
v. Gardiner, 768, 769.
Stith v. Fullinwider, 223.
Stitzell v. Reynolds, 205.
Stock v. Boston, 77.
Stockett v. Watkins' Admr., 131.
Stockwell v. Rutland, 74.
v. White Lake, 382.

[REFERENCES ARE TO PAGES.]

Stoddard v. Roland, 170.
Stokes v. Morning Journal Ass'n, 219.
v. Pennsylvania R. R. Co., 566, 577.
v. Saltonstoll, 691, 711.
Stokoe v. Upton, 410.
Stomme v. Hanford Produce Co., 533.
Stone v. Boston, etc., R. R. Co., 32, 688, 697.
v. Cartwright, 623.
v. Chicago, etc., R. R. Co., 139.
v. Clough, 422.
v. Dickinson, 84, 101.
v. Donaldson, 339.
v. Dry Dock, etc., R. R. Co., 714.
v. Graves, 377, 386.
v. Hill, 494.
v. Hubbardston, 770, 771.
v. Knapp, 332.
v. Marion County, 382.
v. Marsh, 141.
v. New York, 328.
v. Pendleton, 37.
v. Rabinowitz, 58.
v. Seattle, 79.
v. Stevens, 172.
v. Swift, 173.
Stonebreaker v. Stonebreaker, 355.
Stonehewer v. Farrar, 596.
Stoneman v. Com., 155.
Stoner v. Erisman, 204.
Stoolfodz v. Jenkins, 61.
Storer v. Gowen, 633, 689.
Stores v. Feick, 317.
Storey v. Challands, 239.
v. State, 113.
v. Wallace, 199, 242.
Stork v. Am. Surety Co., 399.
Storrie v. Grand Tr. El. Co., 274.
Story v. Downey, 66.
v. Jones, 204.
v. N. Y. El. R. R. Co., 370, 613.
Stoughton v. Baker, 626.
v. Mott, 439.
Stout v. Keyes, 53.
v. Stoppel, 407.
v. Wood, 134.
v. Wren, 51, 138, 152.
Stowball v. Ansell, 43.
Stowe v. Heywood, 259.
Stowell v. Flagg, 146.
v. Standard Oil Co., 777.
Stowers v. Singer, 261, 262.
Strahlendorf v. Rosenthal, 506.
Strait v. Brown, 590.
Stranhan Bros. C. Co. v. Coit, 499.
Stratton v. Lyons, 320.
v. Staples, 686, 733.
Straus v. Young, 174.
Strauss v. Louisville, 478, 481.
v. Meyer, 228.
v. Schwab, 426.
Strawbridge v. Bradford, 714.
Street v. Holyoke, 772.
v. Nelson, 118.
v. Packard, 86.
v. Union Bank, 22.
Streeter v. Johnson, 89.
Street Ry. Co. v. Eadie, 720.
Streety v. Wood, 236.
Strehlow v. Pettit, 177.
Strickfadden v. Zipprick, 402.
Strickland v. Atlanta, etc., R. R. Co., 156.
v. Capital City Mills, 705.
v. Graybill, 448.
Strickler v. Todd, 327.
Stringer v. Ala. Mineral R. R. Co., 681.
v. Frost, 57.
Stringham v. Hilton, 513.
v. Stewart, 558.
Stroebel v. Kerr Salt Co., 570, 596, 599, 600, 628.
Strohlburg v. Jones, 320.
Strong v. Adams, 415.
v. Bradley, 399.
v. Lord, 468.

[REFERENCES ARE TO PAGES.]

Strong v. Sacramento, etc., Co., 763.
v. Strong, 382.
Stroud v. Humble, 89.
Strouse v. Leiff, 63, 66, 348.
Strout v. Milbridge Co., 595.
Strozzi v. Wines, 162.
Strubbee v. Trustees, 118.
Stuart v. Baltimore, 329.
v. Hawley, 742.
v. News Pub. Co., 222, 249.
v. Press Pub. Co., 235, 242, 243.
v. Stewart & Co., 358.
Stubbs v. Mulholland, 173, 178.
Stuber v. Gannon, 348.
v. Louisville, etc., R. R. Co., 550.
Stucke v. Orleans R. R. Co., 520.
Stuckey v. Atlantic Coast Line R. R. Co., 285.
Studwell v. Ritch, 339.
v. Shafter, 58, 61.
Stufflebaum v. Montgomery, 611, 613.
Stumer v. Pitchman, 202.
Stumps v. Kelley, 344.
Sturges v. Keith, 431, 435.
Sturzebecker v. Inland Traction Co., 100.
Stutsman v. Stutsman, 204.
Styles v. Long Co., 775.
v. Nokes, 242.
Suburban R. R. Co. v. Balkwell, 97.
Sudbury Meadows v. Middlesex Canal Co., 146.
Sue, The, 304.
Suffield v. Brown, 363.
Suffolk v. Parker, 80.
Sullens v. Chicago, etc., Ry. Co., 595.
Sullivan v. Boston, etc., R. R. Co., 735, 739.
v. Carberry, 410.
v. Dunham, 608.
Sullivan v. Hannibal, etc., R. R. Co., 533, 539, 544.
v. India Mfg. Co., 500, 501.
v. Johnson, 586.
v. Jones, 378.
v. Lawler, 433.
v. Louisville B. Co., 560.
v. Louisville, etc., R. R. Co., 496, 748.
v. Me. Cent. R. R. Co., 49.
v. New York, etc., R. R. Co., 542, 545.
v. Nicholson File Co., 543.
v. Philadelphia, etc., R. R. Co., 690.
v. Railroad Co., 542.
v. Shanklin, 386, 387.
v. Strathan, etc., Co., 231, 235.
v. Sullivan, 197.
v. Union Pac. R. R. Co., 271.
Sulpho-Saline Bath Co. v. Allen, 639.
Summerfield v. W. U. Tel. Co., 26.
Summerhays v. Kansas Pac. Ry. Co., 542.
Summers v. Bergner Br. Co., 713,
v. Board, etc., 77.
v. People, 374.
Sumner v. Beeler, 374, 375.
v. Utley, 206.
Sunasack v. Morey, 740.
Sunderlin v. Bradstreet, 239.
Sun Life Ins. Co. v. Bailey, 69.
Sunlin v. Skutt, 103.
Sunny South L. Co. v. Neimeyer L. Co., 423, 431.
Supper v. Agnew, 518.
Surocco v. Geary, 328.
Susquehanna Fertilizer Co. v. Malone, 571, 572, 573, 574, 577, 603, 625.
v. Spangler, 571, 573, 574, 577, 603.
Sutor v. Wood, 179.
Sutton v. Anderson, 177.

[REFERENCES ARE TO PAGES.]

Sutton v. Bonnett, 746.
v. Clarke, 135.
v. Hoffman, 261, 262.
v. Johnstone, 384.
v. McConnell, 174.
v. Smith, 197.
v. Snohomish, 78, 767.
v. Wauwatosa, 49.
v. Wood, 679.
Sutphen v. Hedden, 609.
Sutzin v. Chicago, etc., Ry. Co., 708.
Suydam v. Moore, 96.
Svendsen v. State Bank, 210.
Svenson v. Svenson, 266.
Swaim v. Stafford, 171.
Swain v. Mizner, 190, 330.
v. Tenn. Copper Co., 92, 96, 624.
Swan v. Bridgeport, 394.
v. Jackson, 774.
v. Mathre, 447, 448.
v. Tappan, 248.
Swaney v. Gage Co., 141.
Swanson v. Central R. R. Co., 762.
v. Lafayette, 506, 528.
Swart v. Rickard, 162, 166.
Swartz v. Swartz, 327.
Sweeney v. Berlin, etc., R. R. Co., 512.
v. Kansas City Cable Ry. Co., 653.
v. Merrill, 742.
v. Penney, 178.
Sweet v. Kimball, 189, 453.
v. Ohio Coal Co., 532.
Sweetland v. Ill., etc., Tel. Co., 666.
Swensgaard v. Davis, 181.
Swenson v. Erickson, 97.
Swepson v. Davis, 185, 188.
Swett v. Cutts, 569, 570, 583.
Swift v. Broyles, 604.
v. Johnson, 271.
v. Rounds, 444.
Swigart v. Graham, 100.
Swinarton v. LeBoutillier, 733.
Swindler v. Hilliard, 648.
Swithin v. Vincent, 91.
Swoboda v. Ward, 531.
Swords v. Edgar, 617, 732, 733,
Syeds v. Hay, 430.
Sykes v. Johnson, 57.
v. Sykes, 358, 360.
Sylvester v. Maag, 344.
Symms v. Cutler, 669.
Symonds v. Harris, 433.
Syndaker v. Brosse, 89.
Szymanski v. Blumenthal, 699.

T.

Taber v. Jenny, 414.
v. Lawrence, 420.
Tacoma L. & M. Co., v. Tacoma, 745.
Taffe v. Oregon R. R. Co., 651.
Taillon v. Mears, 654.
Talcott v. Wabash R. R. Co., 661.
Tall v. Baltimore Steam Packet Co., 654.
Talley v. Courter, 128.
Tally v. Ayres, 685, 746.
Talmage v. Smith, 152.
Talpey v. Wright, 669.
Talty v. Atlantic, 738.
Tampa W. W. Co. v. Cline, 590, 591.
Tangley v. Sullivan, 182.
Tanner v. Albion, 604.
v. Harper, 558.
v. Louisville, etc., R. R. Co., 707.
Tape v. Harley, 307.
Tarbell v. Rutland Railroad Co., 282.
Tardos v. Bozant, 392.
Tarleton v. Lagarde, 200.
Tarlton v. Fisher, 192.
Tarr v. Northey, 105.
Tarrant v. Hoff, 358, 359.
v. Webb, 516.

[REFERENCES ARE TO PAGES.]

Tarver v. State, 150.
Tate v. Parrish, 578.
v. St. Paul, 80.
Tatley v. Courter, 745.
Tatnall v. Courtney, 155.
Taunton v. Costar, 119, 321.
Taylor v. Ashton, 458, 462.
v. Austin, 77.
v. Avon, 72, 474.
v. Baldwin, 700.
v. Ballard, 37.
v. Bradley, 412.
v. Carew Mfg. Co., 702.
v. Church, 239.
v. Cole, 321.
v. Collins, 407.
v. Cumberland, 76.
v. Doremus, 377, 386.
v. Ellington, 202.
v. Evansville, etc., R. R. Co., 542, 545, 553.
v. Felsing, 555, 558.
v. Fickas, 583.
v. Gillies, 357.
v. Grand Trunk Ry. Co., 126, 654, 656.
v. Granger, 582.
v. Hall, 205.
v. Hearst, 196, 199, 249.
v. Henniker, 43.
v. Lake Shore, etc., Ry. Co., 148.
v. Manchester, etc., Ry. Co., 13.
v. Manderson, 415.
v. Monroe, 123, 124.
v. Nevada, etc., Ry. Co., 556, 557.
v. Peckham, 770.
v. Pullen, 64, 66.
v. Seil, 747.
v. Shelkett, 262.
v. Short, 467.
v. Smith, 398.
v. Star Coal Co., 49.
v. State, 317.
Taylor v. Thompson, 97.
v. Whitehead, 329.
v. Western Union Tel. Co., 49.
Teachout v. Van Horsen, 449.
Teaff v. Hewitt, 407.
Teague v. Stradley, 731.
Teall v. Barton, 742.
v. Felton, 393.
Tedford v. Los Angeles Elec. Co., 524.
Teel v. Miles, 89.
Teipel v. Hilsendegen, 700, 704.
Telegraph Co. v. Griswold, 729.
Telfer v. Northern R. R. Co., 285.
Tellefsen v. Fee, 162, 169, 440.
Templeton v. Russell, 44, 294, 296, 297.
v. Voshloe, 585.
Tenant v. Goldwin, 578.
Tennessee Coal, etc., Co. v. Jarrett, 524.
Tenney v. State Bank, 435.
Tenny v. Harvey, 90, 169.
Terre Haute, etc., R. R. Co. v. Brunker, 761.
v. Buck, 39.
v. Graham, 758.
v. Jackson, 68.
v. Mansberger, 548.
v. Mason, 172, 175.
v. Williams, 677.
Terrell v. Andrew County, 390.
v. Martin, 334.
Terry v. Bamberger, 52.
v. Davis, 186.
v. Fellows, 225, 242, 243.
v. Hooper, 208.
v. Hutchinson, 261.
v. Jewett, 287.
v. Munger, 130, 131.
v. Mut. Life Ins. Co., 455.
v. Wright, 377, 381.
Terwilliger v. Gt. West. Tel. Co., 458.
v. Wands, 203.

[REFERENCES ARE TO PAGES.]

Tesch v. Milwaukee Elec. Ry. & Lt. Co., 713, 764, 765.
Tewes v. North G. L. S. S. Co., 725.
Tewksbury v. Bucklin, 340.
Texarkana, etc., Ry. Co. v. Anderson, 125.
Texarkana Gas & Elec. L. Co., v. Orr. 752.
Texas, etc., Co. v. Kirk, 547.
Texas, etc., R. R. Co., v. Archibald, 536, 537, 561.
v. Barrett, 511, 548.
v. Bayliss, 412.
v. Bingle, 556, 557.
v. Breadow, 708.
v. Callender, 651.
v. Carlin, 32.
v. Carr, 128.
v. Clayton, 651.
v. Cody, 760.
v. Eberheart, 520.
v. Echols, 520.
v. Johnson, 516.
v. Kelly, 533.
v. Mangum, 619.
v. Miller, 654, 658.
v. Morrison Faust Co., 660.
v. Murphy, 681.
v. Reiss, 651.
v. Rogers, 518.
v. Scoville, 496.
v. Swearingen, 561.
v. Thompson, 511, 548.
v. Williams, 487.
Texas Loan Agency v. Fleming, 619.
Texas Trunk Ry. Co. v. Johnson, 492.
Thames Manufacturing Co. v. Lathrop, 438.
Thatcher v. Weeks, 428.
Thayer v. Boston, 68, 80.
v. Brooks, 135.
v. Manley, 437.
Thayer v. Smoky Hollow Coal Co., 504.
v. Turner, 468.
Threadgill v. Board of Com'rs, 403.
Thebaut v. Canova, 627.
Theisen v. Porter, 493.
Thelman v. Moeller, 542.
Theroux v. No. Pac. R. R. Co., 142.
Thibault v. Sessions, 206.
Thibodaux v. Thibodaux, 374.
Thiele v. McManus, 683.
Thobum v. Campbell, 743, 746.
Thoemke v. Fiedler, 328.
Thomas v. Ann Arbor, R. R. Co., 514.
v. Blasdale, 202.
v. Boston, etc., R. R. Co., 652.
v. Bowen, 212, 224.
v. Bradbury, 246.
v. Central R. R. Co., 32, 103.
v. Crosswell, 213, 242.
v. Crout, 407.
v. Dabblemont, 672.
v. Dunaway, 221.
v. Grafton, 474.
v. Harrington, 480, 481.
v. Lancaster Mills, 38.
v. Lennon, 353.
v. Markman, 397, 440.
v. Maysville Gas Co., 751, 755.
v. Philadelphia, etc., R. R. Co., 691.
v. Quartermaine, 139.
v. Ross, 507.
v. Royster, 42.
v. Rumsey, 91.
v. Springfield City, 767.
v. Winchester, 750, 775.
Thomasson v. Agnew, 44.
Thompkins v. Clay St. R. R. Co., 719.
v. Haile, 89.
v. Marine Engine, etc., Co., 524.

[REFERENCES ARE TO PAGES.]

Thompson v. Androscoggin Riv. Imp. Co., 615.
v. Bartlett, 560.
v. Beacon Valley Rubber Co., 170, 172, 178, 180.
v. Boston, etc., R. R. Co., 128.
v. Bowers, 247.
v. Central R. R. Co., 559.
v. Craigmyle, 119.
v. Crocker, 135.
v. Currier, 424.
v. Deeds, 268, 270.
v. Fisk, 164.
v. Force, 171.
v. Ft. Worth, etc., Ry. Co., 280.
v. Gibson, 621.
v. Jackson, 377, 381.
v. Johnston Bros. Co., 284.
v. Jordan, 637.
v. Lacy, 640.
v. Lowell, etc., St. Ry. Co., 731, 732.
v. Metropolitan St. Ry. Co., 254, 256.
v. New Orleans, etc., R. R. Co., 125.
v. Northern Mo. R. R. Co., 704.
v. Roe, 427, 430.
v. Rose, 431, 444.
v. Ross, 260.
v. Salt Lake R. T. Co., 41, 709.
v. Stanhope, 354.
v. West. U. Tel. Co., 729.
Thomson v. Gortner, 421.
Thoresen v. La Crosse City Ry. Co., 764.
Thorn v. Blanchard, 236.
v. Sutherland, 410.
Thornburg v. Am. Strawboard Co., 274, 279.
Thorne v. Colton, 117.
v. Deas, 632.
v. Tilbury, 419, 430.
Thornton v. Dwight Mfg. Co., 421.
v. Me. State Ag. Soc., 746.
Thornton v. Smith, 372.
v. Thornton, 44.
Thorogood v. Bryan, 718.
v. Robinson, 431.
Thorpe v. Miss., etc., Ry. Co., 704.
v. Mo. Pac. Ry. Co., 518.
v. Rutland, etc., R. R. Co., 676.
v. Union Pac. Coal Co., 275.
Thrall v. Lathrop, 435.
Threadgill v. Anson County Comrs., 72.
Threefoot v. Nuckols, 172.
Thunder Bay etc., Co. v. Speechly, 594, 613.
Thurber v. Eastern B. & L. Ass'n, 172, 174.
v. Martin, 590, 591, 594.
Thurston v. Blanchard, 427, 430, 463.
v. Hancock, 364, 365.
v. Prentiss, 147.
Thurtell v. Beaumont, 222.
Thweatt v. Jones, 99.
Tibby v. Mo. Pac. Ry. Co., 726.
Tickell v. Read, 155.
Tidball v. Williams, 161, 168.
Tierney v. Frasier, 440.
v. Minn., etc., Co., 547.
Tighe v. Lowell, 768.
Tiffin v. McCormack, 484.
Tifft v. Tifft, 58, 62.
Tillett v. Norfolk, etc., R. R. Co., 97.
v. Ward, 342.
Tillinghast v. McLeod, 231.
Tillis v. Austin, 467.
Tillman v. Beard, 164, 165, 168.
Tillock v. Webb, 49.
Tillotson v. Smith, 125.
Tillson v. Robins, 213.
Tilt v. Jarvis, 87.
Timlin v. Standard Oil Co., 618.
Timm v. Bear, 594, 598.
Timmons v. Cent. Ohio R. R. Co., 701.
Tindle v. Birkett, 458.

[REFERENCES ARE TO PAGES.]

Tinicum Fishing Co. v. Carter, 315.
Tinker v. Forbes, 369.
Tinsman v. Belvidere R. R. Co., 371.
Titcomb v. Fitchburg R. R. Co., 678.
Titus v. Northbridge, 769.
Tobey v. Leonard, 399.
v. Webster, 313.
Tobin v. Deal, 418.
v. Portland, etc., R. R. Co., 655, 732.
v. Portland Mills Co., 637.
Todd v. Crookshanks, 422.
v. Flight, 617, 619.
v. Hawkins, 238.
v. Hoagland, 394.
Tolan v. Hodgeboom, 132.
Toland v. Paine Furn. Co., 733.
Toledo Brewing & Malt Co. v. Bosch, 504, 697.
Toledo, etc., R. R. Co. v. Bowler, etc., Co., 660.
v. Fredericks, 509.
v. Harmon, 490.
v. Jones, 677.
v. Moore, 547.
v. O'Connor's Admx., 544.
Tolle v. Correth, 692.
Tolles v. Duncombe, 317.
Tolman v. Syracuse, etc., Co., 704, 762.
Tombler v. Koelling, 638.
Tomle v. Hampton, 618.
Tomlin v. Den, 446.
Tomlinson v. Derby, 123, 124.
v. Warner, 184.
Tompkins v. Clay St. R. R. Co., 100, 102.
v. Hallick, 353.
v. Marine Engine, etc., Co., 513.
v. Nichols, 466.
v. Sands, 383, 385.
Toms v. Whitby, 769.
Tonawanda R. R. Co. v. Munger, 341.
Toncray v. Dodge County, 402.
Toner v. Chicago, etc., R. R. Co., 547.
v. South Covington, etc., St. Ry. Co., 716, 717.
Tong v. Marvin, 441.
Tongue v. Nutwell, 334.
Toogood v. Spyring, 233.
Toolan v. Lansing, 79.
Toomey v. Eureka Iron & S. Works, 535.
v. Southern Pac. R. R. Co., 736, 758.
Toothaker v. Winslow, 8.
Topping v. Evans, 321.
v. St. Lawrence, 278.
Torbush v. Norwich, 76.
Torey v. Schneider, 84.
Torpy v. Johnson, 104, 107.
Torrey v. Field, 242.
Torry v. Scranton, 584.
Torsch v. Bell, 174, 175, 179, 180.
Totel v. Bonnefoy, 583.
Tootle v. Clifton, 124, 125, 583, 584.
Totten v. Phipps, 733.
Toub v. Schmidt, 645.
Tourtellot v. Rosebrook, 742.
Tower v. Grocers, 639.
Towne v. Bowers, 412.
v. St. Anthony, etc., El. Co., 431.
v. United Elec., etc., Co., 514.
v. Wiley, 59.
Townes v. City Council, 620, 622.
Townley v. Chicago, etc., Co., 699.
Townsend v. Bell, 597.
v. Briggs, 155, 156.
v. Norfolk, etc., R. & L. Co., 614.
v. State, 571, 589.
v. Walthen, 323.
Tozer v. Child, 388.
Trabue v. Mays, 205.

[REFERENCES ARE TO PAGES.]

Traction Co. v. Carroll, 697.
Tracy v. Swartwout, 400.
v. Troy, etc., R. R. Co., 676.
v. Wood, 633.
Trade Mark "Alpine," In re, 357.
Traill v. Baring, 444.
Trainor v. Philadelphia, etc., R. R. Co., 520.
Trammel v. Russellville, 377.
Transfer Co. v. Kelly, 720.
Transue v. Sill, 332.
Trask v. Shotwell, 736.
Travas v. Murray, 695.
Travis v. Smith, 178.
Traynor v. Sielaff, 215, 217, 231.
Treadwell v. Whittier, 663, 695.
Treat v. Browning, 221, 247.
Trebby v. Transcript Pub. Co., 243.
Trebilcock v. Anderson, 230.
Treffy v. Transcript Pub. Co., 230.
Treka v. Burlington, etc., Ry. Co., 515, 542.
Tremain v. Cohoes Co., 316.
v. Richardson, 144.
Trenton Pass. Ry. Co. v. Cooper, 693.
Trenton Water Power Co. v. Raff, 612, 613, 614.
Treschman v. Treschman, 157.
Trescott v. Moon, 404.
Tretheway v. Hulett, 447, 454.
Trevitt v. Prison Ass'n, 597.
Tri-City Ry. Co. v. Gould, 654.
Trigg v. Ozark L. & L. Co., 562.
v. Read, 442.
Triggs v. Sun P. & P. Co., 213, 215, 223, 245, 246.
Trihay v. Brooklyn Lead Min. Co., 503, 528.
Trimble v. New York Cent., etc., R. R. Co., 492, 660.
v. Tautlinger, 200.
Triple State Nat. Gas Co. v. Wellman, 756.
Triplett v. Rugby Distilling Co., 458.
Troe v. Larson, 594.
Trogden v. Henn, 52, 154.
Troth v. Wills, 340.
Trotter v. Furniture Co., 556, 557.
Trout v. Virginia, etc., R. R. Co., 706.
Trow v. Vt. Cent. R. R. Co., 702, 706.
Trowbridge v. Forepaugh, 94.
Troxler v. Richmond, etc., R. R. Co., 745.
Troy v. Cheshire R. R. Co., 146
v. Smith, 141.
Troy, etc., R. R. Co. v. Tibbits, 145.
Trudo v. Anderson, 113, 431.
True v. International Tel. Co., 729.
v. Meredith Creamery Co., 733.
v. Thomas, 444.
True & True Co. v. Woda, 32.
Trulock v. Merte, 576, 577.
Truly v. North Lumber Co., 540.
Trussell v. Scarlett, 239.
Trustees, etc., v. Strong, 313, 314, 315.
Tryon v. Evening News Ass'n, 245.
v. Whitmarsh, 441, 460.
Tutwiler Coal Co. v. Enslen, 284.
Tubbs v. Richardson, 433.
Tuck v. Downing, 447, 465.
Tucker v. Call, 222.
v. Draper, 281, 284, 717, 738.
v. Erie Ry. Co., 497.
v. Jerris, 87.
v. Jewett, 130.
v. Moreland, 59, 61.
v. Nebeker, 422.
v. Newman, 579.
v. New York Cent., etc., R. R. Co., 714.
v. Norfolk, etc., R. R. Co., 737, 758.
v. Parks, 123, 124.
v. Tucker, 257, 258.
Tudor v. Lewis, 395.

[REFERENCES ARE TO PAGES.]

Tuel v. Weston, 491.
Tuerk H. P. Co. v. Tuerk, 359.
Tuff v. Warman, 702.
Turess v. New York, etc., R. R. Co., 738.
Turnbull v. Rivers, 363.
Turner v. Franklin, 439.
v. Goldsboro Lumber Co., 523.
v. Hearst, 206, 249.
v. Hitchcock, 98, 101, 102. 103.
v. Holtzman, 109.
v. Huff, 649.
v. Meymott, 119.
v. Newburg, 78, 482, 767, 768.
v. Norfolk, etc., R. R. Co., 523.
v. North Car. Ry. Co., 48.
v. So. Pac. Co., 539.
v. Sterling, 23.
v. Thompson, 369, 370.
v. Walker, 183.
v. Whitaker, 644.
Turney v. Wilson, 648.
Turnpike Co. v. Brown, 148.
v. Martin, 147.
v. Railroad Co., 681.
v. Van Dusen, 147.
Turnpike Road v. Champney, 385.
Turpen v. Booth, 384.
Turrentine v. Blackwood, 438.
Turton v. N. Y. Recorder Co., 215, 249.
v. Powelton Elec. Co., 752.
v. Turton, 358.
Tuthill v. Wheeler, 419.
Tuttle v. Atlantic City R. R. Co., 711.
v. Hardenberg, 423.
v. Hunt, 192.
v. White, 437.
v. Wilson, 436.
Twigg v. Ryland, 345, 346, 347, 348.
Twilley v. Perkins, 165, 167.
Twitchell v. Shaw, 440.
Twomley v. Central Park, etc., R. R. Co., 710.
Twombley v. Consolidated Elec. Lt. Co., 508.
Tyler v. Ricamore, 36.
v. Thama County, 766.
v. Western Union Tel. Co., 728.
v. Wilkinson, 598, 601.
Tyler S. E. Ry. Co. v. Rasberry, 287.
Tyner v. Cory, 350.
v. People's Gas Co., 587.
Tyrus v. Kansas City, etc., R. R. Co., 585.
Tyson v. Britton, 142.
v. McGuineas, 135.

U.

Uggla v. West End St. Ry. Co., 693.
Uhlein v. Cromack, 349.
Ukman v. Daily Record Co., 209 212.
Ulbricht v. Eufaula Water Co., 23, 591, 593.
Uline v. New York, 627.
Ullman v. Chicago, etc., Ry. Co., 724.
Ulmer v. Leland, 171.
Ulrich v. New York Central, etc., R. R. Co., 727.
Ultzen v. Nicols, 638.
Umback v. Lake Shore, etc., Co., 510, 531.
Underhill v. Harwood, 444.
v. Welton, 203, 211.
Underwood v. Hewson, 746.
v. Robinson, 439.
v. Smith, 199.
v. Waldron, 579, 580, 706.
Unger v. Forty-Second St. R. R Co., 687.
Union Associated Press v. Heath, 199.
Union Compress Co. v. Nunnally, 636.

[REFERENCES ARE TO PAGES.]

Union Depot, etc., Co. v. Smith, 163, 164, 165.
Union, etc., Co. v. Shacklett, 101.
Union Mfg. Co. v. East Ala. Nat. Bank, 442, 464.
Union Mill Co. v. Shores, 610.
Union Mut. Life Ins. Co. v. Thomas, 229.
Union Nat. Bank v. Hunt, 458.
Union Pac. Ry. Co. v. Artist, 72.
v. Benson, 611.
v. Broderick, 508.
v. Doyle, 544.
v. Erickson, 550.
v. Goodridge, 303.
v. Harris, 140.
v. Jones, 285.
v. Lapsley, 720.
v. McDonald, 732.
v. Rainey, 650, 722.
v. Ray, 128.
v. Rollins, 339, 712.
v. Sue, 653, 655.
v. Vincent, 725.
Union Stock Yards Co. v. Conoyer, 705.
Union Stock Yards & T. Co. v. Mallory, etc., Co., 430.
Union St. Ry. Co. v. Stone, 37, 93.
United Elec. Lt. & P. Co. v. State, 752.
United Electric Ry. Co. v. Shelton, 93, 94, 753.
United Oil Co. v. Roseberry, 755, 756.
United Rys. & Elec. Co. v. Biedler, 719.
v. Fletcher, 693.
v. State, 657.
United Society v. Underwood, 101, 437.
United States v. Buntin, 307.
v. Commissioner, 384.
v. Edme, 190.
v. Harris, 332.
v. Hoar, 625.
United States v. Homestake Min Co., 118, 119, 436, 437.
v. Lee, 82.
v. McLemore, 82.
v. Peters, 82.
v. Rio Grande D. & I. Co., 591.
U. S. Brewing Co. v. Stoltenberg, 284, 679.
U. S. Elec. Lt. Co. v. Sullivan, 755.
U. S., etc., Co. v. Wilder, 516.
U. S. Express Co. v. Backman, 646, 725.
U. S. Tel. Co. v. Gildersleeve, 668 728.
United States Wind Engine & P Co. v. Linville, 402.
Updegraff v. Bennett, 263.
Updegrove v. Zimmerman, 222.
Upjohn v. Richland, 587.
Upton v. Hume, 241, 244.
v. Times-Dem. Pub. Co., 215.
v. Tribilcock, 452.
v. Vail, 470.
Urban v. Helmick, 216, 217, 218.
Uren v. Golden Tunnel Min. Co., 550.
Uromsky v. Dry Dock, etc., R. R Co., 256.
Urquhart v. Ogdensburg, 79.
Urton v. Price, 102.
Usher v. Severance, 242.
v. West Jersey R. R. Co., 275
Utah T. & S. Bank v. Diamond, etc., Co., 275.
Uthermohlen v. Boggs Run Co., 684, 739.
Utley v. Hill, 460.

V.

Vale v. Bliss, 686.
Valentine v. Jackson, 53.
Vallance v. Falle, 147.
Valley Ry. Co. v. Franz, 617.
Vallo v. United States Exp. Co., 711.

[REFERENCES ARE TO PAGES.]

Valparaiso v. Moffitt, 92, 93, 95, 597, 624.
Valparaiso C. W. Co. v. Dickover, 594.
Van Ankin v. Westfall, 203.
Vanarsdale v. Laverty, 236.
Van Auken v. Monroe, 320.
Van Bibber v. Frazier, 333, 334.
Van Bracklin v. Fonda, 445.
Van Brunt v. Schenck, 332, 418.
Van Camp v. Board of Education, 307.
Van Campen v. Bruns, 445.
Vance v. Erie R. R. Co., 69.
v. Louisville, etc., Co., 241.
v. Phillips, 466.
v. Thockmorton, 643, 644.
v. Vance, 141.
Vandegrift v. Delaware, etc., R. R. Co., 338.
v. Rediker, 707.
Vandenburgh v. Truax, 40.
v. Van Bergen, 592.
Van den Heurel v. National Furnace Co., 515.
Vanderbeck v. Hendry, 324.
Vanderbilt v. Turnpike Co., 87.
Vanderslice v. Philadelphia, 77.
Vanderwiele v. Taylor, 584.
Van Deusen v. Young, 325.
Vandeveer v. Mattocks, 164.
Vandiver v. O'Gorman, 435.
v. Pollak, 84, 107.
Van Duzen Gas, etc., Co. v. Schelies, 539, 541.
Van Egmond v. Seaforth, 596.
Van Epps v. Harrison, 449.
Van Gilder v. Chicago, etc., R. R. Co., 634.
Van Hoesen v. Coventry, 592.
Vanhorn v. Burlington, etc., Ry. Co., 676, 706.
Van Horn v. Van Horn, 86, 87, 292, 296.
Van Horne v. Freeman, 261.
Vanhooser v. Berghoff, 670.
Van Hoozier v. Hannibal, etc., R. R. Co., 617.
Van Ingen v. Mail & Express Pub. Co., 219.
Van Leuven v. Lyke, 313, 343, 344, 350, 365.
Vannactor v. State, 157.
Van Ness v. Pacard, 407.
Vannest v. Fleming, 583, 585.
Van Olinda v. Hall, 257.
Vanasdall v. Hamilton, 421.
Van Praag v. Gale, 696, 698.
Van Schaick v. Sigel, 391.
Vansickle v. Brown, 179.
Van Skike v. Potter, 672.
Van Steenburgh v. Bigelow, 385.
Van Tassell v. Derrensbacher, 145.
Vanvert v. Fleming, 328.
Van Winkle v. Am. Steam Boiler Ins. Co., 750, 779.
Van Wormer v. Albany, 110, 111.
Van Wyck v. Aspinwall, 237.
Varble v. Bigley, 647.
Varnes v. Masterson, 582.
Varney v. Manchester, 768.
v. Varney, 266.
Vartaman v. New York, etc., R. R. Co., 554.
Vasse v. Smith, 58.
Vaughan v. Menlove, 687, 743
Vaughn v. Webster, 435.
Vaun v. McCreary, 175.
Vausse v. Lee, 228.
Vawter v. Mo. Pac. R. R. Co., 275.
Veazie v. Dwinel, 568, 626.
Vedder v. Vedder, 616.
Vegelohn v. Gunther, 293, 298.
Veith v. Salt Co., 749.
Velsor v. Seeberger, 452.
Velzian v. Lewis, 430.
Venard v. Cross, 609.
Venderzee v. McGregor, 236.
Veneman v. Jones, 165.
Vennum v. Huston, 378, 381.
Veraguth v. Denver, 75.

[REFERENCES ARE TO PAGES.]

Vere v. Cawdor, 349.
Vernon v. Cornwell, 489, 496.
Vernum v. Wheeler, 586.
Vertue v. Jewell, 652.
Vestry of St. Pancras v. Battenburg, 147.
Vetatoro v. Perkins, 279.
Vial v. Hofen, 319.
Vicars v. Wilcocks, 30.
Vickers v. Stoneman, 220.
Vicksburg v. Hennessy, 704.
v. McLain, 713.
Vicksburg, etc., R. R. Co. v. Patton, 338.
v. Wilkins, 559.
Victor Coal Co. v. Muir, 702.
Viebahm v. Crow Wing Co., 610.
Viemeister v. White, 309.
Viets v. Toledo, etc., Ry. Co., 522.
Vigeant v. Scully, 96.
Vigo Agricultural Soc. v. Brumfiel, 636.
Village v. Kallagher, 609.
Vinal v. Core, 180.
Vinas v. Merch., etc., Co., 228.
Vincennes Water Supply Co. v. White, 483.
Vincent v. Stenehour, 18.
Vining v. Baker, 419.
Vinton v. Middlesex, etc., R. R. Co., 658.
Virginia B. & I. Co. v. Jordan, 505.
Va. Cent. R. R. Co. v. Sanger, 656.
Virginia, etc., Co. v. Chalkley, 556.
v. Harris, 556, 558.
Virginia, etc., Wheel Co. v. Chalkley, 514.
Virginia Iron, etc., Co. v. Hamilton, 520, 550.
Virginia Midland Ry. Co. v. Washington, 98.
Vitto v. Keogan, 539.
Vizetelly v. Mudie's Select Library, Limited, 199.
Vocht v. Kuklence, 66.
Vogel v. Am. Bridge Co., 515, 543, 546, 554.
Voglegesang v. St. Louis, 37, 767, 773.
Vogt v. Honstain, 535.
Volkmar v. Manhattan R. R. Co., 693.
Von Gerichten v. Seitz, 203.
Voorhees v. Earl, 468.
Vorce v. Oppenheim, 182.
Vosbeck v. Kellogg, 484.
Vosburg v. Putney, 153.
Vose v. Grant, 99.
Vossel v. Cole, 261, 263.
Vredenburg v. Behan, 350.
Vrooman v. Lawyer, 343.

W.

W. v. L., 203.
Waaler v. Gt. Northern Ry. Co., 498.
Wabash, etc., Ry. Co. v. Hawk, 544.
v. Locke, 21.
v. Shacklet, 718, 719.
Wabash P. & P. Co. v. Cumrine, 127.
Wabash Ry. Co. v. Brown, 698.
v. Coker, 35.
v. Cregan, 284, 285.
v. Keister, 761.
v. Kelly, 72.
v. McDaniels, 517.
v. Savage, 487.
v. Young, 216, 289.
Wachsmuth v. Martini, 459.
v. Merchants' Nat. Bank, 70.
Waddingham v. Loker, 466.
Wade v. Columbia Elec. Co., 697.
v. Donan B. Co., 410.
v. Lutcher, etc., Lumber Co., 632.
v. Miller, 402.
v. Nat. Bank, 185.
Wadhurst v. Damme, 349.

[REFERENCES ARE TO PAGES.]

Wadsworth v. Boston El. Ry. Co., 693.
v. Tillotson, 593.
v. W. U. Tel. Co., 25, 667.
Wager v. Troy Union R. R. Co., 612, 613.
Waggoner v. Jermaine, 620.
Wagner v. Bissell, 339.
v. Cleveland, etc., R. R. Co., 407.
v. Chicago, etc., Ry. Co., 735.
v. Jackson Tp., 38.
v. Portland, 76, 534.
v. Scott, 234, 235.
v. Truedale, 762.
v. Uphur, 508.
Wagstaff v. Schippel, 179.
Wahl v. Laubensheimer, 318.
v. Walton, 165.
Wait v. Dann, 394.
Waite v. North East R. R. Co., 717.
Wakefield v. Connecticutt, etc., R. R. Co., 677.
v. Dyer, 411.
v. Newport, 80.
Wakelin v. London, etc., Co., 704.
Wakely v. Hart, 163.
Wakeman v. Dalley, 461.
v. Robinson, 21.
v. Wilbur, 610.
Walbert v. Trexler, 505.
Walcott v. Ely, 382.
Waldon v. Conn, 312, 321.
v. Dudley, 439.
Waldron v. Haverhill, 81.
v. Sperry, 181.
Waldrop v. Almond, 397, 440.
Wales v. Ford, 344, 565.
v. Miner, 252.
v. Pac. Elec. Motor Co., 753.
Walford v. Herald Ptg. & Pub. Co., 220.
Walker v. Brewster, 605.
v. Bolling, 541.
v. Casgrain, 464.
v. Cronin, 291, 294.
v. Culman, 68.
Walker v. Davis, 57, 61.
v. Goodman, 670.
v. First Nat. Bank, 429.
v. Grand Rapids, etc., Co., 408, 409.
v. Halleck, 377, 386.
v. Hawley, 217.
v. Herron, 339.
v. Hunter, 105.
v. McMillan, 481, 623.
v. Mobile, etc., R. R. Co., 448.
v. Schindel, 409.
v. Shepardson, 610.
v. Walker, 8.
Walkley v. Bostwick, 248.
Wall v. Hoskins, 134.
v. Litt, 19.
v. Livezay, 691.
v. Trumbull, 162, 385, 440
Wallace v. Cannon, 48.
v. Homestead Co., 220, 246.
v. Jameson, 206, 235, 241.
v. Miller, 98, 99.
v. Morss, 60.
v. Muscatine, 403.
v. Rodgers, 246.
v. Southern Cotton Oil Co., 484.
v. Stevens, 100.
Waller v. Bowling, 423, 434.
Wallever v. Southern Coton Oil Co., 484.
Walley v. Deseret Nat. Bank, 421.
v. McConnell, 89.
Walling v. Miller, 438.
v. Potter, 640.
Wallis v. Harrison, 326.
v. Truesdell, 439.
Walmsley v. Atlas S. S. Co., 424.
Walpert v. Bohan, 638.
Walrod v. Webster Co., 37.
Walsh v. Ass'n of Master Plumbers, 145.
v. Fitchburg R. R. Co., 738.
v. Hall, 457.
v. Missouri Pacific R. R. Co., 678.

[REFERENCES ARE TO PAGES.]

Walsh v. Peet Valve Co., 503.
v. Porterfield, 642.
v. Trustees, etc., 475.
Walter v. County Com'r, 622, 623.
v. Sample, 173, 174.
v. Selfe, 572, 575, 602.
Walter Baker & Co. v. Sanders, 358, 359.
Walters v. Chicago, etc., R. R. Co., 277.
v. Denver Con. Elec. Lt. Co., 753.
v. Morgan, 442.
Walther v. Warner, 329.
Walton v. Crowley, 355.
v. Middlesex, etc., Co., 260.
v. New York, etc., Co., 492.
Walworth v. Jenness, 412.
Wanless v. N. E. R. Co., 676.
War v. Railroad Co., 713.
Warax v. Cincinnati, etc., Ry. Co., 563.
Ward v. Andrews, 415.
v. Brown, 340.
v. Carp River Iron Co., 52.
v. Danzeezen, 343, 344.
v. Dick, 224.
v. Flood, 307.
v. Hinkleman, 619.
v. Jefferson, 769.
v. McIntosh, 319.
v. New England Fibre Co., 475.
v. Odell Mfg. Co., 697.
v. Reasor, 182.
v. Severance, 144.
v. Trimble, 458.
v. Vance, 61.
v. West Jersey, etc., R. R. Co., 28.
v. White, 151, 155.
v. Young, 473.
Warden v. Bailey, 134.
v. Millar, 742.
Wardell v. Fosdick, 453.
Warder, Bushnell & Gleasner Co. v. Harris, 420.
Ware v. Brown, 391, 400.
Warfield v. Clark, 460.
Warm v. W. U. Tel. Co., 729.
Warner v. Benjamin, 447, 453.
v. N. Y. Cent. R. R. Co., 704.
v. Press Pub. Co., 235.
v. Reddiford, 159.
v. Rogers, 368.
v. Southall, 218.
v. Vallily, 430.
Warren v. Englehart, 274.
v. Ritchie, 464.
v. State, 18, 149.
v. Warren, 257, 258.
Warren Bank v. Parker, 399.
Washburn v. Cooke, 238.
Washburn, etc., Co. v. Worcester, 613.
Washer v. Slater, 166.
Washington v. Quayle, 737.
Washington Co., W. Co., v. Garver, 590.
Washington, etc., Co. v. State, 145
Washington, etc., Road v. State, 144.
Washington, etc., R. R. Co. v. Harmon, 662.
v. Hickey, 93.
v. McDade, 525, 532.
v. Wright, 701.
Washington, etc., Tel. Co. v. Case 19.
v. Hobson, 666.
Washington Gas Lt. Co. v. Eckloff, 695, 756.
v. Lansden, 199.
Washington Ins. Co. v. Wilson, 222.
Washington M. Co. v. Clagett, 741.
Wasmer v. Del., etc., R. R. Co., 621, 710.
Wason v. Walter, 241.
Wasson v. Mitchell, 386.
Waterbury v. Chicago, etc., Ry. Co., 655.
v. Lockwood, 439.

[REFERENCES ARE TO PAGES.]

Waterbury v. Westervelt, 91.
Waterbury Clock Co. v. Trion, 317.
Water Co. v. Ware, 480.
Waterer v. Freeman, 22, 373.
Waterhouse v. Schlitz Brewing Co,. 608, 618.
Waterloo W. M. Co. v. Shanahan, 374.
Waterman v. Merritt, 192.
v. Shipman, 355, 357.
Waters v. Anthony, 167.
v. Dumas, 47.
v. Lilly, 313.
v. Moss, 339.
v. Retail Clerks' Union, 211, 216.
v. West Chicago St. R. R. Co., 67.
Waterson v. Saldunbehre, 122.
Watkins v. Baird, 183.
v. Kaolin Mfg. Co., 27.
v. Lynch, 332.
v. Rist, 128.
v. Roberts, 635.
v. Wallace, 438, 466.
v. W. W. Land & Imp. Co., 453.
Watriss v. Nat. Bank, 411.
Watson v. Atwood, 453.
v. Calvert Building Ass'n, 670.
v. Coburn, 434.
v. Colusa P., M. & S. Co., 597, 624.
v. Crandall, 457.
v. Dilts, 27, 29.
v. Gray, 368.
v. Jones, 463.
v. Loughran, 642, 644.
v. McCarthy, 205.
v. McEwan, 226.
v. Minneapolis R. R. Co., 763.
v. Rinderknecht, 151.
v. Silsby, 443, 444.
v. Stever, 132.
v. Watson, 263, 438, 440.
Watt v. Nevada Cent. R. R. Co., 744.
v. Potter, 432.
Watts' Admr. v. Kinney, 134.
Way's Case, 165.
Way v. Powers, 58.
v. Townsend, 383, 386.
v. Wright, 395.
Weakley v. Paige, 566, 576.
Wear v. Gleason, 645.
Weare v. Fitchburg, 771.
Weatherford v. Fishback, 451.
Weathersby v. Sleeper, 407.
Weaver v. Cone, 449.
v. Deavendorf, 384, 386.
v. Shriver, 456.
v. Ward, 55, 746.
Weckerly v. Geyer, 388.
Webb v. Beavan, 113.
v. Cecil, 91.
v. Drake, 297.
v. Fisher, 377.
v. Portland Mfg. Co., 23, 125, 591, 592.
v. Rome, etc., R. R. Co., 744.
v. State, 165, 168.
Webbe v. W. U. Tel. Co., 667.
Webber v. Barry, 293, 332.
v. Gay, 440.
v. Hunting, 439.
v. Piper, 511.
v. Davis, 423.
Weber Wagon Co. v. Kehle, 503, 555.
Webster v. Drinkwater, 131.
v. Fowler, 174, 176.
v. Hillsdale, 81.
v. Stevens, 367, 368.
v. Symes, 744.
v. Webster, 335, 336.
Weddell v. Hapner, 584.
Wedgewood v. Chicago, etc., R. R. Co., 514.
Weed v. Case, 462.
v. Panama R. R. Co., 493.
Weedon v. Timbrell, 251.

[REFERENCES ARE TO PAGES.]

Week v. McNulty, 645.
v. Tremont Mill Co., 529.
Weeks v. Conn, etc., Turnpike Co., 769.
v. Sharer, 517, 562.
Weener v. Brayton, 355.
Weet v. Brockport, 767.
Weetan v. Woodcock, 410.
Weger v. Pennsylvania R. R. Co., 516.
Wehner v. Lagerfelt, 752.
Weick v. Lander, 31.
Weidner v. Phillips, 450.
Weightman v. Washington, 78, 767.
Weil v. Baker, 368.
v. Israel, 179.
v. Silverstone, 116.
Weiland v. Krejnick, 637.
Weiler v. Kershner, 132.
Weiller v. Pennsylvania R. R. Co., 726.
Weintz v. Kramer, 400.
Weir v. Bell, 70.
v. Plymouth, 585.
Weiss v. Oregon, etc., Co., 592.
v. Whittemore, 208.
Weiser v. Holzman, 776.
Welch v. Bagg, 131.
v. Bath Iron Works, 524.
v. Boston, etc., R. R. Co., 177, 722.
v. Burdick, 449.
v. Cheek, 181.
v. Durand, 126, 747.
v. Mohr, 424, 637.
v. Stowell, 111.
v. Wesson, 50.
Weld v. Green, 395.
v. Hornby, 626.
v. Oliver, 433.
Welher v. Meyersham, 263.
Welle v. Celluloid, 534.
Weller v. Baker, 22.
v. McCormick, 684.
Wellington v. Oil Co., 678, 750, 777.
Wellman v. Dickey, 333.
v. English, 397.
v. Sun P. & P. Co., 195, 249.
Wellihan v. Nat. Wheel Co., 553.
Wells v. Abrahams, 11.
v. Atlanta, 376.
v. Cook, 457.
v. Gallagher, 748.
v. Head, 349.
v. Howell, 338.
v. Johnson, 168.
v. New York Cent. R. R. Co., 655, 727.
v. Steam Nav. Co., 647.
v. Steele, 146.
v. Watling, 22.
Wells & French Co. v. Kapaczynski, 535, 538, 540.
Wehner v. Lagerfelt, 751.
Welsh v. Cornell, 562.
v. Rutland, 76.
v. Wilson, 331.
Welting v. St. Louis, etc., Ry. Co., 723.
Welton v. Martin, 371.
Wencker v. Missouri, etc., Ry. Co., 683.
Wendell v. New York, etc., R. R. Co., 704.
v. Pratt, 580.
Wendler v. Peoples' H. F. Co., 500.
Wentworth v. Gove, 404.
v. Sawyer, 439.
Werges v. St. Louis, etc., R. R. Co., 612, 615.
Wernwag v. Philadelphia, etc., Co., 652.
Wert v. Strouse, 261, 262.
Wertz v. Western U. Tel. Co., 666, 729.
Wescott v. Middleton, 576.
v. Sharp, 130.
Wesson v. Washburn I. Co., 601, 606.
West v. Emery, 14.
v. Emmanuel, 750.

[REFERENCES ARE TO PAGES.]

West v. Hayes, 440.
v. Tel. Co., 26.
v. West. U. Tel. Co., 26, 667.
v. Wright, 461.
West Arlington I. Co. v. Mt. Hope Retreat, 596, 597.
Westbrook v. Mobile, etc., R. R. Co., 714, 716.
Westchester, etc., R. R. Co., v. Miles, 304.
West Chicago, etc., R. R. Co. v. Dwyer, 555.
West Chicago St. Ry. Co. v. Feldstein, 99.
v. Linderman, 704, 708, 709.
West Covington v. Freking, 333.
Westerfeld v. N. Y. Life Ins. Co., 469.
Westerfield v. Scripps, 222, 224.
Western v. Barnicoat, 215.
Western Coal & Min. Co. v. Ingraham, 503.
Western College, etc., v. Cleveland, 374.
Western, etc., R. R. Co., v. Adams, 559.
v. Bass, 282.
v. Bradford, 561.
Western Elec. Co. v. Henselman, 521.
Western, etc., R. R. Co., v. Young, 128, 713.
Western Loan & S. Co., v. Silver Bow Abstract Co., 669.
Western Md. R. R. Co. v. State, 39, 690, 711.
Western Nat. Bank's Appeal, 368.
Western Ry. Co. v. Harwell, 650.
v. Little, 652.
v. Sistrunk, 31.
v. Harwell, 725.
Western Stone Co. v. Musical, 539, 540.
v. Whalen, 516, 517, 518.
Western Union Tel. Co. v. Adams, 728.
Western Union Tel. Co. v. Allen, 666.
v. Berckman, 728.
v. Buchanan, 668.
v. Carew, 666, 668, 728.
v. Chamblee, 728.
v. Cobbs, 668.
v. Cohen, 666.
v. Crall, 728.
v. Crawford, 728.
v. Crider, 668.
v. Culberson, 730.
v. Dougherty, 668.
v. Dubois, 667.
v. Edsall, 668, 730.
v. Fenton, 729.
v. Ferguson, 25, 26, 51.
v. Flint River L. Co., 667.
v. Fontaine, 729.
v. Graham, 729.
v. Harding, 668.
v. Hearne, 730.
v. Howell, 728.
v. Jones, 668.
v. Krichbaum, 13.
v. McDaniel, 702.
v. McGuire, 668.
v. McMullen, 518.
v. Meek, 729.
v. Meredith, 728, 730.
v. Meyer, 666.
v. Neill, 729.
v. Pritchett, 215.
v. Quinn, 701.
v. Rogers, 26.
v. Schriver, 684.
v. Scircle, 666, 668.
v. Short, 728.
v. State, 752, 753.
v. Steenberger, 668.
v. Stevenson, 728, 730.
v. Thorn, 753.
v. Tyler, 728.
v. Uralde Nat. Bank, 667.
v. Van Cleave, 25.
v. Waters, 25.

[REFERENCES ARE TO PAGES.]

Western Union Tel. Co. v. Watson, 666.
v. Way, 728.
v. Wood, 26.
Westervelt v. National P. & S. Co., 352.
West Fla. Land Co. v. Studebaker, 68.
Westgate v. Wixon, 408.
Westinghouse Elec. & Mfg. Co. v. Heimlich, 510, 525, 526.
West Jersey, etc., R. R. Co., v. Welsh, 487, 498.
West Jersey R. R. Co., v. Trenton, etc., Co., 423.
Westlake v. Westlake, 257.
West Mahonoy v. Watson, 33.
West Muncie Strawboard Co. v. Slack, 95, 597, 624.
Weston v. Advertiser Co., 241.
v. Carr, 431.
v. Com. Adv. Ass'n, 206.
v. Sampson, 314.
v. Troy, 704.
v. Weston, 199.
West Orange v. Field, 585.
West Virginia Cent., etc., R. R. Co., v. State, 684, 693.
West Va. Trans. Co., v. Standard Oil Co., 44, 67, 292, 301.
Wetherbee v. Green, 117.
v. Partridge, 480, 481.
Wettmer v. Bishop, 247.
Wetmore v. Mellinger, 186.
v. Tracy, 112, 145.
v. White, 328.
Wettor v. Dunk, 686.
Wetzell v. Waters, 89.
Weymouth v. Chicago, etc., R. R. Co., 436.
v. Gile, 340.
Whale v. Reinback, 604.
Whalen v. Citizens' Gas Lt. Co., 704.
Whaley v. Bartlett, 699, 705.
v. Catlett, 282.
Whaling v. Wells, 177.
Whatley v. Zenida Coal Co., 541.
Wheatland v. Ill. & M. Tel. Co., 728.
Wheatley v. Baugh ,21, 586, 587, 589.
v. Chrisman, 327.
v. Harris, 417.
Wheaton v. Beecher, 241.
v. Peters, 353.
Wheelan v. Chicago, etc., Ry. Co., 287.
Wheeldon v. Lowell, 114.
Wheeler v. Bedell, 405.
v. Cincinnati, 75.
v. Clark, 367.
v. Gavin, 168, 378, 381.
v. Kirkendall, 411.
v. Lawson, 419.
v. Norton, 316.
v. Plymouth, 75.
v. Shields, 247.
v. Train, 419.
v. Wason Mfg. Co., 503.
v. Westport, 699, 705.
v. Wheeler, 433.
v. Worcester, 98, 99.
Wheeler, etc., Co., v. Boyce, 70.
Wheeler & W. Mfg. Co. v. Heil, 64.
Wheeling, etc., R. R. Co. v. Koontz, 653.
Wheelock v. Boston, etc., R. R. Co., 704.
v. Jacobs, 587.
Wheelwright v. Boston, etc., R. R. Co., 762.
Whetstone v. Bowser, 589.
Whicher v. Boston, etc., R. R. Co., 664, 665.
Whiddon v. Williams Lumber Co., 317.
Whipley v. Dewey, 410.
Whipple v. Fuller, 185.
Whirley v. Whiteman, 716.
Whisenhant v. Railroad Co., 700.
Whitaker v. Helena, 718.

[REFERENCES ARE TO PAGES.]

Whitbourne v. Williams, 261.
Whitcomb v. Vt. Cent. R. R. Co., 595.
White v. Ala. Insane Hospital, 71.
v. Apsley Rubber Co., 188, 189.
v. Board of Com'rs, 81.
v. Brantley, 415.
v. Brooks, 130, 432, 433.
v. Carr, 175, 176.
v. Carroll, 46, 226.
v. Chicago, etc., Ry. Co., 762.
v. Concord R. R. Co., 676.
v. Cutler, 336.
v. East Lake L. Co., 599.
v. Elwell, 114, 325.
v. Godfrey, 333.
v. Griffin, 23.
v. Kellogg, 151.
v. Marshfield, 77, 374.
v. McQueen, 165.
v. Mellin, 247.
v. Morse, 378.
v. Murtland, 261, 262.
v. Nichols, 239.
v. Parks, 215.
v. Phelps, 427.
v. Philbrick, 101.
v. Postal Tel. Cable Co., 303.
v. Riley, 37.
v. Sander, 28.
v. Spettigue, 11.
v. Stifel, 739.
v. Suffolk, etc., R. R. Co., 705.
v. Tug Mary Ann, 647.
v. Twitchell, 113, 114.
v. Webb, 415.
v. Yawkey, 118.
v. Yazoo, 79.
Whitehead v. St. Louis, etc., Ry. Co., 491.
Whitehurst v. Ward, 172.
Whitemore v. Haroldson, 645.
Whitesell v. Hill, 672.
Whitesides v. Thurlkill, 722.
Whitfield v. Le DeSpencer, 393.
v. Whitfield, 435.
Whitford v. Panama R. R. Co., 272, 280.
Whiting v. Brastow, 408.
v. Hill, 465.
v. Mills, 642.
Whitley v. McLaughlin, 740.
Whitman v. Egbert, 257.
v. Fisher, 701, 719.
Whitmarsh v. Walker, 325, 413.
Whitmore v. Boston, etc., R. R. Co., 555.
v. Green, 89.
v. Orono P. & P. Co., 740.
Whitney v. Allaire, 451.
v. Allen, 236.
v. Bartholomew, 573, 606.
v. Farrar, 91.
v. Hause, 167.
v. Hitchcock, 259.
v. Huntington, 53, 119, 436.
v. Janesville Gazette, 212.
v. Ladd, 415.
v. Nat. Bank, 633.
v. Peckham, 177.
v. Preston, 397.
v. Pullman, etc., Co., 661.
v. Richards, 450.
v. Stark, 143.
Whitney & Starrette Co. v. O'Rourke, 484, 500, 504.
Whittaker v. Collins, 96, 97.
v. Delaware, etc., Canal Co., 516, 517.
Whittemore v. Cutter, 352.
v. Weiss, 222.
Whittingham v. Owen, 434.
Whittlesey v. New York, etc., R. R. Co., 545.
Whitlock v. Uhle, 45.
Whitton v. Fitzwater, 444.
Whitworth v. Hall, 183.
v. Shreveport Belt Ry. Co., 709
Wichita, etc., R. R. Co., v. Davis, 761.
Wickenburg v. Minneapolis, etc., Ry. Co., 683, 686.

[REFERENCES ARE TO PAGES.]

Wicker v. Hotchkiss, 173.
Wickes v. Clutterbuck, 380.
Wickham v. Freeman, 52.
v. Wolcott, 743.
Widekind v. Water Co., 581.
Widner v Maine Cent. R. R. Co., 676.
Wiedeman v, Keller, 445.
Wiedmer v. N. Y. El. R. R. Co., 693.
Wieland v. Sunwell, 637.
Wiesinger v. First Nat. Bank, 184, 187.
Wiest v. Coal Creek R. R. Co., 475.
v. Elec. Traction Co., 92, 94, 100, 288.
Wiggett v. Fox, 562.
Wiggin v. St. Louis, 481.
Wiggins v. Hathaway, 393.
v. United States. 87.
Wikberg v. Olson Co., 696, 699.
Wilbert v. Sheboygan, 754.
Wilbur v. Hubbard. 346.
v. Prior, 453.
v. Flood, 468.
v. White, 482.
Wilckins v. Willet, 395.
Wilcox v. Chicago, 76.
v. Henry, 603.
v. Moon, 198, 218.
v. Smith, 439.
Wild v. Odell, 174.
v. Oregon Short Line, 520.
v. Walker, 270.
Wilder v. DeCou, 610.
v. Maine Cent. R. R. Co., 706.
v. Stanley, 31, 93, 94, 342.
v. Wilder, 342.
Wiley v. Elwood, 614.
v. First Nat. Bank, 633.
Wilgus v. Gettings, 407.
Wilk v. Key, 444.
Wilke v. Louisville, etc., R. R. Co., 487, 497.
Wilkes v. Jackson, 101.
v. Shields, 214.
Wilkes v. Western, etc., R. R. Co., 655.
Wilkie v. Raleigh, etc., R. R. Co., 560.
Wilkins v. Earle, 643.
v. Irvine, 326.
v. Monson Consolidated Slate Co., 608.
v. Rutland, 81.
Wilkinson v. Arnold, 177.
v. Connell, 312.
v. Downton, 27.
v. Goodfellow-B. Shoe Co., 183.
v. Parrott, 347.
v. Stewart, 116.
v. Wilkinson, 336.
Willamette Iron Works v. Ore. R. & N. Co., 370.
Willans v. Taylor, 179, 180.
Willcock v. Pennsylvania R. R. Co., 648, 723, 726.
Willcox v. Hines, 740.
Willard v. Holmes, 69, 182, 184, 187.
v. Monarch El. Co., 430.
v. Rice, 116.
Willett v. St. Albans, 78, 79.
v. Willett, 130.
Willetts v. Chicago, etc., Ry. Co., 583.
Willey v. Carpenter, 138.
v. Clements, 451.
v. Mulledy, 678.
Williams v. Belmont Coal & C. Co., 522.
v. Birmingham B. & M. Co., 533.
v. Brooks, 358.
v. Buchanan, 313.
v. Camden, etc., Ry. Co., 275.
v. Chicago, etc., R. R. Co., 683.
v. Churchill, 522.
v. Clark, 535.
v. Dickenson, 12.
v. East India Co., 748.
v. Esling, 23, 125.

[REFERENCES ARE TO PAGES.]

Williams v. Gill, 487.
v. Gording, 145.
v. Great Western R. Co., 676.
v. Hays, 55, 56.
v. Hill, 205, 211.
v. Holdridge, 205.
v. Holland, 417.
v. Karnes, 212.
v. Kearney County, 72.
v. Kyes, 176, 180.
v. Lanier, 321.
v. Le Bar, 103, 166.
v. Levert L. & S. Co., 508.
v. McKee, 202, 218.
v. McManus, 203.
v. Mich. Cent. R. R. Co., 338, 701.
v. Mo. Pac. Ry. Co., 516.
v. Moray, 348.
v. Mutual Gas Co., 304.
v. Nashville, 736.
v. Nelson, 595.
v. N. Y. Cent. R. R. Co., 333, 612, 613.
v. North Wisconsin Lumber Co., 501.
v. Planters' Ins. Co., 69.
v. Pomeroy Coal Co., 579.
v. Pullman Palace Car Co., 665.
v. Safford, 329.
v. South, etc., R. R. Co., 717.
v. Spencer, 330.
v. Spurr, 443.
v. State, 154.
v. Stein, 310.
v. Taylor, 178, 179.
v. Texas, etc., Co., 717.
v. Tripp, 478.
v. Van Meter, 175.
v. Weaver, 385.
v. Williams, 257.
v. Woodhouse, 180.
Williamson v. Dow, 439.
v. Freer, 233.
v. Louisville, Indust. School, 71.
Williamson v. Newport News, etc., R. R. Co., 506.
v. Oleson, 585.
v. Sheddon Marble Co., 523, 529, 530, 534.
v. So. R. R. Co., 684.
Williamstown v. Willis, 404.
Willis v. Armstrong Co., 38.
v. Bernard, 252.
v. Perry, 590, 599.
Willitts v. Chicago, etc., Ry. Co., 585.
Willman v. Press Pub. Co., 213.
Willmett v. Hanner, 222.
Willmot v. Corrigan Con. St. Ry. Co., 663.
Willow River Club v. Ward, 314.
Wills v. Hardcastle, 199.
v. Jones, 243.
Willson v. Treadwell, 619.
Willy v. Mulledy, 675.
Wilmarth v. Burt, 192, 440.
v. Woodcock, 578.
Wilmerton v. Sample, 167.
Wilmot v. Bell, 582, 602.
v. Howard, 715.
Wilson, *ex parte*, 190.
Wilson v. Baltimore, etc., R. R. Co., 665.
v. Bowen, 170.
v. Brett, 689.
v. Chalfant, 327.
v. Charleston, 704.
v. Charleston, etc., R. R. Co., 551, 554, 555.
v. Chesapeake & W. Co., 525, 529.
v. Clark, 477.
v. Collishaw, 334.
v. Cooper, 637.
v. Coulter, 257.
v. Fitch, 245.
v. Forbes, 314.
v. Fourteenth St. R. R. Co., 662.
v. Garrard, 58.

[REFERENCES ARE TO PAGES.]

Wilson v. Grit, 203.
v. Louisville, etc., R. R. Co., 696.
v. Matthews, 436.
v. McKenzie, 133.
v. McLaughlin, 418.
v. Milner, 99.
v. New Bedford, 579, 580.
v. New U. S. Cattle Ranch Co., 469.
v. New York, 79, 376, 383, 386.
v. Nichols, 450.
v. Penn. Railroad Co., 698.
v. Peto, 96.
v. Peverly, 743.
v. Reed, 433.
v. Rochester, etc., R. R. Co., 677.
v. Sioux Consolidated Min. Co., 515.
v. Sullivan, 224, 229.
v. Tumman, 87, 89.
v. Troy, 128, 129.
v. Waddell, 579.
v. Wheeling, 127.
v. Whitacre, 227.
v. Willimantic, etc., Co., 527.
v. Winona, etc., Co., 557.
Wilson Sewing Machine Co. v. Wilson, 193.
Wilt v. Welsh, 59, 60.
Wilting v. St. Louis, etc., Ry. Co., 722.
Wilts, etc., Canal Co. v. Swindon W. W. Co., 593.
Wiltse v. Holt, 164.
v. State, 491.
Wimbish v. Hamilton, 229.
Wimer v. Allbaugh, 203.
v. Smith, 464.
Winans v Randolph, 746.
Winchell v. Clark 109.
Winchester v. Craig, 436.
v. Stevens Point, 317, 370.
Windeler v. Rush Co. Fair Ass'n, 39. 711.
Windham v. Wither, 102.
Winebiddle v. Portefield, 172.
Wing v. Hussey, 88.
v. Milliken, 118, 423, 424, 435, 437.
Wingate v. Smith, 116.
v. Waite, 381.
Winn v. Lowell, 771.
Winnegar v. Cent. Pass. Ry. Co., 487.
Winnetka v. Clifford, 611.
Winona Coal Co. v. Holmquist, 712
Winship v. Enfield, 769, 773.
v. Neale, 419.
v. Pitts, 336.
Winslow v. Gifford, 329.
v. Newlan, 100.
Winsmore v. Greenbank, 251, 622
Winter v. Atkinson, 112.
v. Beebe, 112.
v. Bandel, 455, 464.
Winterbottom v. Wright, 773.
Winterburn v. Brooks, 160.
Wintermute v. Clarke, 640.
Winters v. Kansas City Cable Ry. Co., 716.
Wintringham v. Lafoy, 397.
Wirtz v. Eagle B. Co., 361.
Wischam v. Rickard, 472.
Wise v. Ackerman, 663.
v. Covington, etc., St. R. R Co., 490.
v. Morgan, 680, 685, 750.
Wiseman v. Luchsinger, 326.
Wiskie v. Montello Granite Co., 543, 546, 554.
Witham v. Gowan, 177.
Withee v. Brooks, 265.
Witherow v. Tannehall, 366.
Witherspoon v. Blewett, 431.
Wittich v. First National Bank, 22.
Wittleder v. Citizens' Elec. Ill. Co., 752.
Witts v. Jones, 202.
Wixon v. Newport, 77, 80.

[REFERENCES ARE TO PAGES.]

Wm. G. Rogers Co. v. International Silver Co., 83.
Wofford v. Meeks, 207, 214.
Wohle v. Reimbach, 575.
Wolf v. American Tract Society, 694.
v. Banereis, 256.
v. City Ry. Co., 698.
v. Frank, 257.
v. Kilpatrick, 621.
v. Lake Erie, etc., R. R. Co., 717.
v. Third Ave. R. R. Co., 662.
v. Wash. Ry. & Nav. Co., 713.
v. West. U. Tel. Co., 668.
v. Wolf, 257.
Wolfe v. Barnett, 355.
Wolff v. Chalker, 344.
Womack v. Central R. R. Co., 273.
v. Circle, 177.
v. Fudeckar, 174.
v. West. U. Tel. Co., 729.
Womble v. Merchants' G. Co., 695.
Wonder v. Baltimore, etc., R. R. Co., 514, 542, 551.
Wonderly v. Booth, 458.
Wood v. Am. Nat. Bank, 47, 210.
v. Bartholomew, 705.
v. Boyle, 213.
v. Clapp, 670.
v. Cobb, 475.
v. Crocker, 652.
v. Detroit, etc., Co., 489.
v. Edes, 590, 593.
v. Esson, 611, 613.
v. Garland, 468.
v. Heiges, 531.
v. Hewett, 409.
v. Lafayette, 319.
v. Lake Shore, etc., Co., 657.
v. Leadbitter, 305, 325, 326.
v. Maine Cent. R. R. Co., 659, 661.
v. Manley, 113, 325.
v. McClure, 635.
v. Moulton, 583, 584.
Wood v. Phillips, 321.
v. Rio Grande W. R. R. Co., 525, 528.
v. Ruhland, 391.
v. School District, 323.
v. Snider, 338, 342, 343.
v. Thornly, 227.
v. Waud, 22, 23, 371, 593, 596.
v. Wood, 190.
Woodard v. New York, etc., Co., 762.
Woodbridge v. Connor, 98.
v. Marks, 348.
Woodbury v. Parshley, 327.
v. Thompson, 203.
Woodcock v. Guy, 360.
v. Parker, 352.
Woodenware Co. v. U. S., 437.
Woodgate v. Phillips, 91.
Woodis v. Jordan, 431.
Woodland v. North Jersey St. R. R. Co., 763, 765.
Woodley v. Coker, 187.
v. Met. R. R. Co., 530.
Woodman v. Hubbard, 49, 59.
v. Prescott, 1.9.
v. Tufts, 23, 372, 622.
Wooden v. Western, etc., R. R. Co., 275.
Woodring v. Forks Township, 332, 333.
Woodruff v. Bowen, 328, 683, 735.
v. Bradstreet Co., 209.
v. Fisher, 567.
v. Neal, 333.
v. Painter, 638, 639.
Woodruff Sleeping, etc., Co., v. Diebel, 664.
Woods v. Board of Com'rs, 714.
v. Devin, 660.
v. Finnell, 185.
v. Gilson, 191.
v. King, 215.
v. Lindrall, 544.
v. McCall, 423.
v. Rose, 420, 427, 430.

[REFERENCES ARE TO PAGES.]

Woodward v. Barnes, 65.
v. Birch, 646.
v. Chicago, etc., R. R. Co., 278.
v. Lazar, 357.
v. Mich., etc., R. R. Co., 274.
v. Ragland, 497.
v. Railway Co., 274.
v. Seely, 325.
Woodworth v. Hascall, 425.
v. Mills, 173, 181.
v. Morse, 642, 646.
Woodyear v. Schaefer, 596, 624.
Woollen v. Wright, 88.
Woolenslagle v. Runals, 454.
Wooley v. Batte, 104, 106.
v. Campbell, 143.
Woolf v. Bernero. 633.
v. Chalker, 350, 417.
v. Washington R. & N. Co., 762.
Woolridge v. Coughlin, 362.
v. White, 348.
Woolsey v. Judd, 354.
Woolwine v. Chesapeake, etc., Ry. Co., 736.
Wootton v. Wheeler, 398.
Word v. Vance, 60.
Worden v. Cal. F. S. Co., 356.
v. Humeston, etc., Co., 531.
v. New Bedford, 81.
v. Witt. 401.
Workman v. New York, 76, 123.
World v. Georgia R. R. Co., 518, 540.
World Pub. Co. v. Mullen, 213.
World's Columbian Expo. v. Lehigh, 542, 549.
Wormley v. Gregg, 343.
Wormouth v. Cramer, 221.
Wormwell v. Me. Cent. R. R. Co., 559.
Worster v. Winnipiseogee Lake Co., 135.
Worth v. Gilling, 346.
v. Northam, 118.
Worthen v. Love, 345.
Worthington v. Central Vt. R. R. Co., 700.
v. Hanna, 398.
v. Mencer, 714.
v. Scribner, 228.
Wotherspoon v. Currier 360.
Wray v. Taylor, 319.
Wren v. Truitt, 447, 450.
Wright v. Ascheim, 185.
v. Boston, etc., R. R. Co., 321 758.
v. Detroit, etc., Ry. Co., 714.
v. Hanna, 175.
v. Howard, 590, 591.
v. Illinois, etc., Tel. Co., 715.
v. Lathrop, 98, 101, 227.
v. Leonard, 60, 63, 64.
v. Macdonald, 407, 411.
v. Malden, etc., R. R. Co., 715
v. Moore, 372.
v. N. Y. Central R. R. Co., 561
v. Peet, 467, 468.
v. Ramscot, 350.
v. Shanahan, 387.
v. Skinner, 119, 423, 424, 437
v. Southern Pac. Co., 515, 558.
v. Wheeler, 402.
v. Wilcox, 96, 489.
Wulstein v. Wohlman, 28.
Wunder v. McLean, 618, 619.
Wuotilla v. Duluth, etc., Co., 534.
Wust v. Erie City Iron Works, 517.
Wyatt v. Buell, 228.
v. Harrison, 365.
Wygant, Ex parte, 576.
Wyeth v. Stone, 352.
Wylde v. Pickford, 689.
Wyley Canal Co. v. Bradley, 365.
Wylie v. Elwood, 606.
v. Northampton Bank, 633.
v. Palmer, 475, 482.
Wymore v. Mahaska Co., 282.
Wynkoop v. Wynkoop, 270.
Wysocki v. Wisconsin, etc., Co., 515.
Wyss v. Grunert, 100.

[REFERENCES ARE TO PAGES.]

Y.

Yater v. Mullen, 435.
Yates v. Kinney, 412.
v. Lansing, 379.
v. McCullough I. Co., 529, 530, 542.
v. Milwaukee, 371.
v. S. W. Brush Elec. L. & P. Co., 754.
Yazoo, etc., R. R. Co. v. Grant, 723.
Yeager v. Woodruff, 328.
Yedrsley v. Heane, 192.
v. Sunset T. & T. Co., 505.
Yeates v. Reed, 56.
Yellow Riv. R. R. Co. v. Harris, 317.
Yerkes v. Northern Pac. Ry. Co., 556, 687.
Yess v. Chicago Brass Co., 519.
Yoant v. Carney, 169.
Yockey v. Smith, 428.
Yocum v. Polly, 179.
Yolo v. Sacramento, 609.
York v. Cleaves, 744.
v. Pease, 237.
York Co. v. Central R. R. Co., 724.
Youll v. Sioux City, etc., 522.
Youmans v. Smith, 196, 227.
Young v. Bransford, 749.
v. Charleston, 79, 766.
v. Clark, 714.
v. College of P. & S., 268.
v. Commissioners, 401.
v. Commissioner of Roads, 766.
v. East Ala., etc., Co., 430.
v. Geiske, 247.
v. Gormley, 87, 156.
Young v. Lohr, 669.
v. Macroe, 208.
v. Mason, 673.
v. Miles, 637.
v. New Haven, 770.
v. New York, etc., Co., 762.
v. Nubling, 58.
v. Shickle, etc., Co., 558.
v. Western U. Tel. Co., 25, 668, 730.
Youngblood v. Eubank, 410.
Yousling v. Dare, 197.

Z

Zackery v. Mobile, etc., R. R. Co., 656.
Zahniser v. Penn. Torpedo Co., 693, 696.
Zebley v. Storey, 182.
Zeigler v. North East. R. R. Co., 762.
Zeitinger v. Hackworth, 312.
Zeliff v. Jennings, 204.
Zell v. Dunkle, 636.
Zettel v. West Bend, 610.
Ziegenheim v. Smith, 499.
Zier v. Hofflin, 218.
Zieman v. Kieckhefer El. Co., 776.
Zimmer v. N. Y. Cent., etc., R. R. Co., 725.
Zimmerman v. Whitley, 253.
Zinc Co. v. Franklinite Co., 367.
Zinn v. Rice, 188, 189.
Zintek v. Stinson Mill Co., 544
Zoebisch v. Tarbell, 735.
Zouch v. Chesapeake, etc., Ry. Co. 725.
Zweigardt v. Birdseye, 669.

THE LAW OF TORTS.

CHAPTER I.

GENERAL PRINCIPLES.

§ 1. As to the definition of a tort. In a late work on torts it is said that, notwithstanding the many text books on the subject of torts that have been written in recent years and notwithstanding the great number of decisions involving the nature of a tort that have been rendered, "neither a complete theory of torts nor a perfect definition of a tort has yet been attained." [1] This may be accepted as a correct statement and, since any definition must be derived from the decisions of the courts and, since the courts do not concern themselves with definitions and often differ as to whether a given wrong is a tort or not and, since a definition is fixed and rigid while the law is plastic and is constantly undergoing modification and development, the statement will doubtless remain true for years to come and, perhaps, for all time.[2] But while a perfect definition of a tort may not be attainable, it is possible to arrive at an adequate conception of the nature of a tort by an analysis of the wrong which constitutes a tort and by its comparison with other wrongs which are not torts.

[1] Burdick on Torts, page 3. In Rich v. New York, etc., R. R. Co., 87 N. Y. 382, Finch, J., says: "We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto*, there exists what has been termed a border land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other and become so nearly coincident as to make their practical separation somewhat difficult. The text writers either avoid a definition entirely, or frame one plainly imperfect, or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes."

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§ 2. General characteristics of a tort. Every tort involves the violation of a right created and sanctioned by law. The law of torts is thus, primarily, the law of rights.[3] There can be no legal wrong unless a legal right has been violated. The first and basic question in every case is whether there exists a legal right that has been interfered with, a right which the law recognizes and will enforce.[4] Every legal right involves a corresponding legal obligation or duty to respect that right.[5] And a tort may be regarded either as the violation of a right in the party injured or as the violation of a duty resting upon the wrongdoer. The right must be a private right, a right pertaining to an individual, natural or artificial, as distinguished

tract;" which is perhaps as good a definition as can be given, though even this may require explanation, since in many cases a tort only arises in consequence of the disregard of contract relations. Addison (on Torts, p. 1), gives no definition, only quoting from Bayley, J., in Rex v. Pagram Commissioners, 8 B. & C. 362, that to constitute a tort two things must concur, actual or legal damage to the plaintiff and a wrongful act committed by the defendant; but this is no more than saying that there must be damage as well as wrong to constitute a tort; and beyond that it might be misleading, since the want of an act —in other words, blamable neglect—is often the very thing in which a tort consists. Mr. Chitty speaks of personal actions in form *ex delicto* as being those "principally for the redress of wrongs unconnected with contract;" which is true enough, though, as we have said, torts, in large classes of cases, only arise in consequence of a disregard of duty in relations which have been formed by express or implied contract. For a further discussion of definitions see Pollock on Torts, chap. I; 1 Jaggard on Torts, pp. 1-6; Bishop, Non-Contract Law, ch. I.

[3] "No one, legally speaking, is injured or damnified unless some right is infringed." Savage, C. J., in Mahan v. Brown, 13 Wend. 260, 264. "A wrong is a violation of one's right." Parker v. Griswold, 17 Conn. 287, 302, 42 Am. Dec. 739.

[4] Frasier v. Brown, 12 Ohio St. 294; Mahan v. Brown, 13 Wend. 260; Lord v. Langdon, 91 Me. 221, 39 Atl. 552; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Cleveland, etc. Ry. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811; Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 89 Am. St. Rep. 828; Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101; Rich v. New York Central, etc., R. R. Co., 87 N. Y. 382.

[5] "Obligation and right are correlative terms; where any person has a right, some one or more persons are under an obligation which corresponds to that right; and, on the contrary, where any person is under an obligation, some other person or persons have a right which corresponds to that

from a right pertaining to the public. It must be one created by law and not by contract or the act of the parties. But the law often creates rights and duties in connection with contracts or in connection with their execution, and it is often a difficult uestion to determine whether a given wrong is a mere breach contract, or is the violation of a right or duty created by law connection with a contract. In the former case the wrong not in tort; in the latter it is. This difficulty will be further onsidered in a later section. Finally the right must be of such a nature that its violation is remediable in a common-law action for damages. A right may be created by law and yet be of an equitable nature. In such case its violation is not a tort. A tort is thus, in brief, the violation of a private right created by law and cognizable in a court of common-law jurisdiction.

§ 3. **Of rights in general.** A right in the legal sense implies something with which the law invests one person, and in respect to which, for his benefit, another, or, perhaps, all others are required by the law to do or perform acts, or to forbear or abstain from acts. A distinguished author on jurisprudence defines a right as follows: "A party has a right, when another or others are bound or obliged by the law, to do or to forbear, towards or in regard to him."[6]

The rights which every government is expected to recognize and protect may be classed under the following heads: 1. Security in person. 2. Security in the acquisition and enjoyment of property. 3. Security in the family relations. Under the first class are included the right to life, the right to immunity from attacks and injuries, and the right equally with others similarly circumstanced to control one's own action. In all enlightened countries the same class would also include the right to the benefit of such reputation as one's conduct has entitled him to, and the enjoyment of all such civil and political rights as are conceded by the law. The other classes require no explanation.

§ 4. **Growth of rights.** Some reference to the progressive growth of rights seems required by the subject. Historically,

obligation." Rutherforth's Institutes, ch. II, sec. 5. Wharton, Neg. § 24.

[6] Austin, Jurisprudence, Lecture XVI. And see Wharton, Neg. § 24.

this is always obscure and can only imperfectly be traced. In most countries rights, in their origin, are traditionary rather than statutory. With us, as will be more fully shown hereafter, they have always rested in the main upon what we call the common law, and upon principles which, by a liberal use of fiction, we assume have always constituted a part of this common law. A common law was unquestionably in existence during the period of the Saxon kings, and it supplied the rule of right and of property under the arbitrary Normans to an extent sufficient to continue to it that attachment of the people which had been cherished before the Conquest. The Great Charter was a guaranty of its principles rather than a new grant. It was a useful code in barbarous and despotic periods, and it has not been any the less so in enlightened periods and under free governments. But in order that it may be continuously useful the progressive changes must be great and numerous, so great and so numerous that it could only be by the most enlarged intendment that the law of today could be recognized as the common law of even the time of Lord Coke. In fact, its principles now depend very largely on a species of judicial legislation which from time to time, as new conditions were found to exist, has endeavored to fit and conform the old law to them.

The process of growth has been something like the following: Every principle declared by a court in giving judgment is supposed to be a principle more or less general in its application, and which is applied under the facts of the case, because. in the opinion of the court, the facts bring the case within the principle. The case is not the measure of the principle; it does not limit and confine it within the exact facts, but it furnishes an illustration of the principle, which, perhaps, might still have been applied, had some of the facts been different. Thus, one by one, important principles become recognized, through adjudications which illustrate them, and which constitute authoritative evidence of what the law is when other cases shall arise. But cases are seldom exactly alike in their facts; they are, on the contrary, infinite in their diversities; and as numerous controversies on differing facts are found to be within the reach of the same general principle, the principle seems to grow and expand, and does actually become more comprehensive, though

so steadily and insensibly under legitimate judicial treatment that for the time the expansion passes unobserved. But new and peculiar cases must also arise from time to time, for which the courts must find the governing principle, and these may either be referred to some principle previously declared, or to some one which now, for the first time, there is occasion to apply. But a principle newly applied is not supposed to be a new principle; on the contrary, it is assumed that from time immemorial it has constituted a part of the common law of the land, and that it has only not been applied before, because no occasion has arisen for its application. This assumption is the very ground work and justification for its being applied at all; because the creation of new rules of law, by whatsoever authority, can be nothing else than legislation; and the principle now announced for the first time must always be so far in harmony with the great body of the law that it may naturally be taken and deemed to be a component part of it, as the decision assumes it to be. Thus a species of judicial legislation, proper and legitimate in itself, because it is absolutely essential to a systematic adjudication of rights, goes on regularly, and without interruption; and up to the present time, in England and America, it has been not only more efficient, but also more useful, in establishing the rules by which private rights are to be determined, and in giving remedies for their violation, than has been the regular and formal enactment of laws. Thus a very considerable proportion of the common law has had its real origin in judicial action, which has accepted many things for law, and rejected many others, and by a sifting process has made the law what we find it now. The growth of the law under this treatment has been so moderate, so steady, and so beneficent as to afford no small justification for the hearty praise that so often has been bestowed upon it. It has been modified and expanded under the decisions, but the changes effected by or through the influence of any particular decision have been such only as it was believed did not disturb the general harmony of the law, and such as could be justified as being rather a new illustration of the law as it was, than an alteration of it. In this steady and almost imperceptible change must be found the chief advantages of a judicial development of the law

over a statutory development; the one can work no great or sudden changes; the other can, and frequently does, make such as are not only violent, but premature.[7] But there are always some particulars in which improvement by judicial decisions is impossible, and where legislation alone is adequate to the purpose. Thus no action would lie at the common law for causing the death of a human being. This was as thoroughly settled by decisions as it was possible for any point to be, and the concurrence of authority was unanimous. When, therefore, it was concluded that public policy demanded the giving a right of action in these cases, a new law was obviously essential. There was no old principle that could adapt itself to such a remedy, for the established principle was distinctly adverse to it. Near a century ago an English judge pointed out the distinction between the cases in which legislative interference was essential and those in which it was not, in the following language: "Where cases are new in their *principle,* there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago; if it was not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them."[8] It must be conceded that this is somewhat indefinite, and that the field it allows for the exercise of judicial discretion in determining what principles are and what are not recognized in the law and what cases fall within those that are recog-

[7] These cases illustrate the principle in question and show how the principles of the common law will be moulded and applied to meet new cases and new conditions. Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829; Mentzer v. Western Union Tel. Co., 93 Ia. 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; Kerner v. McDonald, 60 Neb. 663, 84 N. W. 92, 83 Am. St. Rep. 550; Johnson v. Girdwood, 7 Misc. 651, 28 N. Y. S. 151; Pope v. Pollock, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255; Commonwealth v. Hess, 148 Pa. St. 98, 23 Atl. 977, 33 Am. St. Rep. 810.

[8] Ashurst, J., in Pasley v. Freeman, 3 T. R. 51, 63.

nized, is a very broad one. It is often exercised by looking beyond the limits of the common law and culling from the civil law the principles there discovered which may supplement and improve where the common law is discovered to be deficient. An actual adjudication will illustrate this: The owner of logs, by a sudden and very great freshet, had them carried away upon the land of a proprietor below, where they cause considerable injury as they float about. For this injury the owner of the logs is not responsible, because it happened without his fault. The law does not impose on any one the obligation to compensate for accidental injuries. But the logs are now upon the lands of another and cannot be reclaimed without a trespass The owner of the logs must, therefore, lose them, or he must re claim them with a further injury to the owner of the land What is the solution of this difficulty, and how, under such circumstances shall the rights of the parties be adjusted? The civil law affords a solution. By that, if the owner of the logs claimed exemption from responsibility for the injury occasioned by them, he must abandon them to the party they had injured. If he reclaimed them he must pay for the injury. The option was with him, and the condition was perfectly reasonable. Now the common-law judge finds this principle applicable to a case before him, and he also finds that it may readily be fitted in and accommodated to the common-law system; that, in fact, it seems to belong there, and he therefore accepts it. It decides the particular case and it becomes a precedent.*

Judicial development of the law is perceived in two forms: In the recognition of rights, and in giving a remedy for the invasion or deprivation of rights. In the first, usages and precedents will be consulted, and analogies made use of. A right cannot be recognized until the principle is found which supports it. But when the right is found, the remedy must follow, of course. "Wherever there is a valuable right and an injury to it, with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will

* For views opposed to the judicial development of the law and characterizing it as a usurpation of legislative functions, see Bentham, Const. Code, Introduction, ch. 2; Works, vol. IX, p. 8.

make the most complete reparation."[10] The maxim of law, that wherever there is a right there is a remedy, is a mere truism; for, as Lord Holt has said, "it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."[11] The method of determining the question of remedy is well illustrated by the leading case of *Ashby v. White*,[12] just referred to. The facts were, that certain persons had been denied the right to vote for members of parliament. They brought suit against the officer who excluded them. No such case had ever been adjudged, and there was no precedent for the suit. But in the opinion of Lord Holt, a precedent was not important. The material question was, had they a right to vote? This was to be determined by the statute prescribing the qualifications of voters, and by the facts which did or did not bring these parties within the statute. When the facts were found in their favor, the legal conclusion must follow. Having a right, the remedy was of course. It might have been different had the officer been made the judge, whether the proper qualifications existed; for then his judgment that the right existed would have been a condition precedent.

It is no answer to an action that the like was never heard of before, because every form of action when brought for the first

[10] Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829.

[11] Ashby v. White, Ld. Raym. 938; S. C. 1 Smith, Lead. Cases, 105. See Co. Lit. 197 *b*; Herring v. Finch, Lev. 250; 3 Bl. Com. 123; Johnstone v. Sutton, 1 T. R. 493; Lord Camden in Entrinck v. Carrington, 19 How. State Trials, 1066; Pasley v. Freeman, 3 T. R. 63; Hobson v. Todd, 4 T. R. 71; Millar v. Taylor, Burr. 2344; Braithwaite v. Skinner, 5 M. & W. 313; Jenkins v. Waldron, 11 Johns. 120, 6 Am. Dec. 359; Toothaker v. Winslow, 61 Me. 123; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Bass v. Emery, 74 Me. 338; Doremus v. Hennessey, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A 797; Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389, 28 Am. St. Rep. 213; Mentzer v. Western Union Tel. Co., 93 Ia. 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; Deitzman v. Mullin, 108 Ky. 610, 57 S. W. 247, 94 Am. St. Rep. 390, 50 L. R. A. 808; Walker v. Walker, 63 N. H. 321, 56 Am. Rep. 514; Pope v. Pollock, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255.

[12] Ld. Raymond, 938, 1 Smith, Lead. Cas. 105.

time must have been without a precedent.[13] "It is the peculiar merit of the common law that its principles are so flexible and expansive as to comprehend any new wrong that may be developed by the inexhaustible resources of human depravity."[14]

§ 5. **Moral and legal wrong.** An act or omission may be wrong in morals, or it may be wrong in law. It is scarcely necessary to say that the two things are not interchangeable. No government has undertaken to give redress whenever an act was found to be wrong, judged by the standard of strict morality; nor is it likely that any government ever will.[15] Thus it is wrong in morals for one to put up an erection on his land for the sole purpose of injuring his neighbor, as by cutting off his light and prospect. But as one person has no legal *right* to light and prospect over his neighbor's land, no legal right is violated by such erection and no legal wrong is committed.[16]

[13] Kujek v. Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156; Johnson v. Girdwood, 7 Misc. 651, 28 N. Y. S. 151; Hundley v. Louisville & N. R. R. Co., 105 Ky. 162, 48 S. W. 429, 88 Am. St. Rep. 298; Holleman v. Harward, 119 N. C. 150, 25 S. E. 972, 56 Am. St. Rep. 672, 34 L. R. A. 803. In Pavesich v. New England Life Ins. Co., 122 Ga. 190, 193, 194, 69 L. R. A. 101, the court says: "The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the court to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the lawmaking power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case 'although there be no precedent, the common law will judge according to the law of nature and the public good.' Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is on the application of a recognized principle to a new case, 'it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.'"

[14] Johnson v. Girdwood, 7 Misc. 651, 28 N. Y. S. 151.

[15] McAleer v. Horsey, 35 Md. 439, 451; Birch v. Amory Mfg. Co., 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163. It is not appointed to human tribunals to sit in judgment upon mere moral delinquencies or abstract wrongs affecting only the conscience. Mahoney v. Whyte, 49 Ill. App. 97.

[16] Mahan v. Brown, 13 Wend.

§ 6. **Private and public rights—Crimes and torts.** Certain acts or omissions are taken notice of by the law as constituting wrongs to the state. These may consist in something which tends to disturb, embarrass, or subvert the government, or to hinder the administration of the laws, or they may consist in acts or neglects which prejudice individuals, but indirectly and perceptibly affect the public also. The law also permits certain acts to be punished as wrongs to municipal corporations, or to the several political divisions of the state, because they have a tendency to disturb their peace and good order, or to embarrass or obstruct in some manner the local government, though to the people of the state at large they may be matters of indifference. These wrongs will consist mainly in breaches of municipal by-laws, or of local police regulations, and they may or may not be wrongs to individuals. The two classes of wrongs just enumerated constitute what are known as public wrongs, and they will be visited with some species of penalty. While the leading purpose in imposing the penalty will be security for the future, incidentally the reformation of the offender may also be had in view. In inferior offenses the idea of compensation is sometimes present, and even in case of offenses of a high grade, pecuniary penalties are often imposed to cover in whole or in part the cost of bringing the wrongdoer to justice. But compensation in the case of public wrongs is usually a subordinate purpose, while in the case of private wrongs it is the substantial purpose of the law.

When the act or neglect which constitutes a public wrong violates some right vested in an individual by law or is specially and peculiarly injurious to an individual and obstructs him in the enjoyment of some right which the law has undertaken to assure, the offender may be subject to a double liability; he may be punished by the state, and he may also be compelled to remunerate the individual. The same act may thus constitute a public offense and also a private injury; or, in other words, may be both a crime and a tort. But whether or not it shall have this two-fold character can never be deter-

260, 28 Am. Dec. 461; Lord v. Langdon, 91 Me. 221, 39 Atl. 552; Metzger v. Hochrein, 107 Wis. 267, 83 N. W. 308, 81 Am. St. Rep. 841, 50 L. R. A. 305.

mined by an analysis of the moral qualities, and a determination of the presence or absence of evil intent. We must look beyond these, and see whether the act comes within the definition of a crime, and also within that of a private injury, and if it does, the fact that it is the one will not prevent its being the other also. Certain acts or omissions are made public offenses by the common law or by statute, either because their inherent qualities and necessary tendencies make them prejudicial to organized society, or because it is believed that the evils likely to flow from them will be so serious that the general good will be subserved by forbidding them; and penalties are attached to them, which are imposed on public grounds. These, according to their grade, are crimes or misdemeanors, or they are simply things prohibited under penalty. But where the same wrongful acts cause damage to private individuals, they come directly within the definition of torts, and are such. If one man strikes another in anger, the public peace is broken, and the man assaulted is injured; and there is thus a public wrong and a private wrong. Punishing one does not redress the other, nor does forgiving the one preclude legal proceedings to punish or obtain compensation for the other.[17]

There is in England a rule regarding the order of proceedings when an action is both a public and private offense. The rule is, that if the public offense is of the grade of felony, the private remedy is suspended until the public justice is satisfied.[18] Looking for the reason of the rule, which seems a harsh

[17] For the distinction between crimes and torts, see 4 Bl. Com. 5; Austin, Jurisprudence, lecture XVII; 1 Bishop, Cr. Law, §§ 532, 533, 3d ed.; Rex v. Wheatly, Burr. 1125; King v. Higgins, 2 East, 5, 20.

[18] Crosby v. Leng, 12 East. 409. See 1 Hale, P. C. 546; Masters v. Miller, 4 T. R. 320; Higgins v. Butcher, Yelv. 89; Gibson v. Minet, 1 H. Bl. 569; Gimson v. Woodfull, 2 C. & P. 41; White v. Spettigue, 13 M. & W. 603; Stone v. Marsh, 6 B. & C. 551. The law on this subject seems now in an unsettled state in England. In a late case where the question was fully considered upon all the cases, the court remarked that the old doctrine was exploded, but the decision turned on the fact that it did not appear whether there had been a neglect to prosecute. Midland Ins. Co. v. Smith, L. R. 6 Q. B. D. 561. See, also, Wells v. Abrahams, L. R. 7 Q. B. 554; Ex parte Ball, L. R. 10 Ch. D. 667.

one, we discover it in the fact that in that country the party injured is relied upon to take the place of public prosecutor; and his interest in the accomplishment of public justice is enlisted and kept active by postponing the redress of his private grievance. In this country the common-law doctrine of the suspension of civil remedy in case of felony has not been recognized. The reason usually assigned is, that in this country the duty of prosecuting for public offenses is devolved upon a public officer chosen for the purpose, instead of being left, as in England, to the voluntary action of the party injured by the crime.[19] The civil and the criminal prosecution may therefore go on *pari passu*, or if the latter is not commenced at all, the failure to seek public justice is no bar to the private remedy.[20]

§ 7. Contracts and torts. The general rule is that when contract relations exist between parties they assume towards each other no duties whatever besides those the contract imposes.[21] But the undertaking in a contract may be of such a nature that the law imposes certain duties upon one party towards the other in respect thereto. These duties become a part of the contract by implication of law. The violation of any such duty is, therefore, at once a breach of contract and a tort and the injured party may, at his option, sue either in contract or tort for the damages sustained. The case of the common carrier is a conspicuous illustration. The law requires him to carry with impartiality and safety for those who offer. If he fails to do so, he is chargeable with a tort. But when goods are delivered to him for carriage, there is also a contract, express or by operation of law, that he will carry with impartiality and safety; and if he fails in this there is a breach of contract. Thus for

[19] Plummer v. Webb, 1 Ware, 69; Pettingill v. Rideout, 6 N. H. 454; Boardman v. Gore, 15 Mass. 331; Boston & Worcester R. R. Co. v. Dana, 1 Gray, 83; Hyatt v. Adams, 16 Mich. 180; Allison v. Bank of Va., 6 Rand. 204; Ballew v. Alexander, 6 Humph. 433; Hepburn's Case, 3 Bland, 114; Foster v. Commonwealth, 8 W. & S. 77; Blassingame v. Glaves, 6 B. Mon. 38. But see Sawtell v. West. R. R. Co., 61 Ga. 567.

[20] Williams v. Dickenson, 28 Fla. 90, 9 So. 847; Powell v. Augusta, etc., R. R. Co., 77 Ga. 192, 3 S. E. 757; Parker v. Lanier, 82 Ga. 216, 8 S. E. 57.

[21] Quay v. Lucas, 25 Mo. App. 4; McGuire v. Kiveland, 56 Vt. 62; Mobile Life Ins. Co. v. Randall, 74 Ala. 170.

the breach of the general duty, imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought.[22] So in case of a negligent injury or other wrong to a passenger.[23] Other bailees of property occupy a similar position;[24] they assume certain duties in respect to the property by receiving it. The keeper of an inn does this in respect to property confided to his care by his guests, and his failure to perform the duty of an innkeeper is tortious, though in contemplation of law there are between him and his guest contract relations also.[25] So the law implies certain duties of diligence and due care in case of telegraph companies in their undertakings and either an action of tort or contract may be brought for their neglect.[26] Another illustration of such alternative is to be found in the employment of professional men and those whose occupations call for the exercise of special skill or knowledge. In all such cases the law implies that the person employed will exercise that degree of care, skill and diligence that the nature of the employment and the occasion demand and a failure to do so may be treated either as a breach of contract or a tort.[27] This principle is general and extends to every contract for service.[28]

[22] Holland v. Southern Express Co., 114 Ala. 128, 21 So. 992; Louisville, etc. R. R. Co. v. Hine, 121 Ala. 234, 25 So. 857; Southern Ry. Co. v. Resenbery, 129 Ala. 287, 30 So. 32; Baltimore, etc. R. R. Co. v. Pumphrey, 59 Md. 390; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292.

[23] Baltimore, etc., R. R. Co. v. Kemp, 61 Md. 619; Delaware, etc. R. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435; Carroll v. Staten Island R. R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Holden v. Rutland R. R. Co., 72 Vt. 156, 47 Atl. 403; Taylor v. Manchester, etc., Ry. Co., (1895) 1 Q. B. 134; Kelly v. Metropolitan Ry. Co., (1895) 1 Q. B. 944. The same rule applies to sleeping car companies. Nevin v. Pullman Pal. Car Co., 106 Ill. 222, 46 Am. Rep. 688.

[24] Bridges v. Bridges, 93 Me. 557, 45 Atl. 827; Peton v. Nichols, 180 Mass. 245, 62 N. E. 1.

[25] See *post*, § 323.

[26] Western Union Tel. Co. v. Krichbaum, 132 Ala. 535, 31 So. 607.

[27] Lane v. Borcourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; Kuhn v. Brownfield, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700. And see ch. XVIII, *post*.

[28] "A person undertaking any service for another, is charged with a legal duty and obligation of discharging that service in such a manner that through no fault of his damage shall result to his em-

So held where the plaintiff employed the defendants to load a hogshead of treacle and the treacle was lost by their negligence in doing the work.[29] And other cases are to the same effect.[30] And the injured party may have his remedy in tort, though the duty implied by law is expressly embodied in the contract, for in such case the duty exists by virtue both of the law and of the contract.[31]

If one by means of a false warranty is enabled to accomplish a sale of property, the purchaser may have his remedy upon the contract of warranty, or he may bring suit for the tort.[32] The tort consists in his having been, by fraud and falsehood, induced to make the purchase. There is a broken contract, but there is also something more: there is deception to the injury of the purchaser in procuring the contract to be made. Suit may be brought on the contract, ignoring the fraud; but it

ployer." 1 Wood's Addison on Torts, pp. 27 and 28, note. In Mobile Life Ins. Co. v. Randall, 74 Ala. 170, 177, the court says: "Contracts have a leading, primary obligation—to do a specified act; to perform a specified service; or to pay or deliver a specified thing of value. A mere failure to perform such a contract obligation is not a tort, and it furnishes no foundation for an action on the case. But contracts, however briefly expressed, are to be interpreted in the light of great legal principles, which enter into and permeate all human transactions. Hence, the duty of requisite skill, fidelity, diligence, and a proper regard for the rights of others, is implied in every obligation to serve another. The degree of these qualifications is graduated by the nature of the service undertaken; but they inhere in, and form a part of all dealings between man and man. The observance of these duties is necessary to the peace, good order and success of all municipal regulation. Now, for a breach of the contract obligation, the remedy is an action *ex contractu*. If the implications or collateral duties of the service be disregarded, and injury ensue, this is a tort, for which an action on the case will lie."

[29] Govett v. Radnidge, 3 East, 62.

[30] Barnett v. Lynch, 5 Barn. & Cres. 589; Boorman v. Brown, 3 A. & E. (N. S.) 511, 43 E. C. L. R. 843; Marzetti v. Williams, 1 B. & Ad. 415.

[31] See Dean v. McLean, 48 Vt. 412, 21 Am. Rep. 130.

[32] Langridge v. Levy, 2 M. & W. 519; Dobell v. Stevens, 5 D. & Ry. 490; West v. Emery, 17 Vt. 583, 44 Am. Dec. 356; Ives v. Carter, 24 Conn. 392; Johnson v. McDaniel, 15 Ark. 109; Newell v. Horn, 45 N. H. 421; Carter v. Glass, 44 Mich. 154, 38 Am. Rep. 240; Perdue v. Harwell, 80 Ga. 150, 4 S. E. 877.

may also be brought for the fraud, and then the contract will not be counted on, though it will necessarily be shown, in order to make it appear how the deception was injurious. The tort in such a case is connected with the contract only as it enabled the tort feasor to bring the party wronged into it.

A breach of contract may be only an element or incident in a larger wrong accomplished by fraud, oppression and unfair dealing in connection with the contract and, in such case, the injured party is not confined to his remedy upon the contract, but may sue in tort for the whole damage sustained. In one case the plaintiffs had a contract with the defendants by which the latter gave the former the exclusive right to sell certain machines invented by the defendants, who were to manufacture the machines and fix the price of sale. The plaintiffs were to have forty per centum for making the sales and, if the defendants failed to supply enough machines to meet the demand, the plaintiffs had the right to procure their manufacture elsewhere The defendants, claiming a violation of the contract, seized the plaintiffs' property, books and papers, excluded them from their place of business, advertised that they had succeeded to the business and that plaintiffs were insolvent and thereby broke up the plaintiffs' business and deprived them of the benefits of the contract. It was held that though there was a breach of contract and various distinct wrongs, such as trespass, slander, etc., the plaintiffs might set forth all the facts in a single action of tort and recover the entire damage sustained.[33] In another case the plaintiff owned a valuable property adjacent to a station on the defendant's road, which gave to the property its chief value. In order to force the release of certain riparian rights the company removed its station to another place. Thereupon the plaintiff entered into a contract with the defendant by which, in consideration of such release by the plaintiff, the defendant agreed to restore its station to the old location. A new station was built in accordance with the agreement, but, when ready for occupancy, the company refused to open it unless the plaintiff would consent to the vacation of a certain street, which the plaintiff refused to do without the payment of large damages. The company then entered

[33] Oilver v. Perkins, 92 Mich. 304, 52 N. W. 609.

upon a scheme to procure such consent through the foreclosure of a mortgage on the property. To that end it gave out that it would not restore the station and by working on the fears of the mortgagee and by actual persuasion prevailed upon him to foreclose and buy in the property, which he did at a great sacrifice. The consent was then given and the station opened. The court held that an action of tort would lie, and, in giving its opinion, says: "There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that and outside of that there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of resistance to the purpose ultimately sought. In other words, the necessary theory of the complaint is that a breach of contract may be so intended and planned; so purposely fitted to time, and circumstances and conditions; so inwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious or wrongful act or omission. It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty, which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself or exercise his own rights as not to injure another. Whatever its origin, such

legal duty is uniformly recognized and has been constantly applied as the foundation of actions for wrong; and it rests upon and grows out of the relations which men bear to each other in the frame-work of organized society. It is then doubtless true, that a mere contract obligation may establish no relation out of which a separate and specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort grow out of the entire range of facts of which the breach of the contract was but one."[34]

Some similar cases are referred to in the margin.[35] This class of cases arises out of peculiar circumstances and conditions and no general rule can be deduced from them, which will act as a solvent in future cases.

§ 8. **Acts merely intended.** An act contemplated but not yet accomplished, though it may sometimes be ground for preventive remedies, cannot support an action as for a tort. A tort supposes a wrong actually committed, and this implies a right invaded, or in some manner hindered or abridged. The mere intent cannot constitute actionable matter.[36] A malicious person may purpose to libel his rival in business; he may have the libel prepared, put in print ready for dissemination among the people, have messengers ready for its distribution, so that the evil intent and the deliberate purpose to do mischief are manifested in a manner most emphatic and conclusive; but if no other person has yet seen the libel there is no wrong, because the reputation is not yet assailed, and the right of the party to protection in it is therefore not yet violated. It is only assailed when a publication is made. All that precedes the publication rests in intent, and intent may be overcome by repentance, or accident or the interposition of others may pre-

[34] Rich v. New York Central, etc., R. R. Co., 87 N. Y. 382.

[35] Church v. Anti-Kalsomine Co., 118 Mich. 219, 76 N. W. 383; Shirley v. Waco Tap Ry. Co., 78 Tex. 131, 10 S. W. 543; Western Union Tel. Co. v. Wells, 50 Fla. 474.

[36] Sheple v. Page, 12 Vt. 519; Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Herron v Hughes, 25 Cal. 555; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172; Jones v. Baker, 7 Cow. 445

vent its being carried into effect. Any degree of preparation for a tort can never constitute a tort; if the wrong is prevented there is certainly no wrong suffered.

§ 9. Threats and words. A threat to commit an injury is sometimes made a criminal offense, but it is not an actionable private wrong. Damages cannot be recovered for a mere threatened injury.[37] Many reasons may be assigned for distinguishing between this case and that of an assault, one of them being that the threat only promises a future injury, and usually gives ample opportunity to provide against it, while an assault must be resisted on the instant. But the principal reason, perhaps, is found in the reluctance of the law to give a cause of action for mere words. Words never constitute an assault, is a time honored maxim.[38] Words may be thoughtlessly spoken; they may be misunderstood; they may have indicated to the person threatened nothing but momentary spleen or anger, though when afterward reported by witnesses they seem to express deliberate malice and purpose to injure. Even when defamation is complained of the law is very careful to require something more than expressions of anger, reproach, or contempt, before it will interfere; justly considering that it is safer to allow too much liberty than to interpose too much restraint. And comparing assaults and threats, another important difference is to be noted: in the case of threats, as has been stated, preventive remedies are available; but against an assault there are usually none beyond what the party assaulted has in his power of physical resistance.

§ 10. Accidental injuries. For a purely accidental occurrence, causing damage without the fault of the person to whom it is attributable, no action will lie, for though there is damage, the thing amiss, the *injuria*, is wanting.[39] Any accident in the

[37] Empire Transportation Co. v. Johnson, 76 Conn. 79, 55 Atl. 587; National Protection Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135.

[38] Smith v. State, 39 Miss. 521; State v. Mooney, Phill. (N. C.) L. 43. Even though the party at the time has by his side a deadly weapon, which, however, he makes no attempt to use. Warren v. State, 33 Tex. 517; Cutler v. State, 59 Ind. 300.

[39] Brown v. Kendall, 6 Cush. 292; Vincent v. Stenehour, 7 Vt. 62, 29 Am. Dec. 145; The Nitro-Glycerine Case, 15 Wall. 524;

sense intended here is such an occurrence as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency of the case and in the circumstances in which he was placed.[40] The supreme court of the United States lays down the rule to be "that the measure of care against accident, which one must take to avoid injury, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own."[41]

Some illustrations are given, in all of which the loss or injury was held to be accidental. The defendant's horses ran away without his fault, and injured the plaintiff.[42] An employee in a store, carrying a heavy roll of cloth, stumbled on a roll of matting in the passageway, fell and hit the plaintiff.[43] A servant in defendant's restaurant took up a burning lamp to remove it. His clothes caught fire and he threw the lamp toward the door. It exploded and injured a customer.[44] A storm on Lake Pontchartrain loosened defendant's raft from its moorings, broke it up and drove the logs against the plaintiff's embankment, doing serious damage.[45] The defendant had a sign board on his land a hundred feet from the highway. The

Steen v. Williamson, 92 Cal. 65, 28 Pac. 53; Jackson v. Standard Oil Co., 98 Ga. 749, 26 S. E. 60; Hopkins v. Butte, etc., Co., 13 Mont. 223, 33 Pac. 817, 40 Am. St. Rep. 438; Allison Mfg. Co. v. McCormick, 118 Pa. St. 519, 12 Atl. 273, 4 Am. St. Rep. 613; Purdy v. Westinghouse, etc., Co., 197 Pa. St. 257, 47 Atl. 237, 80 Am. St. Rep. 816, 51 L. R. A. 881; Consumers' Brewing Co. v. Doyle, 102 Va. 399, 46 S. E. 390; Dicken v. Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582; Miller v. Casco, 116 Wis. 510, 93 N. W. 447; Hunter v. Kansas City, etc., Co., 85 Fed. 379, 29 C. C. A. 206; Kinsel v. Atlanta, etc., Ry. Co., 137 Fed. 489, — C. C. A. —; Stanley v. Powell, (1891) 1 Q. B. 86.

[40] Brown v. Kendall, 6 Cush. 292, 296. And see Washington, etc., Turnpike Co. v. Case, 80 Md. 36, 30 Atl. 571.

[41] The Nitro-Glycerine Case, 15 Wall. 524, 538.

[42] Bennett v. Ford, 47 Ind. 271; Brown v. Collins, 53 N. H. 451, 16 Am. Rep. 384; Creamer v. McIlvain, 89 Md. 343, 43 Atl. 935, 73 Am. St. Rep. 186, 45 L. R. A. 531.

[43] Wall v. Lit, 195 Pa. St. 375, 46 Atl. 4.

[44] Donohue v. Kelly, 181 Pa. St. 93, 37 Atl. 186, 59 Am. St. Rep. 632.

[45] New Orleans, etc., R. R. Co. v. Lumber Co., 49 La. Ann. 1184, 22 So. 675, 38 L. R. A. 134.

plaintiff's horse was frightened by its being blown down and she was injured.[46] The defendant's servant was using an axe on the fifth floor of a building. As he raised it to strike the axe flew off, went through a door and hit the plaintiff who was on the first floor. The axe had been in use two years, had been frequently inspected and was apparently all right.[47] Oil works were on fire and the oil escaped and was conducted into a sewer under the direction of the chief of the fire department. The outlet of the sewer was obstructed by high water. Some days afterwards the oil in the sewer exploded underneath a building and killed the plaintiff's husband who worked therein.[48] Additional illustrations will be found in the margin.[49]

[46] O'Sullivan v. Knox, 81 App. Div. 438, 80 N. Y. S. 848.

[47] Stearns v. Ontario Spinning Co., 184 Pa. St. 519, 39 Atl. 292, 63 Am. St. Rep. 769, 39 L. R. A. 842.

[48] Fuchs v. St. Louis, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136. On a previous appeal the city was held liable. Fuchs v. St. Louis, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118.

[49] Where a party, in self-defense, fired a pistol at his assailant and accidentally shot a third party, he was held not liable for the injury done. Morris v. Platt, 32 Conn. 75. See, to the same effect, Paxton v. Boyer, 67 Ill. 132, 16 Am. Rep. 615. Where in the use of a steam engine without negligence it explodes and causes injury to others, the owner is not liable therefor. Losee v. Buchanan, 51 N. Y. 746, 10 Am. Rep. 623; Marshall v. Welwood, 38 N. J. L. 339, 20 Am. Rep. 394. So as to accidents from machinery, where their liability to happen is proved only by their actual happening. Richards v. Rough, 53 Mich. 212; Sjogren v. Hall, id. 274. So as to injuries from the use of dye-stuff supposed harmless. Gould v. Slater Woolen Co., 147 Mass. 315, 17 N. E. 531. A mule caught its foot in a hole in a railroad track so small that no one could have foreseen such result. *Held*, no liability. Nelson v. Chicago, etc., Ry. Co., 30 Minn. 74. So where a workman was painting by lamplight the inside of a tank with an approved and long used paint, bought ready for use, and the benzine in the paint caused an explosion. Allison Mfg. Co. v. McCormick, 118 Pa. St. 519, 12 Atl. 273. So where the plaintiff was painting a hot boiler with coal tar and the tar popped and put out his eye. This was the material ordinarily used for the purpose and no such accident had been known to happen before. San Antonio Gas Co. v. Robertson, 93 Tex. 503, 56 S. W. 323. From some unexplained cause a telegraph wire across a track sagged, and hitting a brakeman on top of a car broke, at the same time becoming fastened to the car brake. The end caught a man engaged in business near the depot, and the wire being drawn along by the

§ 11. Damage from the lawful exercise of rights. It is *damnum absque injuria* if through the lawful and proper exercise by one man of his own rights a damage results to another, even though he might have anticipated the result and avoided it. That which it is right and lawful for one man to do cannot furnish the foundation for an action in favor of another.[50] The question remains as to that which it is right and lawful for a man to do and that is considered in the various chapters upon particular torts. A few illustrations are noted here. It is right and lawful for a man to erect any structure he pleases on his own land though the result may be to greatly damage his neighbor by cutting off his light and view.[51] Defamation by a legislator may be very injurious but is not actionable.[52] A man may dig a well or make an excavation on his own land though the effect may be to destroy his neighbor's well or spring.[53] So an inconvenience suffered in obeying a police regulation of

moving train the man was killed. *Held*, to be an accident. Wabash, etc., Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391. An accident may be defined as an event happening unexpectedly and without fault: if there is any fault there is liability. As where one drives against another by getting on the wrong side of the road in a dark night. Leame v. Bray, 3 East. 593. Or by pulling the wrong rein by mistake. Wakeman v. Robinson, 1 Bing. 213.

[50] Aldred's Case, 9 Co. 58, *b.*; Acton v. Blundell, 12 M. & W. 350; Chasemore v. Richards, 2 H. & N. 168; S. C. 7 H. L. Cas. 749; New River Co. v. Johnson, 2 El. & El. 435; Charles River Bridge v. Warren Bridge, 7 Pick. 344; S. C. in Error, 11 Pet. 420; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Chatfield v. Wilson, 28 Vt. 49; Frazier v. Brown, 12 Ohio St. 294; Wheatley v. Baugh, 25 Pa. St. 528, 44 Am. Dec. 721; Hitchcock v. Bacon, 118 Pa. St. 272, 12 Atl. 352; Fisher v. Seaboard Air Line Co., 102 Va. 363, 46 S. E. 381; Russell v. Bancroft, 79 Tex. 377, 15 S. W. 282.

[51] Mahan v. Brown, 13 Wend. 260, 28 Am. Rep. 461; Lord v. Langdon, 91 Me. 221, 39 Atl. 552; Horan v. Byrnes, 70 N. H. 531, 49 Atl. 569; Levy v. Brothers, 4 Misc. 48, 23 N. Y. S. 825; Metzger v. Hochrein, 107 Wis. 267, 83 N. W. 308, 81 Am. St. Rep. 841, 50 L. R. A. 305; Bordeaux v. Greene, 22 Mont. 254, 56 Pac. 218; Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; Anthony W. Live Stock Co. v. McIlquam, 14 Wyo. 209.

[52] *Post*, § 119.

[53] Acton v. Blundell, 12 M. & W. 324; Chasemon v. Richards, 7 H. L. Cas. 349; Wheatley v. Baugh, 25 Pa. St. 528; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352. See *post*, 300.

the state is damage without injury.[54] The limits as to what a man may lawfully do are not easily defined and each case must be dealt with upon its own peculiar facts.[55]

§ 12. Concurrence of wrong and damage. It is said by the authorities that it is the conjunction of damage and wrong that creates a tort, and there is no tort if either damage or wrong is wanting.[56] But although damage is a necessary element in an actionable wrong, it is sometimes damage merely implied or presumed; not damage shown. There are many cases in which, in point of fact, a showing of pecuniary damage is impossible, and some where it would be easy to show that none had been sustained, in which, nevertheless, the law adjudges that a tort had been committed. The ground of liability is, that from every distinct invasion of right, some damage is presumed; and the law therefore makes some award, though no damages are proven, and none are susceptible of proof.[57] If the reason for

[54] Flint, etc., Ry. Co. v. Detroit, etc. R. R. Co., 64 Mich. 248, 31 N. W. 281; Northwestern Fertilizer Co. v. Hyde Park, 70 Ill. 632; S. C. affirmed, 97 U. S. 659; 1 Lewis, Em. Dom. § 156.

[55] Pollock, Torts, chap. 4, § 7. See also *post*, ch. XVII.

[56] Waterer v. Freeman, Hob. 266. "If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title two things must concur; damage to himself and a wrong committed by the other party." Bailey, J., in Rex v Pagham, 8 B. & C. 362; Wittich v. First Nat. Bank, 20 Fla. 843, 51 Am. Rep. 631; Day v. Brownrigg, L. R. 10 Ch. D. 294; Street v. Union Bank, L. R. 30 Ch. D. 156; Knapp v. Roche, 94 N. Y. 329; Brown v. Marshall, 47 Mich. 576, 41 Am. Rep. 728; Nat. Copper Co. v. Minn. etc. Co. 57 Mich. 83; North Vernon v. Voegler, 103 Ind. 314; Ming v. Woolfolk, 116 U. S. 599; Raynsford v. Phelps, 49 Mich. 315; Gilcrist v. Nautker, 42 Neb. 564, 60 N. W. 906; Commercial Union Ass'n Co. v. Shoemaker, 63 Neb. 173, 88 N. W. 156; Carpenter Paper Co. v. News Pub. Co., 63 Neb. 59, 87 N. W. 1050.

[57] Ashby v. White, 2 Ld. Raym., 938, 955; Herring v. Finch, 2 Lev. 250; Hunt v. Dowman, Cro. Jac. 478; S. C. 2 Roll. R. 21; Weller v. Baker, 2 Wils. 414; Wells v. Watling, 2 W. Black, 1233; Blofield v. Payne, 4 B. & Ad. 410; Wood v. Waud, 3 Exch. 748; Barker v. Green, 2 Bing. 317. "Actual, perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right in which the law will presume damage." Parke B. in Embry v. Owen, 6 Exch. 353. 368. "I am not able to understand how it can correctly be said in a legal sense that an action will not lie even in case of a

this is sought for, we are not left in perplexity or doubt. The method chosen for the protection of rights being an action for the recovery of damages for their invasion, it is manifest that when a party is convicted of the invasion, the conviction must be followed by some consequences disagreeable to himself, or it could not possibly operate as a restraint. As damages are the only penalty which the law provides for the commission of a tort, it is obvious that a recovery of these must be allowed in every case in which a wrong is committed, or those wrongs for which no damages are awarded will be committed with impunity. Subject every man to the necessity of pointing out in what manner a trespass had caused him a pecuniary injury, and for many of the most vexatious there might be no redress and for the rights invaded no protection.[58] In some cases if a recovery could not be had unless actual damages were shown, the right itself might be lost by acquiescence and prescription.[59] Even a showing that the party was benefited, rather than damnified, would be no defense, since no man is compellable to

wrong or violation of a right, unless it is followed by some perceptible damage which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. . . Actual, perceptible damage is not indispensable as a foundation of an action. The law tolerates no further inquiry than whether there has been a violation of a right." Story, J., in Webb v. The Portland Manufacturing Co., 3 Sumner, 189, 192. See, also, Williams v. Esling, 4 Pa. St. 486, 45 Am. Dec. 710; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504; Woodman v. Tufts, 9 N. H. 88; Blodgett v. Stone, 60 N. H. 167; Laflin v. Willard, 16 Pick. 64; White v. Griffin, 4 Jones, L. 139; Dixon v. Clow, 24 Wend. 191; Chapman v. Copeland, 55 Miss. 467; Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572; East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. 631; Lance v. Apgar, 60 N. J. L. 447, 38 Atl. 695.

[58] See Ashby v. White, 2 Ld. Raym. 938, 955; Hobson v. Todd, 4 T. R. 71, 73; Clifton v. Hooper, 6 Q. B. 468; Fry v. Voules, 1 El. & Bl. 839.

[59] Rochdale Canal Co. v. King, 14 Q. B. 134, 135. See Turner v. Sterling, 2 Lev. 50; S. C. 2 Vent. 25; Bower v. Hill, 1 Bing. N. C. 549; Mason v. Hill, 3 B. & Ad. 304; S. C. 5 B. & Ad. 1; Wood v. Waud, 3 Exch. 748; Blanchard v. Baker, 8 Greenl. 253, 23 Am. Dec. 504; Johns v. Stevens, 3 Vt. 308; Ripka v. Sergeant, 7 W. & S. 9, 42 Am. Dec. 214; Gladfelter v. Walker, 40 Md. 1; Green v. Weaver, 63 Ga. 302.

have benefits thrust upon him offensively, and in defiance of his right of independent action.[60] But in a very large proportion of cases the wrong is only complete when damage is suffered; that is to say, the act done is not wrongful in itself, but only becomes so when an injurious consequence follows. Thus, if one build a fire on his own grounds there is no wrong in the act, and in law no complaint can be made of it; but if the circumstances surrounding the act render it imprudent and dangerous to the rights of others, and at length it spreads to the premises of others, inflicting damage, this damage completes the injury. In all such cases, that which may cause damage, but as yet has not done so, being something that the party may rightfully do, it cannot be taken notice of as a thing amiss until the damage is suffered; and the case differs from an assault, which in itself is a thing amiss. So if one call another a rogue, this speaking is not in itself a legal wrong, the law not supposing such words to be injurious; but if the person concerning whom they were spoken can show that he lost his employment in consequence, he thereby connects the speaking with a damage, which constitutes it, in law, a thing amiss, and the tort is then complete. So many things which are actionable as nuisances, only become so when actual damage can be traced to them. And in all cases of negligence there can be no recovery unless damages are shown. But in all these cases the plaintiff's right is simply a right not to be damaged in a particular way, as the right not to be damaged by another's negligence, or the right not to be damaged by a nuisance created or suffered on the lands of another, and the like. Manifestly such a right cannot be violated unless damage is shown. It is therefore a universal proposition that whenever a legal right is violated an action accrues and a recovery may be had. If the right is independent of damage, then no damage need be shown to sustain a recovery. If the right is dependent upon damage, then damage must be shown.

§ 13. **Mental anguish.** In the class of torts or actions wherein there must be a showing of actual damages in order to sus-

[60] It is as illegal to force one to receive a benefit as to submit to an injury. East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. 631. (Court of Errors and Appeals.)

tain a recovery, the question arises whether mental suffering alone is such damage as will satisfy the requirement. The question has been much discussed in suits against telegraph companies, for negligence in sending messages announcing the sickness, death or funeral of a near relative. The first of these cases was decided in Texas in 1881 in favor of the right of recovery.[61] Since then there have been numerous decisions on the question with much conflict of authority. A recovery in such cases is now sustained by the courts of Iowa,[62] Kentucky,[63] North Carolina,[64] Tennessee[65] and Texas.[66] In Alabama it is held that damages for mental anguish may be recovered, in such cases, if the action is *ex contractu*, but not if it is *ex delicto*.[67] The reverse is held in Iowa.[68] But the decided weight of authority is against the right to recover against telegraph companies, for negligence in sending messages, when the only damage is mental anguish.[69] These decisions rest upon the elementary principle that mere mental pain and anxiety are too

[61] So Relle v. Telegraph Co., 55 Tex. 308, 40 Am. Rep. 805.

[62] Mentzer v. Western Union Tel. Co., 93 Ia. 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72.

[63] Chapman v. Western Union Tel Co., 90 Ky. 265, 13 S. W. 880; Western Union Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366.

[64] Young v. Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669; Cashion v. Western Union Tel. Co., 123 N. C. 267, 31 S. E. 493; Bryan v. Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938.

[65] Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574; Newport News, etc., R. Co. v. Griffin, 92 Tenn. 692, 22 S. W. 737.

[66] Loper v. Western Union Tel. Co., 70 Tex. 689, 8 S. W. 600; Gulf, etc., Tel. Co. v. Richardson, 79 Tex. 649, 15 S. W. 689; Potts v. Western Union Tel. Co., 82 Tex. 545, 18 S. W. 604.

[67] Blount v. Western Union Tel. Co., 126 Ala. 105, 27 So. 779; Western Union Tel. Co. v. Waters, 139 Ala. 652, 36 So. 773.

[68] Mentzer v. Western Union Tel. Co., 93 Ia. 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72.

[69] Pray v. Western Union Tel. Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463; Russell v. Western Union Tel. Co., 3 Dak. 315, 19 N. W. 408; International O. Tel. Co. v. Saunders, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810; Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901; Giddens v. Western Union Tel. Co., 111 Ga. 824, 35 S. E. 638; Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; overruling Reese v. Western Union Tel. Co., 123 Ind. 294; Francis v. Western Union Tel. Co., 58

vague for legal redress where no injury is done to person, property, health or reputation.[70] Outside of the telegraph cases the authorities are almost unanimous in support of this principle,[71] and there seems to be no good reason why the negligence of telegraph companies in transmitting messages should form an exception to the general rule.[72] The result of the authorities therefore is that mental anguish alone is not such damage as, in conjunction with wrong, will support an action.

§ 14. Fright or mental anguish producing sickness or other physical effects. It is manifest that this is a very different case from the one last considered. There recovery was sought for a mental condition, the existence of which it is impossible to verify or combat. But sickness, miscarriage, St. Vitus dance, nervous prostration, and the like, any of which may be produced by fright or shock, are physical effects which may be

Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406; West v. Telegraph Co., 39 Kan. 93, 17 Pac. 807; Western Union Tel. Co. v. Rogers, 68 Miss. 748, 9 So. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; Connell v. Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345, 38 Am. St. Rep. 575, 20 L. R. A. 172; Morton v. Western Union Tel. Co., 53 Ohio St. 431, 41 N. E. 689, 53 Am. St. Rep. 648, 32 L. R. A. 735; Butner v. Western Union Tel. Co., 2 Okl. 234, 37 Pac. 1087; Lewis v. Western Union Tel. Co., 57 S. C. 325, 35 S. E. 556; Connelly v. Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; Davis v. Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026; Summerfield v. Western Union Tel. Co., 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17; Western Union Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706.

[70] Morton v. Western Union Tel. Co., 53 Ohio St. 431, 41 N. E. 689, 53 Am. St. Rep. 648, 32 L. R. A. 735.

[71] Gaskins v. Runkle, 25 Ind. App. 584, 58 N. E. 740; Cleveland, etc., R. R. Co. v. Stewart, 24 Ind. App. 374, 56 N. E. 917; Spade v. Lynn & B. R. R. Co., 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512; Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335; Spohn v. Missouri Pac. R. R. Co., 116 Mo. 617, 22 S. W. 690; Ewing v. Pittsburgh, etc., Ry. Co., 147 Pa. St. 40, 23 Atl. 340, 30 Am. St. Rep. 709; Linn v. Duquesne, 204 Pa. St. 551, 54 Atl. 341, 93 Am. St. Rep. 800; Huston v. Freemansburg, 212 Pa. St. 548; Gulf, etc. Ry. Co. v. Trott, 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 866. And see the numerous cases cited in the opinion of the court in Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846.

[72] Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846.

observed and traced. When legal wrong towards the plaintiff produces fright and the fright causes disease or miscarriage, the physical effect so produced would seem to be the direct and proximate result of the negligence, within the meaning of the rule as to proximate cause, which is discussed in the following pages. Where a passenger in a street car was put in imminent peril of a collision by the company's negligence and was overcome by fright, went into convulsions and suffered a miscarriage, the miscarriage was held to the the proximate result of the negligence and the company was held liable. In giving its opinion the court says: "Now, if the fright was the natural consequence of—was brought about, caused by, the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of these injuries. That a mental condition or operation on the part of the one injured comes between the negligence and injury does not necessarily break the required sequence of intermediate causes." [73]

The right of recovery for such injuries is supported by a number of well considered cases both here and in England.[74] On the other hand, perhaps an equal number of cases deny the

[73] Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

[74] Watson v. Dilts, 116 Ia. 249, 89 N. W. 1068, 92 Am. St. Rep. 239; Brownback v. Frailey, 78 Ill. App. 262; Cameron v. New England Tel. & Tel. Co., 182 Mass. 310, 65 N. E. 385; Plouty v. Murphy, 82 Minn. 268, 84 N. W. 1005; Hickey v. Welch, 91 Mo. App. 4; Watkins v. Kaolin Mfg. Co., 131 N. C. 536, 42 S. E. 983; Hill v. Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; Wilkinson v. Downton, (1897) 2 Q. B. 57; Dulieu v. White & Sons, (1901) 2 K. B. 669. In the case first cited the court says: "It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently one who causes a diseased condition of the latter must anticipate the consequences which follow it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright." P. 252.

right of recovery for such damages.[75] The latter decisions are based largely on grounds of public policy, founded on the difficulty in tracing the physical injuries complained of to the negligence of the defendant and in the opportunity afforded for speculative claims.[76] In one of the English cases cited, this position is answered by Kennedy, J., as follows: "I should be sorry to adopt a rule which would bar all such claims on the grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves a denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claims. My experience gives me no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright, than in weighing the like evidence as to the effects of nervous shock through a railway collision or carriage accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time."[77]

It is held that there can be no recovery for fright which results in physical injuries, in the absence of any contemporaneous physical injury to the plaintiff "unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant."[78] Thus the supreme court of Minnesota holds that

[75] Braun v. Craven, 175 Ill. 401, 51 N. E. 657; Morse v. Chesapeake, etc. Ry. Co., 117 Ky. 11, 25 Ky. L. R. 1159, 77 S. W. 361; Ward v. West Jersey, etc. R. R. Co., 65 N. J. L. 383, 47 Atl. 561; Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781; Spade v. Lynn & B. R. R. Co., 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512; White v. Sander, 168 Mass. 296, 47 N. E. 90; Lehman v. Brooklyn City R. R. Co., 47 Hun, 355; Wulstein v. Mohlman, 57 N. Y. Supr. 50, 5 N. Y. S. 569; Huston v. Freemansburg, 212 Pa. St. 548.

[76] See especially Braun v. Craven, 175 Ill. 401, 51 N. E. 657; Spade v. Lynn & B. R. R. Co., 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512; Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. Rep. 604, 34 L. R. A. 781.

[77] Dulieu v. White & Sons, (1901) 2 K. B. 669, 681.

[78] Sanderson v. Northern Pac Ry. Co., 88 Minn. 162, 92 N. W. 542, 97 Am. St. Rep. 509, 60 L. R. A. 403. To the same effect: Buckman v. Great Northern Ry. Co., 76 Minn. 373, 79 N. W. 98; Lesch v. Great Northern Ry. Co., 97 Minn. 503, 106 N. W. 955; Dulieu

if a passenger is put in peril of a collision by the negligence of the company and is thereby frightened and the fright produces a miscarriage, the company is liable for all the consequences,[79] while if the fright is caused by an assault made on the passenger's children or husband by the conductor, then there can be no recovery.[80] But other cases have held that a wrong to a third party committed with force and violence in the presence of a woman may be a wrong to her also, if thereby she suffers fright and physical injury.[81]

v. White & Sons (1901), 2 K. B. 669. In the last case the plaintiff, a woman, was put in fear of bodily harm by the negligence of the defendant and the fright brought on a miscarriage. The right to recover was sustained but, in discussing the limitations upon the right to recover for injuries resulting from fright, Kennedy, J., says: "It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, when it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A has, I conceive, no legal duty not to shock B's nerves by the exhibition of negligence towards C, or towards the property of B or C. . . . I should not be prepared in the present case to hold that the plaintiff was entitled to maintain this action if the nervous shock was produced, not by the fear of bodily injury to herself, but by horror and vexation arising from the sight of injury being threatened or done either to some other person, or to her own or to her husband's property, by the intrusion of the defendant's van and horses. The cause of the nervous shock is one of the things which the jury will have to determine at the trial."

[79] Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

[80] Sanderson v. Northern Pac. Ry. Co., 88 Minn. 162, 92 N. W. 542, 97 Am. St. Rep. 509, 60 L. R. A. 403; Buckman v. Great Northern Ry. Co., 76 Minn. 373, 79 N. W. 98.

[81] Hill v. Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618. In this case the defendant, knowing that the plaintiff was pregnant and that excitement might produce serious injury, went into her yard and assaulted two negroes in her presence, causing fright and a miscarriage. He was held liable. And see to the same effect, Watson v. Dilts, 116 Ia. 249, 89 N. W. 1068, 92 Am. St. Rep. 239, where an assault was made upon the plaintiff's husband by the defendant. But see Gaskins v. Runkle, 25 Ind. App. 584, 58 N. E. 740; Phillips v. Dickerson, 85 Ill. 11, 28 Am. Rep. 607; Renner v. Canfield, 36 Minn. 90.

§ 15. Proximate cause. In order to constitute an actionable wrong it is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is, that in law the immediate and not the remote cause of any event is regarded;[82] and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote cause. As this principle is of the highest importance in the law of torts, and the right of action in many cases, and the extent of recovery in others depend upon it, it may be well to consider it a little further. In doing this we lay down the following propositions:

1. The one already more than once mentioned, that in the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result. Here the wrong itself fixes the right of action; we need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence.

2. When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause.[83]

3. If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrong-

[82] Bac. Max., reg. 1; Broom, Max. 165.

[83] Vicars v. Wilcocks, 8 East, 1; Railroad Co. v. Reeves, 10 Wall. 176; Cuff v. Newark, etc., R. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Dale v. Grant, 34 N. J. L. 142; Dubuque Wood, etc., Ass'n v. Dubuque, 30 Ia. 176; Rockford v. Tripp, 83 Ill. 247; Phillips v. Dickerson, 85 Ill. 11, 28 Am. Rep. 607; Allegheny v. Zimmerman, 95 Pa. St. 287, 40 Am. Rep. 649.

ful, the injury shall be referred to the wrongful cause, passing by those which were innocent.[84] But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote.[85]

4. If the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury.[86]

The general rule, as frequently stated, is that in order that an act or omission may be the proximate cause of an injury,

[84] American Express Co. v. Risley, 179 Ill. 295, 53 N. E. 558; Cleveland, etc., Ry. Co. v. Wynant, 134 Ind. 681, 34 N. E. 569; Brash v. St. Louis, 161 Mo. 433, 61 S. W. 808; Rich v. New York, etc., R. R. Co., 87 N. Y. 382; Phillips v. New York Central, etc., R. R. Co., 127 N. Y. 657, 27 N. E. 978; Chacey v. Fargo, 5 N. D. 173, 64 N. W. 932; Rosenbaum v. Shoffner, 98 Tenn. 624, 40 S. W. 1086; Howe v. West Seattle L. & I. Co., 21 Wash. 594, 59 Pac. 495; Goe v. Northern Pac. Ry. Co., 30 Wash. 654, 71 Pac. 182.

[85] Currier v. McKee, 99 Me. 364, 59 Atl. 442; Ross v. Western Union Tel. Co., 81 Fed. 676, 26 C. C. A. 564.

[86] Lynch v. Nurdin, 1 Q. B. 29; Illidge v. Goodwin, 5 C. & P. 190; McCahill v. Kipp, 2 E. D. Smith, 413; Chapman v. N. H., etc., R. R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Colegrove v. N. Y., etc., R. R. Co., 20 N. Y. 492, 75 Am. Dec. 418; Barrett v. Third Av. R. R. Co., 45 N. Y. 628; Griggs v. Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199; Powell v. Deveney, 3 Cush. 300, 50 Am. Dec. 738; Lane v. Atlantic Works, 107 Mass. 104; Weick v. Lander, 75 Ill. 93; Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267; Lake v. Milliken, 62 Me. 240, 16 Am. Rep. 456; Western Railway v. Sistrunk, 85 Ala. 352, 5 So. 79; Georgia Pac. Ry. Co. v. Hughes, 87 Ala. 610, 6 So. 413; Colorado Mort. & Invest. Co. v. Rees, 21 Colo. 435, 42 Pac. 42; Ashborn v. Waterbury, 70 Conn. 551, 40 Atl. 458; Jacksonville, etc., Ry. Co. v. Peninsular, etc., Co., 27 Fla. 1, 9 So. 666, 17 L. R. A. 33; McGary v. West Chicago St. R. R. Co., 85 Ill. App. 610; Burk v. Creamery Package Mfg. Co., 126 Ia. 730, 102 N. W. 793, 106 Am. St. Rep. 377; Murray v. Boston Ice Co., 180 Mass. 165, 61 N. E. 1001; Johnson v. N. W. Tel. Exchange Co., 48 Minn. 433, 51 N. W. 225; Newcomb v. New York Central, etc., R. R. Co., 169 Mo. 409, 69 S. W. 348; Gulf, etc., Ry. Co. v. McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755; Croft v. N. W. S. S. Co., 20 Wash. 175, 55 Pac. 42; Wilder v. Stanley, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479.

the injury must be the natural and probable consequence of the act or omission and such as might have been foreseen by an ordinarily reasonable and prudent man, in the light of the attendant circumstances, as likely to result therefrom.[87] In applying this rule, whether the injury is the natural and probable consequence of the act or omission complained of and such as ought to have been anticipated, is ordinarily a question of fact for the jury.[88] But where the facts are undisputed and the inferences to be drawn from them are plain and not

[87] South Side Pass. Ry. Co. v. Irish, 117 Pa. St. 390, 11 Atl. 627, 2 Am. St. Rep. 672; Haverly v. State Line, etc., R. R. Co., 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848; Scott v. Allegheny Val. R. R. Co., 172 Pa. St. 646, 33 Atl. 712; Thomas v. Central R. R. Co., 194 Pa. St. 511, 45 Atl. 344; Decatur, etc., Mfg. Co. v. Mehaffey, 128 Ala. 242, 29 So. 646; Johnsen v. Oakland, etc., Ry. Co., 127 Cal. 608, 60 Pac. 170; Macon v. Dykes, 103 Ga. 847, 31 S. E. 443; Schmidt v. Mitchell, 84 Ill. 195; Binford v. Johnston, 82 Ind. 426; Louisville, etc., Ferry Co. v. Nolan, 135 Ind. 60, 34 N. E. 710; P. H. & F. M. Roots Co. v. Meeker, 165 Ind. 132; Stone v. Boston, etc., R. R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 791; Harton v. Telephone Co., 141 N. C. 455; Hurley v. Packard, 182 Mass. 216, 65 N. E. 64; Gonzales v. Galveston, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17; Block v. Milwaukee, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365; Diesenreiter v. Malting Co., 97 Wis. 279, 72 N. W. 735; Meyer v. Milwaukee, etc., Co., 116 Wis. 336, 93 N. W. 6; Railway Co. v. Kellogg, 94 U. S. 469; Scheffer v. Railroad Co., 105 U. S. 249; Texas, etc., Ry. Co. v. Carlin, 111 Fed. 777, 49 C. C. A. 605.

[88] Eames v. Texas, etc., R. R. Co., 63 Tex. 660; Hoag v. Lake Shore, etc., R. R. Co., 85 Pa. St. 293, 27 Am. Rep. 653; Ehrgott v. Mayor, etc., 96 N. Y. 264, 48 Am. Rep. 622; Atkinson v. Goodrich, Tr. Co., 60 Wis. 141, 50 Am. Rep 352; East Tenn. etc., Co. v. Lockhart, 79 Ala. 315; Pullman, etc., Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601; Drake v. Kiely, 93 Pa. St. 492; Crowley v. Cedar Rapids, etc., Co., 65 Ia. 658; Savage v. Chicago, etc., Ry. Co., 31 Minn. 419; Landgraff v. Kuh, 188 Ill 484, 59 N. E. 501; True & True Co. v. Woda, 201 Ill. 315, 66 N. E. 369; Haverly v. State Line, etc., R. R. Co., 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848; Bunting v. Hogsett, 139 Pa. St. 363, 21 Atl. 31, 23 Am. St. Rep. 192, 12 L. R. A. 268; Davis v. McKnight, 146 Pa. St. 610, 23 Atl. 320; Brashear v. Phila. Traction Co., 180 Pa. St. 392, 36 Atl. 914; McCafferty v. Pa. R. R. Co., 193 Pa. St. 339, 44 Atl. 435, 74 Am. St. Rep. 690; Gudfelder v. Pittsburg etc., Ry. Co., 207 Pa. St. 629, 57 Atl. 70; Stecher v. People, 217 Ill. 348, 75 N. E. 501; Phillips v. Railroad Co., 138 N. C. 12.

open to doubt by reasonable men, it is the duty of the court to determine the question as a matter of law.[89]

A proximate cause has been defined as "one which in natural sequence, undisturbed by any independent cause, produces the result complained of."[90] This ignores the element of foreseeableness, and according to some authorities the ability to foresee the injury pertains to the question of negligence, and not to the question of proximate cause. Thus it is said by the supreme court of Minnesota: "What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrong-doer is responsible, even though he could not have foreseen the particular results which did follow."[91]

[89] Hoag v. Lake Shore, etc., Co., 85 Pa. St. 293, 37 Am. Rep. 653; West Mahonoy v. Watson, 116 Pa. St. 344, 9 Atl. 430; Henry v. St. Louis, etc., Co., 76 Mo. 288, 43 Am. Rep. 762; Lewis v. Flint, etc., Co., 54 Mich. 55, 52 Am. Rep. 790; Gudfelder v. Pittsburg, etc., Ry. Co., 207 Pa. St. 629, 57 Atl. 70; Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253; P. H. & F. M. Roots Co., v. Meeker, 165 Ind. 132

[90] Behling v. S. W. Penn. Pipe Lines, 160 Pa. St. 359, 28 Atl. 777 40 Am. St. Rep. 724. And see Lake Erie, etc., R. R. Co. v. Charman, 161 Ind. 95, 67 N. E. 923; Gudfelder v. Pittsburg, etc., Ry Co., 207 Pa. St. 629, 57 Atl. 70.

[91] Christianson v. Chicago, etc., Ry. Co., 67 Minn. 94, 69 N. W. 640. To same effect, Isham v. Dow, 70 Vt. 588, 41 Atl. 585, 67 Am. St. Rep. 671, 45 L. R A. 87; Marsh v. Gt. Northern Paper Co., 101

That an act or omission may be the proximate cause of an injury, even though the result would be unlikely to occur to the mind of anyone in advance, is illustrated by such cases as the following: In one, the defendants had a private railroad track which was built on a curve and so as to cross a main line of road twice within a short distance. For convenience of description the crossings may be designated as A and B. The defendant's engineer was negligently backing a dinkey engine, with a car of coke attached, toward the crossing at A, just as a passenger train was approaching the crossing. The defendant's engineer, thinking a collision imminent, shut off steam and jumped from his engine. The passenger train collided with the car of coke and came to a stop on the crossing at B. The effect of the collision was to open the valve of the dinkey engine which started towards the crossing at B, collided with the car in which the plaintiff was riding and produced the injuries sued for. The engineer's negligence in backing his engine towards the first crossing in view of the approaching train was held to be the proximate cause of the plaintiff's injuries, though such a result would have seemed improbable in advance. The engineer's negligence directly caused his peril, his jump from the engine and the first collision. The first collision opened the valve of the engine which set it in motion towards the second crossing and so caused the second collision and the second collision caused the plaintiff's injuries. The court says: "The engineer would be held to have foreseen whatever consequences might ensue from his negligence without some other independent agency, and both his employer and himself would be held for what might, in the nature of things, occur in consequence of that negligence, although, in advance, the actual result might have seemed improbable."[92] In another case the servants of a railroad company while shifting cars burst open two tank cars filled with naphtha. The naphtha ran out and into a sewer. They continued to move the cars while the naphtha was running out and in passing a switch light the naphtha caught on fire. The fire followed the naphtha to the sewer and

Mo. 489; Smith v. Railroad Co., L. R. 6 C. P. 21.

St. 363, 374, 375, 21 Atl. 31, 23 Am. St. Rep. 192, 12 L. R. A. 263.

[92] Bunting v. Hogsett, 139 Pa.

along the sewer 2,800 feet to its outlet near a bridge and there caused a violent explosion which injured the plaintiff who was on the bridge. A judgment for the plaintiff was affirmed. "The wrongful act (of moving the cars near the light) and its injurious effects were connected by an unbroken and continuous succession of events which made the consequence the immediate and natural result of the act unaffected by any efficient intermediate cause."[93]

According to the later authorities, foreseeableness, as an element in proximate cause, does not depend upon whether an ordinarily reasonable and prudent man would or ought in advance to have anticipated the result which happened, but whether if such result and the chain of events connecting it with the act complained of *had occurred to his mind,* the same would have seemed natural and probable and according to the ordinary course of nature.[94] Thus as said in one case, "A person guilty of negligence, or an unlawful act, should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, would at the time of the negligent or unlawful act have thought reasonably to follow, *if they had occurred to his mind.*"[95] In one case it is said that "it is sufficient that after the injury it appears to have been a natural and probable consequence of the defendant's negligence."[96]

§ 16. **Proximate cause—Illustrations.** How far one may be chargeable with the spread of fire negligently started by himself, is a question that has attracted no little attention in judicial circles, and led to some difference of opinion. In New York it is held that while the culpable party would be liable to the owner of an adjoining house to which the fire had spread, he would not be liable to one to whose house the fire should

[93] Gudfelder v. Pittsburg, etc., Ry. Co., 207 Pa. St. 629, 57 Atl. 70.

[94] Chicago, etc., Ry. Co. v. Willard, 111 Ill. App. 225; Bunting v. Hogsett, 139 Pa. St. 363, 21 Atl. 31, 23 Am. St. Rep. 192, 12 L. R. A. 368; Gudfelder v. Pittsburg, etc., Ry. Co., 207 Pa. St. 629, 57 Atl. 70; Quigley v. Del. & H. C. Co., 142 Pa. St. 388, 21 Atl. 827, 24 Am. St. Rep. 504; Christianson v. Chicago, etc., Ry. Co., 67 Minn. 94, 69 N. W. 640.

[95] Wabash R. R. Co. v. Coker, 81 Ill. App. 660, 664.

[96] Marsh v. Gt. Northern Paper Co., 101 Me. 489, 502.

spread from the burning of the first.[97] In Pennsylvania the same conclusion has been reached, and from similar considerations.[98] But a different view prevails in England and in most of the American states. The negligent fire is regarded as a unity: it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first.[99]

[97] Ryan v. N. Y. Cent. R. R. Co., 35 N. Y. 210, 91 Am. Dec. 49; Read v. Nichols, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; Hoffman v. King, 160 N. Y. 618, 55 N. E. 401, 73 Am. St. Rep. 715, 46 L. R. A. 672. Compare O'Neill v. New York, etc., Ry. Co., 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591; Frace v. New York, etc., R. R. Co., 68 Hun, 325, 22 N. Y. S. 958.

[98] Pennsylvania R. R. Co. v. Kerr, 62 Pa. St. 353, 1 Am. Rep. 431. We should say that the weight of this case as a precedent was somewhat diminished by Oil Creek, etc., R. R. Co. v. Keighron, 74 Pa. St. 316, and Pennsylvania R. R. Co. v. Hope, 80 Pa. St. 373, 20 Am. Rep. 100.

[99] Smith v. London, etc., R. R. Co., L. R. 5 C. P. 98; Perley v. Eastern R. R. Co., 98 Mass. 414; Clemens v. Hannibal, etc., R. R. Co., 53 Mo. 366, 14 Am. R. 460; Poeppers v. Miss., etc., Ry. Co., 67 Mo. 715, 29 Am. Rep. 518; Hoyt v. Jeffers, 30 Mich. 181; Fent v. Toledo, etc., R. R. Co., 59 Ill. 349, 14 Am. Rep. 13; Annapolis, etc., R. R. Co. v. Gantt, 39 Md. 115; Kellogg v. Chicago, etc., R. R. Co., 26 Wis. 223, 7 Am. Rep. 69; Atkinson v. Goodrich Tr. Co., 60 Wis. 141, 50 Am. Rep. 352; Hooksett v. Concord R. R., 38 N. H. 242; Atchison, etc., R. R. Co. v. Stanford, 12 Kan. 354, 15 Am. R. 362; Milwaukee, etc., R. R. Co. v. Kellogg, 94 U. S. 469; Delaware, etc., R. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Johnson v. Chicago, etc., Ry. Co., 31 Minn. 57; Small v. Chicago, etc., R. R. Co., 55 Ia. 582; Louisville, etc., Ry. Co. v. Nitshe, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750; Cincinnati, etc., R. R. Co. v. Baker, 94 Ky. 71, 21 S. W. 347; Alabama, etc., Ry. Co. v. Barrett, 78 Miss. 432, 28 So. 820; Gram v. Northern Pac. R. R. Co., 1 N. D. 252, 46 N. W. 972; Tyler v. Ricamore, 87 Va. 466, 12 S. E. 799; East Tennessee, etc., Ry. Co. v. Hesters, 90 Ga. 11, 15 S. E. 828; Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381; Phillips v. Railroad Co., 138 N. C. 12. Where the defendant negligently started a prairie fire which escaped to the plaintiff's land and the plaintiff started a back fire to save his buildings, and was driven off by the defendant's fire and the back fire spread to his buildings, but the same would have been set on fire a few minutes later by the defendant's fire, the latter was held the proximate cause of the

Where an injury is due to a defect in a street or highway in conjunction with the fright of a horse, the defect is generally held to be the proximate cause.[100] But the authorities are not uniform and some hold that the defect is not the proximate cause in such cases.[1] In West Virginia where a horse was frightened by a pile of rocks in the road and ran off an embankment where there was no guard rail the town was held liable.[2] But in a case similar in its facts, except that the horse was frightened by a yoke of calves backing out of the bushes, it was held there was no liability.[3] In Michigan where a horse was frightened at a hole in a bridge and went off for lack of a railing, the latter defect was held the proximate cause.[4] So where the horse stumbled and became unmanageable.[5] But where the plaintiff stopped to talk, when just across a bridge, and the check rein got under the shaft and the horse backed onto and off the bridge, the absence of a railing was held not to be the proximate cause.[6]

destruction of the plaintiff's buildings. McKenna v. Boessler, 86 Ia. 197, 53 N. W. 103, 17 L. R. A. 310.

[100] Denver v. Johnson, 8 Colo. App. 384, 46 Pac. 621; Joliet v. Shufeldt, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 453, 18 L. R. A. 750; Rock Falls v. Wells, 169 Ill. 224, 48 N. E. 440; Belleville v. Hoffman, 74 Ill. App. 503; Board of Coms. v. Mutchler, 137 Ind. 140, 36 N. E. 534; Hazzard v. Council Bluffs, 79 Ia. 106, 44 N. W. 219; Byerly v. Anamosa, 79 Ia. 204, 44 N. W. 359; Langhammer v. Manchester, 99 Ia. 295, 68 N. W. 688; Walrod v. Webster Co., 110 Ia. 349, 81 N. W. 98, 47 L. R. A. 480; Union St. Ry. Co. v. Stone, 54 Kan. 83, 37 Pac. 1012; Voglesang v. St. Louis, 139 Mo. 127, 40 S. W. 653; Stone v. Pendleton, 21 R. I. 332, 43 Atl. 643; Taylor v. Ballard, 24 Wash. 191, 64 Pac. 142; Gray v. Washington Water Pow. Co., 27 Wash. 713, 68 Pac. 360.

[1] La Londe v. Peake, 82 Minn. 124, 84 N. W. 724; Brown v. Laurens Co., 38 S. C. 282, 17 S. E. 21. And see Macon v. Dykes, 103 Ga. 847, 31 S. E. 443; Neely v. Ft. Worth, etc., Ry. Co., 96 Tex. 274, 72 S. W. 159.

[2] Rohrbough v. Barbour Co. Ct., 39 W. Va. 472, 20 S. E. 565, 45 Am. St. Rep. 925.

[3] Smith v. County Court, 33 W. Va. 713, 11 S. E. 1. To the same effect is Hungerman v. Wheeling, 46 W. Va. 761, 34 S. E. 778.

[4] White v. Riley, 113 Mich. 295, 71 N. W. 502.

[5] Shaw v. Saline, 113 Mich. 342, 71 N. W. 642.

[6] Kingsley v. Bloomingdale, 109 Mich. 340, 67 N. W. 333. And see Bleil v. Detroit St. Ry. Co., 98 Mich. 228, 57 N. W. 117; Lambeck v. Grand Rapids, etc., R. R. Co., 106 Mich. 512, 64 N. W. 479.

The question has been much considered in Pennsylvania, apparently with varying results. In general it may be said that the earlier and later decisions in this state favor a recovery in such cases, holding the defect to be the proximate cause of the injury.[7]

Where the act or omission complained of merely creates a condition, it is not the proximate cause of an injury produced by other causes which take effect in the particular way by reason of the condition. Thus the negligent delay of goods by a common carrier is not the efficient cause of their destruction by flood or accident, merely because if they had not been delayed they would have escaped the peril.[8] So the negligent delay of a train is not the proximate cause of an injury to a passenger by the accidental discharge of a gun in the hands of a bystander,[9] or by the upsetting of the train in a gale of wind.[10]

[7] Macungie Tp. v. Mutchofer, 71 Pa. St. 276; Newlin Tp. v. Davis, 77 Pa. St. 317; Hey v. Phila., 81 Pa. St. 44; Scott Tp. v. Montgomery, 95 Pa. St. 444; Burrell Tp. v. Uncapher, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 664; Quinlan v. Phila., 205 Pa. St. 309, 54 Atl. 1026; Davis v. Snyder Tp., 196 Pa. St. 273, 46 Atl. 301; Nichols v. Pittsfield Tp., 209 Pa. St. 240, 58 Atl. 283; Boone v. East Norwegian Tp., 192 Pa. St. 206, 43 Atl. 1025. Cases holding against liability: Jackson Tp. v. Wagner, 127 Pa. St. 184, 17 Atl. 903, 14 Am. St. Rep. 833; Wagner v. Jackson Tp., 133 Pa. St. 61, 19 Atl. 312; Schoeffer v. Jackson Tp., 150 Pa. St. 145, 24 Atl. 629, 30 Am. St. Rep. 792, 18 L. R. A. 100; Herr v. Lebanon, 149 Pa. St. 222, 24 Atl. 207, 34 Am. St. Rep. 603, 16 L. R. A. 106; Willis v. Armstrong County, 183 Pa. St. 184, 38 Atl. 621; Card v. Columbia Tp., 191 Pa. St. 254, 43 Atl. 217.

[8] Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 695; Academy of Music v. Hackett, 2 Hilt. 217; Ashley v. Harrison, 1 Esp. 48; Butler v. Kent, 19 Johns. 223, 10 Am. Dec. 219; Davis v. Central Vt. R. R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; Herring v. Chesapeake, etc., R. R. Co., 101 Va. 778, 45 S. E. 322; Thomas v. Lancaster Mills, 71 Fed. 481, 19 C. C. A. 88; Hoadley v. Northern Trans. Co., 115 Mass. 304, 15 Am. Rep. 106. But see Condict v. Grand Trunk R. R. Co., 54 N. Y. 500; Lamb v. Camden, etc., Co., 46 N. Y. 271, 7 Am. Rep. 327.

[9] Reid v. Evansville, etc., R. R. Co., 10 Ind. App. 385, 35 N. E. 703. The delay in delivering a message warning a man that he is being pursued by armed men is not the proximate cause of his death at the hands of such pursuers. Ross v. Western Union Tel. Co., 81 Fed. 676, 26 C. C. A. 564.

[10] McClary v. Sioux, etc., R. R. Co., 3 Neb. 44, 19 Am. Rep. 631. See Daniels v. Ballantine, 23 Ohio

Where a woman was injured by burns and made sick by over exertion in endeavoring to save her property from destruction by a fire negligently set out by the defendant, it was held that, if the plaintiff acted with reasonable prudence, the defendant's negligence was the proximate cause of her injuries.[11] But the authorities are not uniform upon the question of whether the negligence which puts property in danger of destruction is the proximate cause of injuries sustained in a reasonable attempt to save the property.[12] The negligence which puts a fellow being in peril of life or limb is usually held to be the proximate cause of injury to one who attempts, in a prudent manner, to rescue the person in danger.[13] So, if one is put in peril by the negligence of the defendant and is injured in his attempt to avoid the peril.[14] Similar to these are the cases where a person is negligently put off the cars at the wrong place and suffers from exposure before shelter or destination can be reached.[15]

The act of a human being under the impulse of sudden danger, though a link in the chain of events, connecting the wrong with the injury, is not deemed to be the intervention of a new, independent, efficient cause, but is simply an intermediate effect of the original wrong for which the original wrong-doer is solely responsible. The celebrated Squib case is an illustration. The defendant threw a lighted squib into a crowd of people, one after another of whom in self-protection threw it

St. 532, 13 Am. Rep. 264; Central of Georgia Ry. Co. v. Price, 106 Ga. 176, 32 S. E. 77.

[11] Glanz v. Chicago, etc., Ry. Co., 119 Ia. 611, 93 N. W. 575; Berg v. Great Northern Ry. Co., 70 Minn. 272, 73 N. W. 648, 68 Am. St. Rep. 524; Lining v. Ill. Cent. Ry. Co., 81 Ia. 246, 47 N. W. 66

[12] See Chattanooga, etc., Co. v. Hodges, 109 Tenn. 331, 70 S. W. 616, 97 Am. St. Rep. 844, 60 L. R. A. 459, and cases cited; Seale v. Gulf, etc., Co., 65 Tex. 274; Hinchey v. Manhattan Ry. Co., 49 N. Y. Supr. 406.

[13] Maryland Steel Co. v. Marney, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842.

[14] Windeler v. Rush Co. Fair Ass'n, 27 Ind. App. 92, 59 N. E. 269, 60 N. E. 954; Western Md. R. R. Co. v. State, 95 Md. 637, 53 Atl. 969; St. Joseph, etc., R. R. Co. v. Hodge, 44 Neb. 448, 62 N. W. 887.

[15] Cincinnati, etc., Co. v. Eaton, 94 Ind. 474; Terre Haute, etc., R. R. Co. v. Buck, 96 Ind. 346; Brown v. Chicago, etc., Ry. Co., 54 Wis. 342; Louisville, etc., R. R. Co. v. Sullivan, 81 Ky. 624; Schumaker v. St. Paul, etc., Ry. Co., 46 Minn. 39, 48 N. W. 559.

from him until it exploded near the plaintiff's eye, and blinded him. Here was but a single wrong; the original act of throwing the dangerous missile; and though the plaintiff would not have been harmed by it but for the subsequent acts of others throwing it in his direction, yet as these were instinctive and innocent, "it is the same as if a cracker had been flung, which had bounded and rebounded, again and again before it had struck out the plaintiff's eye," and the injury is therefore a natural and proximate result of the original act.[16] It is an injury that should have been foreseen by ordinary forecast; and the circumstances conjoined with it to produce the injury being perfectly natural, these circumstances should have been anticipated. Where a man with an axe chased a boy into a store, he was held liable for injury done by the boy in the store while endeavoring to escape.[17] A fireman on an engine, believing himself in peril from obstructions ahead, jumped from the train and hit a section hand beside the track. The company was held liable, the fireman being regarded as an inanimate object set in motion by the defendant's negligence.[18] The acts of children of immature age are viewed in the same light.[19]

"Where one party has been negligent, and the second party knowing of such antecedent negligence, fails to use ordinary care to prevent an injury which the antecedent negligence renders possible, and the injury follows by reason of such failure, the negligence of the second party is the sole proximate cause of the injury."[20] A brakeman on a freight train had a defect-

[16] Scott v. Shepherd, 3 Wils. 403; S. C. 2 W. Bl. 892. And see Scott v. Hunter, 46 Pa. St. 192, 84 Am. Dec. 542; Baltimore & Potomac R. R. Co. v. Reaney, 42 Md. 117, 136.

[17] Vandenburgh v. Truax, 4 Denio, 464, 47 Am. Dec. 268.

[18] Jackson v. Galveston, etc., R. R. Co., 90 Tex. 372, 38 S. W. 745. "The law presumes that an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily." Laidlow v. Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216.

[19] Harriman v. Pittsburg, etc., Ry. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Pittsburg, etc., Ry. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464.

[20] Bostwick v. Minneapolis, etc., Ry. Co., 2 N. D. 440, 51 N. W. 781. To same effect: Lloyd v. Albemarle, etc., R. R. Co., 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764; Railroad Co. v. Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R.

ive lantern which was liable to go out in the wind. In giving a signal the lantern went out and he started forward to the engine to relight and was thrown under the wheels by the sudden stopping of the train. The negligence of the company in supplying him with a defective lantern was held to be the proximate cause of his injury.[21] Car doors were left open and the cars became cold. Plaintiff shut the forward door and, in attempting to shut the rear door, was thrown out by a lurch of the train and injured. Negligence in leaving the doors open was the proximate cause.[22] A merchant sent out a cart to deliver parcels, with a servant to drive and a lad to deliver the parcels, who was forbidden to drive. The driver left the cart and went after oil for his lamp. While he was gone the lad turned the cart about and in doing so negligently injured the plaintiff. The negligence of the driver in leaving the cart was held to be the efficient cause of the accident.[23] In the following cases the negligence indicated was held to be the proximate cause of the injury sustained: A street car suddenly stopped in the middle of a block in violation of an ordinance and immediately in front of a funeral procession. The first carriage was brought to a sudden halt and the pole of the second carriage thrust through the back of the first and injured the plaintiff.[24] An engineer was killed by the derailing of his engine by a bull on the track which had come in through a defective fence which the company had negligently permitted to be out of repair.[25] The defendant's servants negligently threw snow against a telephone wire, causing it to break and fall across a trolley wire, whereby it became charged with elec-

A. 674; Hays v. Gainesville St. Ry. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; Sanches v. San Antonio, etc., Ry. Co., 88 Tex. 117, 30 S. W. 431; Thompson v. Salt Lake Rapid Transit Co., 16 Utah, 281, 52 Pac. 92, 67 Am. St. Rep. 621, 40 L. R. A. 172; Chesapeake, etc., Ry. Co. v. Rodgers, 100 Va. 324, 41 S. E. 732.

[21] Pennsylvania Co. v. Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251. Simmons v. East Tennessee, etc., Ry. Co., 92 Ga. 658, 18 S. E. 999, is a similar case.

[22] Denver, etc., R. R. Co. v. Bedell, 11 Colo. App. 139, 54 Pac. 280

[23] Engelhart v. Farrant, (1897) 1 Q. B. 240.

[24] Mueller v. Milwaukee St. Ry. Co., 86 Wis. 340, 56 N. W. 914, 21 L. R. A. 721.

[25] Dickson v. Omaha, etc., R. R Co., 124 Mo. 140, 27 S. W. 476.

tricity, and plaintiff's mule coming in contact with the wire on the street was killed.[26] A steamer was negligently run against the pier of a drawbridge. A stampede of passengers followed and the plaintiff was thrown down and trampled on.[27] A lower tenant negligently obstructed with boxes a stairway leading to the upper floors. A fire occurred and the upper tenant was obliged to get out of the window and was hurt in so doing.[28] Where a boy, carelessly or inadvertently pushed a second boy against a third boy and caused the latter to fall down an unguarded embankment, the want of a railing was held to be the proximate cause of the accident.[29] Where a horse is frightened by the negligence of defendant, such negligence is the proximate cause of any injury the runaway may do, either to himself, the vehicle attached, the occupants of the vehicle, or to the persons or property of third persons.[30] A man who had been up in a balloon landed upon private grounds, attracting upon them a considerable number of people, by whom the premises and crops were considerably damaged. For this he was held responsible as for a result he should have foreseen and avoided.[31] A man left fish brine, poisonous to cattle, in barrels in the street. Another seeing cattle trying to drink it, spilled it in the street. The cattle licked it up and died. The leaving it in barrels in the street was held the proximate cause.[32]

The defendant shipped a car load of petroleum in a car which had no valve to regulate the outflow of the oil. Owing to the

[26] Jones v. Finch, 128 Ala. 217, 29 So. 182.

[27] Southern Trans. Co. v. Harper, 118 Ga. 672, 45 S. E. 458.

[28] Cohn v. May, 210 Pa. St. 615, 105 Am. St. Rep. 840.

[29] Carterville v. Cook, 129 Ill. 152, 22 N. E. 14, 16 Am. St. Rep. 148, 4 L. R. A. 721.

[30] Railway Co. v. Roberts, 56 Ark. 387, 19 S. W. 1055; Thomas v. Royster, 98 Ky. 206, 32 S. W. 613; Smethurst v. Barton Square Church, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 550, 2 L. R. A. 695. But where a horse was frightened by the negligent operation of a steam roller and ruptured a blood vessel which caused his death, it was held that the negligence was not the proximate cause of the death of the horse. Lee v. Burlington, 113 Ia. 356, 85 N. W. 618, 86 Am. St. Rep. 379.

[31] Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234. See Fairbanks v. Alston, 70 Pa. St. 86, 91; Kerr v. Herring, 11 Exch. 812.

[32] Henry v. Dennis, 93 Ind. 452.

absence of the valve, when the consignee undertook to draw off the oil, it ran out so rapidly that it overflowed into the plaintiff's engine room beside the track, exploded and destroyed the mill. The loss was held not to be the proximate result of the defendant's negligence in regard to the valve.[33] Failure to stop a street car at the proper crossing is not the proximate cause of an injury to a passenger by reason of the defective or dangerous condition of the street which she is obliged to traverse because of the mistake.[34] The negligent or unlawful obstruction of a crossing by a railroad company is not the proximate cause of an injury sustained in attempting to go around the obstruction.[35] If there is a defect in a hitching post, and the horse hitched to it is frightened by the running away of another horse, and breaks the post and runs over a person in the street, the latter cannot maintain a suit for the defect in the post as the cause of his injury.[36]

§ 17. **Malice as a source of liability.** Bad motive, by itself, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.[37] "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."[38] "Any trans-

[33] Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253.

[34] Conway v. Lewiston, etc., Horse R. R. Co., 90 Me. 199, 38 Atl. 110; Joslyn v. Milford, etc., St. Ry. Co., 184 Mass. 65, 67 N. E. 866; Haley v. St. Louis Transit Co., 179 Mo. 30, 77 S. W. 731, 64 L. R. A. 295.

[35] Cleveland, etc., Ry. Co. v. Lindsay, 109 Ill. App. 533; Enochs v. Pittsburg, etc., Ry. Co., 145 Ind. 634, 44 N. E. 658; Kelley v. Texas, etc., Ry. Co., 97 Tex. 619, 80 S. W. 1197.

[36] Rockford v. Tripp, 83 Ill. 247. See further Dubuque Wood, etc., Ass'n v. Dubuque, 30 Ia. 176; Gould v. Slater Woolen Co., 147 Mass. 315, 17 N. E. 531.

[37] Jenkins v. Fowler, 24 Pa. St. 308, 310.

[38] Parke, B., in Stevenson v. Newnham, 13 C. B. 285, 297; Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233. See Floyd v. Barber, 12 Co. 23; Stowball v. Ansell, Comb. 11; Taylor v. Henniker, 12 Ad. & El. 488; Heald v. Carey, 11 C. B. 977. "Where one exercises a legal right only, the motive which actuates him is immaterial." Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225. And see Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367; London Guarantee & Acc. Co. v. Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185; Hollenbeck v. Ristine, 105 Ia. 488, 75 N. W.

action which would be lawful and proper, if the parties were friends, cannot be made the foundation of an action merely because they happened to be enemies. As long as a man keeps himslf within the law by doing no *act* which violates it, we must leave his motives to Him who searches the heart."[39] To state the point in a few words, whatever one has a right to do another can have no right to complain of.[40] The principle is forcibly illustrated by the case of *Mahan v. Brown.* In that case the plaintiff declared against the defendant for wantonly and maliciously erecting on his own premises a high fence, near to and in front of the plaintiff's windows, without benefit or advantage to himself, and for the sole purpose of annoying the plaintiff, thereby obstructing the air and light from entering her windows, and rendering her house uninhabitable. It was held that the action would not lie. "The defendant has not so used his property as to injure another. No one, legally speaking, is injured or damnified unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of that which did not belong to her; and whether the motives of the defendant were good or bad, she had no legal cause of complaint."[41] Many cases are to the same effect.[42] In Michigan

355, 67 Am. St. Rep. 306; Hollenbeck v. Ristine, 114 Ia. 358, 86 N. W. 377; Lancaster v. Hamburger, 70 Ohio St. 156, 71 N. E. 789, 65 L. R. A. 856; West Virginia Trans. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804; Allen v. Flood, (1898) A. C. 1; Quinn v. Leathem, (1901) A. C. 495; Temperton v. Russell, (1893) 1 Q. B. 715.

[39] Black, J., in Jenkins v. Fowler, 24 Pa. St. 308, 310. See Fowler v. Jenkins, 28 Pa. St. 176; Covanhovan v. Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373; Frazier v. Brown, 12 Ohio St. 294; Thomasson v. Agnew, 24 Miss. 93; McMillin v. Staples, 36 Iowa, 532; Brothers v. Morris, 49 Vt. 460; Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543; Estey v. Smith, 45 Mich. 402.

[40] Brewster v. Miller's Sons, 19 Ky. L. R. 593, 598, 41 S. W. 301; Fisher v. Feige, 137 Cal. 39, 69 Pac. 618, 59 L. R. A. 333; Bradford v. Pickles, (1895) A. C. 587.

[41] Mahan v. Brown, 13 Wend. 261, 265, 28 Am. Dec. 461.

[42] Lord v. Langdon, 91 Me. 221, 39 Atl. 552; Horan v. Byrnes, 70 N. H. 531, 49 Atl. 569; Panton v. Holland, 17 Johns. 92, 8 Am. Dec. 369; Harwood v. Tompkins, 24 N. J. L. 425; Jenks v. Williams, 115 Mass. 217; Thornton v. Thornton, 63 N. C. 211; Burke v. Smith,

such a structure, which serves no useful purpose and is erected out of spite, will be enjoined as a nuisance.[43] But in the same state it is not actionable to maliciously locate a coal and wood house so as to cut off the plaintiff's light and the principle of the former cases is confined to erections which serve no useful purpose and are purely malicious.[44] In some states an action is given in such cases by statute.[45] So it has been held that no action would lie for maliciously conspiring as insurance officers to refuse insurance on the plaintiff's property;[46] or for maliciously collecting the notes of a bank and presenting them for redemption;[47] or for maliciously adopting a trade mark to the prejudice of a plaintiff who has no exclusive right to appropriate it;[48] or for throwing open one's land to the public, so that they may pass over it, thereby avoiding a toll gate;[49] or for maliciously throwing down fences put up through one's land to mark the lines of a road which has never lawfully been laid out.[50] The malice of a witness in giving injurious testimony, or of a party in making injurious allegations in his pleadings cannot be the foundation of a suit.[51] Illustrations might be

69 Mich. 380, 37 N. W. 838; Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381, 21 Am. St. Rep. 510, 8 L. R. A. 183; Kirkwood v. Finnegan, 95 Mich. 543, 55 N. W. 457; Peek v. Roe, 110 Mich. 52, 67 N. W. 1080; Levy v. Brothers, 4 Misc. 48, 23 N. Y. S. 825; Metzger v. Hochrein, 107 Wis. 267, 83 N. W. 308, 81 Am. St. Rep. 841, 50 L. R. A. 305; Bordeaux v. Greene, 22 Mont. 254, 56 Pac. 218; Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; Anthony W. Live Stock Co. v. McIlquam, 14 Wyo. 209.

[43] Burke v. Smith, 69 Mich. 380, 37 N. W. 838; Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381, 21 Am. St. Rep. 510, 8 L. R. A. 183; Kirkwood v. Finnegan, 95 Mich. 543, 55 N. W. 457; Peek v. Roe, 110 Mich. 52, 67 N. W. 1080. And see Kessler v. Lett, 7 Ohio C. C. 108.

[44] Kuzniak v. Kozminski, 107 Mich. 444, 65 N. W. 275, 61 Am St. Rep. 344.

[45] Whitlock v. Uhle, 75 Conn 423, 53 Atl. 891; Lord v. Langdon 91 Me. 221, 39 Atl. 552; Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 12 Am. St. Rep. 560, 2 L. R. A. 81; Smith v. Morse, 148 Mass. 407, 19 N. E. 393; Brostrom v. Lauppe, 179 Mass. 315, 60 N. E. 785.

[46] Hunt v. Simonds, 19 Mo. 583

[47] South Royalton Bank v. Suffolk Bank, 27 Vt. 505.

[48] Glendon Iron Co. v. Uhler 75 Pa. St. 467, 15 Am. Rep. 599.

[49] Auburn, etc., P. R. Co. v Douglass, 9 N. Y. 444, 450.

[50] Fowler v. Jenkins, 28 Pa. St 176; Jenkins v. Fowler, 24 Pa. St. 308.

[51] Damport v. Simpson, Cro Eliz. 250; Revis v. Smith, 18 C. B. 125; Henderson v. Broomhead, 4

multiplied indefinitely, but it is needless.[52] And, on the other hand, the cases are equally numerous which show that the most correct motive, or even an inability to indulge a motive, will not protect one who invades the right of another. The legal wrong is found in the injury done and not in motive.[53] It is held in Indiana that if one appropriates subterranean waters maliciously and for the sole purpose of injuring his neighbor and does so injure him, he will be liable to an action.[54] But this is a disputed question.[55]

The question whether acts, otherwise lawful, may be actionable by reason of the motive with which they are done, has been much discussed in recent cases involving the rights of trade and labor.[56] In one of these cases the supreme court of Massachusetts says: "It is said also that where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. * * * If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either legally or logically sound. * * * In so far as a

H. & N. 569; Cunningham v. Brown, 18 Vt. 123, 46 Am. Dec. 140; Dunlap v. Glidden, 31 Me. 435, 52 Am. Dec. 625; White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 503.

[52] See Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225; Smith v. Johnson, 76 Pa. St. 191; Payne v. Railroad Co., 13 Lea, 507; Haywood v. Tillson, 75 Me. 225; Phelps v. Nowlen, 72 N. Y. 39; Chatfield v. Wilson, 28 Vt. 49.

[53] See Porter v. Thomas, 23 Ga. 467; Moran v. Smell, 5 W. Va. 26.

[54] Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. 849. So in Barclay v. Abraham, 121 Ia. 619, 96 N. W. 108, 100 Am. St. Rep. 365, 64 L. R. A. 255; Springfield W. W. Co. v. Jenkins, 62 Mo. App. 74. And see Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N. W. 907, 99 Am. St. Rep. 541, 60 L. R. A. 875; Miller v. Black Rock, etc., Co., 99 Va. 747, 40 S. E. 27; Chesley v. King, 74 Me. 164, 43 Am. Rep. 569; Stevens v. Kelley, 78 Me. 445, 6 Atl. 868, 57 Am. Rep. 813.

[55] Bradford v. Pickles, (1895) A. C. 587; and see *post*, § 300.

[56] *Post*, ch. IX.

right is lawful, it is lawful, and in many cases the right is so far absolute as to be lawful whatever be the motive of the action, as where one digs upon his own land for water, or makes a written lease of his land for the purpose of terminating a tenancy at will, but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause; and this justification may be found sometimes in the circumstances under which it is done irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined." [57]

Motive generally becomes important only when the damages for a wrong are to be estimated. It then comes in as an element of mitigation or aggravation, and is of the highest importance.[58] The unintended blow, though negligent, is excused, when the blow meant for an affront, though no heavier, is justly pun-

[57] Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339. In Hollenbeck v. Ristine, 105 Ia. 488, 75 N. W. 355, 67 Am. St. Rep. 306, the court says: "If one intentionally causes temporal loss and damage to another without justifiable cause and with malicious purpose to inflict it, that other may recover, in an action of tort, the damages he has sustained as a natural and proximate result of the wrong." S. C. 114 Ia. 358, 86 N. W. 377. See also Hollenbeck v. Hall, 103 Ia. 214; Stevens v. Kelley, 78 Me. 445, 6 Atl. 868, 57 Am. Rep. 813; Eidmiller Ice Co. v. Guthrie, 42 Neb. 238, 60 N. W. 717, 28 L. R. A. 581; Carrington v. Taylor, 11 East, 571; Keeble v. Hickeringill, 11 East, 574, note.

[58] "Where a tort is committed with a bad motive, or so recklessly as to imply a disregard of social obligations, and generally when the defendant appears to have done the act wantonly, maliciously, or wickedly, the jury may, in their discretion, give exemplary damages." Day v. Holland, 15 Ore. 464, 469, 15 Pac. 855; Louisville, etc., R. R. Co. v. Smith, 141 Ala. 335; Waters v. Dumas, 75 Cal. 563, 17 Pac. 685, Maisenbacker v. Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; Florida Central R. R. Co. v. Mooney, 40 Fla. 17, 24 So. 148; Jacobus v. Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; Cumberland Tel. & Tel. Co. v. Cassidy, 78 Miss. 666, 29 So. 762; Huling v. Henderson, 161 Pa. St. 553, 29 Atl. 276; Duckett v. Pool, 34 S. C. 311, 13 S. E. 542; Erie Tel. & Tel. Co. v. Kennedy, 80 Tex. 71, 15 S. W. 704; Gulf, etc., Ry. Co. v. Reed, 80 Tex. 362, 15 S. W. 1105, 26 Am. St. Rep. 749; Wood v. Am. Nat. Bank, 100 Va. 306, 40 S. E. 931; Spokane Truck & Dray Co. v. Hooper, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L. R. A. 689.

ished with heavy damages. The justice of this is universally and spontaneously conceded in private life and acted upon everywhere.

§ 18. **Injury sustained in wrong-doing.** It is a maxim of the law that no one shall be permitted to take advantage of his own wrong.[59] It follows from this maxim that one cannot recover for an injury to which his own wrong has contributed. This is illustrated by the doctrine of contributory negligence, which is held to bar the plaintiff's recovery.[60] What constitutes such contribution as will bar a recovery, is often a difficult question and is one upon which the authorities differ. Where a confederate soldier, while being transported on a railroad to the field of operations, was injured by the negligence of the railroad company, it was held that there could be no recovery, as both the plaintiff and the company were engaged in an illegal undertaking.[61] So where the plaintiff and others were engaged in a riotous proceeding and he was injured by the negligence of one of his fellows.[62] One who walks on the grass in a public park, in violation of a park regulation, cannot recover for falling into a trench.[63] Nor can a person recover for negligence in sending a telegram which relates to gambling in stocks.[64] So one cannot recover for fraud in a transaction in which he was a participant in the fraudulent purpose.[65] The question has been chiefly mooted in cases where the plaintiff was injured while traveling on Sunday in violation of the Sunday laws. In the New England states it has been repeatedly held that one who was traveling on Sunday in violation of law and was injured by a defect in the highway or by the negligence of a railroad company could not recover.[66] The severity

[59] Findon v. Parker, 11 M. & W. 675, 680; Doe v. Bancks, 4 Barn. & Ald. 401, 409; Malins v. Freeman, 4 Bing. N. C. 395, 399; Riggs v. Palmer, 115 N. Y. 506, 511, 22 N. E. 188, 12 Am. St. Rep. 819, 5 L. R. A. 340; New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591.

[60] See *post*, § 344.

[61] Turner v. North Car. Ry. Co., 63 N. C. 522. See Wallace v. Cannon, 38 Ga. 190; S. C. Smith's Cases on Torts, 106.

[62] Gilmore v. Fuller, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286.

[63] Sheehan v. Boston, 171 Mass. 296, 50 N. E. 543.

[64] Morris v. Western Union Tel. Co., 94 Me. 423, 47 Atl. 926.

[65] Peacock v. Terry, 9 Ga. 137.

[66] Bosworth v. Swansey, 10 Met. 363, 43 Am. Dec. 441; Jones v. Andover, 10 Allen, 18; Johnson

of the doctrine has been mitigated by the later cases which enlarge the scope of justifiable travel [67] and the doctrine itself has now been abolished by statute.[68] But the weight of authority is opposed to the New England cases and the fact that the plaintiff, at the time of the injury, was traveling in violation of law is regarded as a condition and not a cause.[69] So the plaintiff may now recover for injuries received while unlawfully at work on Sunday.[70] The question is much considered by the supreme court of Iowa in *Gross v. Miller*, where the defendant negligently shot the plaintiff while they were hunting together on Sunday in violation of the Sunday law. The doctrine of the Massachusetts cases was repudiated and the defendant held liable. The court says: "Men go hunting every day and no one reasonably anticipates that, as a result, one

v. Irasburg, 47 Vt. 28, 19 Am. Rep. 111; Holcomb v. Danby, 51 Vt. 428; Connolly v. Boston, 117 Mass. 64, 19 Am. Rep. 396; Hinckley v. Penobscot, 52 Me. 89; Tillock v. Webb, 56 Me. 100; Cratty v. Bangor, 57 Me. 423, 2 Am. Rep. 56; Stanton v. Met. R. R. Co., 14 Allen, 485; Bucher v. Fitchburg R. R. Co., 131 Mass. 156; Davis v. Somerville, 128 Mass. 594, 35 Am. Rep. 399.

[67] McClary v. Lowell, 44 Vt. 116, 8 Am. Rep. 366; Buck v. Biddeford, 82 Me. 433, 19 Atl. 912; Cleveland v. Bangor, 87 Me. 259, 32 Atl. 892; Sullivan v. Me. Cent. R. R. Co., 82 Me. 196, 19 Atl. 169, 8 L. R. A. 427; Hamilton v. Boston, 14 Allen, 475; Connolly v. Boston, 117 Mass. 64, 19 Am. Rep. 396.

[68] Bridges v. Bridges, 93 Me. 557, 45 Atl. 827; Acts, 1895, Me., C. 129; Jordan v. New York, etc., R. R. Co., 165 Mass. 346, 43 N. E. 111, 52 Am. St. Rep. 522, 32 L. R. A. 101; Stats., 1884. Mass. C. 37.

[69] Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; Mahoney v. Cook, 26 Pa. St. 342, 67 Am. Dec. 419; Carroll v. Staten Island R. R. Co., 58 N. Y. 126, 17 Am. Rep. 231; Opsahl v. Judd, 30 Minn. 126; Woodman v. Hubbard, 25 N. H. 67, 57 Am. Dec. 310; Norris v. Litchfield, 35 N. H. 271, 69 Am. Dec. 546; Corley v. Bath, Id. 530; Dutton v. Weare, 17 N. H. 34, 43 Am. Dec. 590; Philadelphia, etc., R. R. Co. v. Towboat Co., 23 How. 209; Black v. Lewiston, 2 Idaho, 276, 13 Pac. 80; Taylor v. Western Union Tel. Co., 95 Ia. 740, 64 N. W. 660; Kansas City v. Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; Delaware, etc., R. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435.

[70] Louisville, etc., Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520; Taylor v. Star Coal Co., 110 Ia. 40, 81 N. W. 249; Illinois Cent. R. R. Co. v. Dick, 91 Ky. 434, 15 S. W. 665; Eagan v. Maguire, 21 R. I. 189, 42 Atl. 506; Hoadley v. International Paper Co., 72 Vt. 79, 47 Atl. 69

will negligently shoot the other. As we have already indicated, the result was not to be expected from the act of going hunting on the Sabbath day. It was a result which, under other like circumstances, would be as likely to happen on any other day. We are unable to discover, on principle, any sound reason for holding that plaintiff should be deprived of the usual remedy given him by law for the injury sustained by the negligent act of another, because he and the other person were both violating the law, when it is clear that the violation of the law has no causative connection with the injury complained of, and plaintiff in no way contributed to the injury of which he complains." [71]

The fact that a party injured was at that time violating the law, does not put him out of protection of the law; [72] he is never put by the law at the mercy of others. If he is negligently injured in the highway, he may have redress, notwithstanding at the time he was on the wrong side of the way, provided this fact did not contribute to the injury.[73] So where one is injured by reason of a defect in a highway, it is no defense that he was at the time driving at an unlawful speed, provided the latter fact did not contribute to the injury.[74] So a party who engages in an unlawful game may recover for an injury suffered while playing it,[75] and so may one who participates in a race and is wilfully run down by his competitor.[76] Where the violation of law is merely a condition and not a con-

[71] Gross v. Miller, 93 Ia. 72, 82, 61 N. W. 385, 26 L. R. A. 605.

[72] Chesapeake, etc., Ry. Co. v. Jennings, 98 Va. 70, 77, 34 S. E. 986.

[73] Baker v. Portland, 58 Me. 199, 4 Am. Rep. 274; Daniels v. Clegg, 28 Mich. 32; Beckerle v. Weiman, 12 Mo. App. 354. See Stewart v. Machias Port, 48 Me. 477; Morton v. Gloster, 46 Me. 520. The fact that a vessel run into and injured by another was at the time disregarding the law in any particular, only bears on the question of negligence, and is not conclusive against a recovery of damages for the injury suffered from the collision. Blanchard v. Steamboat Co., 59 N. Y. 292; Hoffman v. Union Ferry Co., 68 N. Y. 385.

[74] Cullman v. McMinn, 109 Ala. 614, 10 So. 981; Broschart v. Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; Chesapeake, etc., Ry. Co. v. Jennings, 98 Va. 70, 34 S. E. 986.

[75] Etchberry v. Leiville, 2 Hilton, 40.

[76] Welch v. Wesson, 6 Gray, 505.

tributory cause of the injury a recovery may be had.[77] The fact that game is unlawfully exposed for sale and is subject to forfeiture by proper proceedings under the law, is no defense to an action of trover against one who has wrongfully seized it.[78] So an inn-keeper cannot excuse himself for the loss of his guest's property on the ground that it was intended for sale without a license in violation of law.[79] And where a sheriff wrongfully levied on the plaintiff's liquor and fixtures in his bar room, it was held to be no defense to an action of trespass that the business was carried on without a license, although this fact would preclude a recovery of special damages for injury to the business.[80] The employment of the property by the plaintiff in carrying on an unlawful business does not operate to defeat a right of recovery based on the right of property legally acquired, and of which he cannot be deprived except by due process of law. Such right of property will be protected against an unauthorized and wrongful seizure, notwithstanding plaintiff may, at the time, be using it in carrying on an illegal business.

By the decisions it is settled that if two persons voluntarily engage in a fight, which implies a license by each that the other may strike him, this license being illegal and void, either party injured by the other may have his action for the battery.[81] Further illustrations of the general principle may be found in those

[77] Newcomb v. Boston Protective Dept., 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; Delaware, etc., R. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435.

[78] Averill v. Chadwick, 153 Mass. 171, 26 N. E. 441.

[79] Cohen v. Manuel, 91 Me. 274, 39 Atl. 1030, 64 Am. St. Rep. 225, 40 L. R. A. 491.

[80] Smith v. Dinkelspiel, 91 Ala. 528, 8 So. 490.

[81] Boulter v. Clark, Bull. N. P. 16; Mathew v. Ollerton, Comb. 218; Logan v. Austin, 1 Stew. 476; Hannen v. Edes, 15 Mass. 346; Brown v. Gordon, 1 Gray, 182; Stout v. Wren, 1 Hawks, 420, 9 Am. Dec. 653; Bell v. Hansley, 3 Jones (N. C.), 131; Dole v. Erskine, 35 N. H. 503; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Bartlett v. Churchill, 24 Vt. 218; Shay v. Thompson, 59 Wis. 540, 48 Am. Rep. 538; Jones v Gale, 22 Mo. App. 637. See State v. Newland, 27 Kan. 764. The statutory penalty for refusing to send a message by telegraph is incurred, though the message was intended to accomplish an immoral purpose. Western U. Tel. Co. v. Ferguson, 57 Ind. 495.

cases in which it has been decided that even a trespasser may demand redress when the injury he receives can not be justified as a necessary and moderate employment of force in defense of one's person or possessions.[82]

§ 19. Torts by Relation. There are many cases in which one's right to institute proceedings for a wrong may only accrue after the wrong has been committed, and where, if he is wronged at all it must be by relation. The bankrupt law affords an illustration: the title of the assignee in bankruptcy relating back to the time when the act of bankruptcy was committed, so as to avoid all dispositions of his property made by the bankrupt after that time. The question then arises, what remedy the assignee may have against those who may have intermeddled with the goods, intermediate the act of bankruptcy and the suing out of the commission; and the rule, in England, is that trover may be brought for the value,[83] but not trespass.[84] It is a general rule that one shall not be made trespasser by relation;[85] but the rule will not prevent a party who has been wronged by unauthorized action before his title became perfected obtaining redress in some form of action; and if the injury consisted in making way with personal property, trover, in which the value might be recovered, would be the appropriate action, while trespass for the recovery of indefinite damages might not lie.[86] So case may be brought against one committing waste upon lands intermediate a purchase on execution

[82] Bird v. Holbrook, 4 Bing. 628; Loomis v. Terry, 17 Wend. 496, 31 Am. Dec. 306; Sherfry v. Bartley, 4 Sneed, 58, 67 Am. Dec. 597; Curtis v. Carson, 2 N. H. 539; Ogden v. Claycomb, 52 Ill. 365; Trogden v. Henn, 85 Ill. 237; Steinmetz v. Kelly, 72 Ind. 442. A trespasser may recover for an injury by a vicious bull kept on the land trespassed upon. Marble v. Ross, 124 Mass. 44.

[83] Balme v. Hutton, 9 Bing. 471, in which all prior cases are carefully reviewed. An assignee rightfully took possession of goods, but converted them prior to the appointment of a receiver. The latter was allowed to bring trover. Terry v. Bamberger, 14 Blatchf. 234.

[84] Smith v. Clarke, 1 T. R. 475.

[85] Case v. DeGoer, 3 Caines, 261; Jackson v. Douglass, 5 Cow. 458; Wickham v. Freeman, 12 Johns. 183; Bacon v. Kimmel, 14 Mich. 201. See Heath v. Ross, 12 Johns. 140; Hess v. Griggs, 43 Mich. 397; Ward v. Carp River Iron Co., 50 Mich. 522.

[86] Balme v. Hutton, 9 Bing. 471.

and the time when the title was perfected by deed,[87] and where a trespass was committed upon lands held in trust during a vacancy in the office of trustee and a trustee was afterwards appointed, it was held that his title related back and that he could sue for the wrong.[88] In the case of estates of deceased persons, however, the distinction between trespass and case as a remedy for wrongs intermediate the death of the testator or intestate and the issue of letters, does not appear to have been recognized, and the personal representative has been allowed to recover in either form of action, according as the facts would have warranted it had letters been issued before the wrong was done.[89]

87 Stout v. Keyes, 2 Doug. (Mich.) 184, 43 Am. Dec. 465. Trover will lie against the purchaser of logs cut by a trespasser between sale and delivery of deed. Whitney v. Huntington, 34 Minn. 458, 57 Am. Rep. 68.

88 Allison v. Little, 93 Ala. 150, 9 So. 388. And see Girard Life Ins. Co. v. Mangold, 94 Mo. App. 135, 67 S. W. 955; Chouteau v. Broughton, 100 Mo. 406, 13 S. W. 877.

89 Sharpe v. Stallwood, 5 M. & Gr. 760; Scarson v. Robinson, 2 Fost. & F. 351; Carlisle v. Benley, 3 Me. 250; Valentine v. Jackson, 9 Wend. 302; Manwell v. Briggs, 17 Vt. 176; Brackett v. Hoitt, 20 N. H. 257; Bell v. Humphrey, 11 Humph. 451; Marcey v. Howard, 91 Ala. 133, 8 So. 566.

CHAPTER II.

THE PARTIES WHO MAY BE HELD RESPONSIBLE FOR TORTS.

§ 20. **Liability of infants and incompetents for contracts and crimes.** The rules of law respecting the capacity to form contract relations, and the consequent liability for failure to observe such as are entered into, are in the main very precise and definite. Leaving out of view a few exceptional cases, and speaking generally, it may be said that one is not authorized to deal with others on the footing of contract, unless he is of the full age of twenty-one years; and that he cannot make the most simple agreement, or enter into the most ordinary legal obligation a day earlier. Neither can he enter into contracts if he is unsound in mind; but his care and protection, and the making of contracts therefor must devolve upon others. It of course follows that, if contracts are made with infants or persons of unsound mind, there is no legal liability upon such contracts on the part of such incompetents.

There are also rules of a like definite character as regards criminal responsibility. An infant under the age of seven can commit no offense against the state. The reason is, that at that immature period he is incapable of understanding political or social duties or obligations, and the law assumes, as a conclusion not to be disputed—not to be put aside by the uncertain judgment of others—that he cannot harbor a criminal intent. After that age, until he reaches fourteen, the case is open to proof of actual capacity and actual malice. An idiot or an insane person is also incapable of committing a crime, and to punish one of these as a criminal would be to punish him for a mere animal or insane impulse, or for mere unreasoning and motiveless action, for which he was in no proper sense responsible; to punish him, in short, for his misfortune.

§ 21. **Torts by lunatics and persons of unsound mind.** In determining whether there shall be civil responsibility for wrongs suffered, a standpoint altogether different is occupied. A

wrong is an invasion of right, to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose, or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore the law, in giving redress, has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. A blow by a youth of eighteen may inflict as serious an injury as a blow by a man of mature years, and the torch of a child may destroy a house as effectually as though applied on the twenty-first birthday, instead of the tenth. If, therefore, redress is the object of the law, the party injured should have the same redress in the one case as is provided for him in the other. Neither is it now protection to society that is sought, except as any enforcement of just laws tends incidentally to its protection. There is consequently no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him; for, as is said in an early case "the reason is, because he that is damaged ought to be recompensed."[1] If recompense is what the law aims at, it is readily perceived that the question of civil responsibility for wrongs suffered is one that directs our attention chiefly to the injury done; and that the weakness of the party committing it, or the absence of any deliberate purpose to injure, must commonly be of little or no importance.

It has accordingly always been held that insane persons and other like incompetents are responsible for damages, resulting from their tortious actions the same as other persons,[2] and it

[1] Lambert v. Bersey, L. Raym. 421. See Bersey v. Olliott, L. Raym. 467.

[2] 2 Saund. Pl. and Ev. 318, 1163; 1 Chit. Pl. 76; Shearm. & Redf. on Neg. §§ 51, 57; Weaver v. Ward, Hob. 134; Moore v. Crawford, 17 Vt. 499; Bush v. Pettibone, 4 N. Y. 300; Krom v. Schoonmaker, 3 Barb. 650; Cross v. Kent, 32 Md. 581; Behrens v. McKenzie, 23 Ia. 343, 92 Am. Dec. 428; Lancaster Co. Bank v. Moore, 78 Pa. St. 407, 412; McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140; Field v. Borodofski, 87 Miss. 727; Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153; Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423.

has given all the usual remedies against them, even to the very severe one of the taking of the body in execution while that barbarous mode of compelling redress was allowable in other cases.[3] The question of liability in such cases is one of public policy and all questions of public policy must be settled on a consideration of what on the whole is the rule that will best subserve the public welfare. The reasons in support of the rule adopted are thus succinctly stated by the supreme court of Illinois: "If an insane person is not held liable for his torts, those interested in his estate, as relatives or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries upon others. There is more injustice in denying to the injured party the recovery of damages for the wrong suffered by him, than there is in calling upon the relatives or friends of the lunatic to pay the expenses of his confinement, if he has an estate ample enough for that purpose. The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons. Again, if parties can escape the consequences of their injurious acts upon the plea of lunacy, there will be a strong temptation to simulate insanity with a view of masking the malice and revenge of an evil heart."[4]

There is no distinction as to liability between torts of nonfeasance and of misfeasance, because the ground of liability is the damage caused by the tort.[5] And in all cases the recovery must be limited to the actual damages sustained and nothing can be given by way of vindictive damages, because the lunatic is incapable of legal malice.[6] Upon the same principle a lunatic is not responsible for a tort, in which malice is an essential ingredient,[7] such as slander.

[3] Ex parte Leighton, 14 Mass. 207.

[4] McIntyre v. Sholty, 121 Ill. 660, 664, 665, 13 N. E. 239, 2 Am. St. Rep. 140.

[5] Williams v. Hays, 143 N. Y. 442, 451, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153.

[6] Krom v. Schoonmaker, 3 Barb. 650; McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140; Mutual Fire Ins. Co. v. Showalter, 3 Pa. Super. Ct. 452.

[7] Irvine v. Gibson, 117 Ky. 306; Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58; Horner v. Marshall, 5 Munf. 466; Bryant v. Jackson, 6 Humph. 199; Yeates v. Reed, 4 Blackf. 463, 32 Am. Dec. 43; Gates v. Meredith, 7 Ind. 440.

§ 22. Torts by infants. The general rule is that an infant is responsible for his torts, as any other person would be.[8] The following cases are illustrations: Where boys of twelve and fourteen trespassed upon a school district and disturbed the school;[9] where a boy of six broke and entered the plaintiff's premises and broke down and destroyed his shrubbery and flowers;[10] where an infant committed a disseisin and ejectment was brought against him;[11] where an infant lessee carried off and converted to his own use crops to which he was not entitled;[12] where an infant employe embezzled his employer's property which had been committed to his charge;[13] where an infant induced another to commit a trespass,[14] and so on. In those cases in which malice is a necessary ingredient in the wrong, an infant may or may not be liable, according as his age and capacity may justify imputing malice to him or preclude the idea of his indulging it. Infants are liable for their negligences,[15] but the question of what constitutes negligence in an infant will depend largely upon his age, experience and

[8] Burnard v. Haggis, 14 C. B. (N. S.) 45; Mills v. Graham, 4 B. & P. 140; Campbell v. Stakes, 2 Wend. 138, 19 Am. Dec. 561; Hartfield v. Roper, 21 Wend. 620, 34 Am. Dec. 273; Neal v. Gillett, 23 Conn. 437; Sikes v. Johnson, 16 Mass. 389; Walker v. Davis, 1 Gray, 506; Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81; Stringer v. Frost, 116 Ind. 477, 19 N. E. 331, 9 Am. St. Rep. 875, 2 L. R. A. 614; Smith v. Davenport, 45 Kan. 423, 25 Pac. 851, 11 L. R. A. 429; Becker v. Mason, 93 Mich. 336, 53 N. W. 361; Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64; Fry v. Leslie, 87 Va. 269, 12 S. E. 671.

[9] School District v. Bragdon, 23 N. H. 507.

[10] Huchting v. Engel, 17 Wis. 230, 84 Am. Dec. 741.

[11] Marshall v. Wing, 50 Me. 62, citing McCoon v. Smith, 3 Hill, 147, 38 Am. Dec. 623; Beckley v. Newcomb, 24 N. H. 363.

[12] Baxter v. Bush, 29 Vt. 465, 70 Am. Dec. 429, citing Green v. Sperry, 16 Vt. 392, 42 Am. Dec. 519. See, also, Walker v. Davis, 1 Gray, 506; Green v. Sperry, 16 Vt. 390; Oliver v. McClellan, 21 Ala. 675.

[13] Peigne v. Sutcliffe, 4 McCord, 387. Further, as to conversions, see Manby v. Scott, 1 Sid. 129; Bristow v. Eastman, 1 Esp. 172; Conklin v. Thompson, 29 Barb. 218; Moore v. Eastman, 1 Hun, 578; S. C. 4 N. Y. Sup. Ct. (T. & C.) 37.

[14] Sykes v. Johnson, 16 Mass. 389. An infant held liable for seduction, Becker v. Mason, 93 Mich. 336, 53 N. W. 361; for reckless driving, Stringer v. Frost, 116 Ind. 477, 19 N. E. 331, 9 Am. St. Rep. 875, 2 L. R. A. 614.

[15] Neal v. Gillett, 23 Conn. 437;

capacity.[16] The fact that an act committed by an infant was advised or commanded by one occupying a position of influence or authority over him is not important when an action of tort is brought against him, as it might be in some cases, were a criminal prosecution to be instituted. Therefore it is no defense for the infant, that in what he did he was merely obeying his father's command.[17]

There are some cases, however, in which an infant cannot be held liable as for tort, though on the same state of facts a person of full age and legal capacity might be. The distinction is this: If the wrong grows out of contract relations, and the real injury consists in the non-performance of a contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it as a tort. Therefore, if case be brought against an infant for the immoderate use and want of care of a horse which has been bailed to him, infancy is a good defense; the gravamen of the complaint being merely a breach of the implied contract of bailment.[18] So infancy is a defense to an action by a ship owner against his supercargo for a breach of his instructions regarding a sale of the cargo, whereby the same was lost or destroyed.[19] So where an infant was entrusted with goods to be sold for cash only and he sold the same on credit, it was held that he could not be made liable in trover, as the gravamen of the action was a breach of contract.[20] The defendant, an infant, contracted to thresh the plaintiff's wheat with his steam thresher. Owing, as alleged, to the lack of a spark arrester and to the manner of locating

Baker v. Morris, 33 Kan. 580, 7 Pac. 267; McCabe v. O'Connor, 4 App. Div. 354, 38 N. Y. S. 572; Way v. Powers, 57 Vt. 135.

[16] See *post*, § 352.

[17] Humphrey v. Douglass, 10 Vt. 71, 33 Am. Dec. 177; Scott v. Watson, 46 Me. 362, 74 Am. Dec. 457. See Tifft v. Tifft, 4 Denio, 175; Wilson v. Garrard, 59 Ill. 51.

[18] Jennings v. Rundall, 8 T. R. 336. See Manby v. Scott, 1 Sid. 129; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189; Root v. Stevenson, 24 Ind. 115; Young v. Nubling, 48 App. Div. 617, 63 N. Y. S. 181.

[19] Vasse v. Smith, 6 Cranch, 126; S. C. 1 Am. Lead. Cas. 237; S. C. Ewell's Lead. Cas. 195. See Studwell v. Shapter, 54 N. Y. 249.

[20] Caswell v. Parker, 96 Me. 39, 51 Atl. 238. See Stone v. Rabinowitz, 45 Misc. 405, 90 N. Y. S. 301.

the engine with respect to the wind, the plaintiff's wheat and barn were destroyed. It was held that the defendant was not liable, as the real ground of action was negligence in the performance of a contract.[21] "The test of an action against an infant," says the court, "is whether a liability can be made out without taking notice of the contract."

There are cases in which it has been decided that if property is bailed to an infant for a definite purpose, and he does in respect to it some specific wrongful act not warranted by the bailment, and which would have rendered any other person responsible to the bailor in an action as for a conversion, the infant is also liable to a like action. Thus, it has been held that an infant who hires a horse to go to a place agreed upon, but drives him to another, in a different direction, is liable in trover for an unlawful conversion of the horse.[22] It has also been held, that if an infant hires a horse, and is guilty of such violence and cruelty as to cause its death, an action of trespass may be maintained against him, though, had an action been brought on the contract of bailment, infancy would have been a defense.[23] But this doctrine has been criticised.[24]

If an infant effects a sale by means of deception and fraud, his infancy protects him.[25] The general rule on this subject has been given in a recent case as follows: "An infant is liable in an action *ex delicto* for an actual and willful fraud only in cases

[21] Lowery v. Cate, 108 Tenn. 54, 64 S. W. 1068, 91 Am. St. Rep. 744, 57 L. R. A. 673.

[22] Homer v. Thwing, 3 Pick. 492; S. C. Ewell's Lead. Cas. 188. See, also, Fish v. Ferris, 5 Duer, 49; Woodman v. Hubbard, 25 N. H. 73, 57 Am. Dec. 310; Eaton v. Hill, 50 N. H. 235, 240, 9 Am. Rep. 189; Towne v. Wiley, 23 Vt. 355, 46 Am. Dec. 85; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Schenk v. Strong, 4 N. J. 87; Freeman v. Boland, 14 R. I. 39, 51 Am. Rep. 340; Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64; Tucker v. Moreland, 10 Pet. 58.

[23] Walworth, Chancellor, Campbell v. Stakes, 2 Wend. 137, 143, 144, 19 Am. Dec. 561; Fish v. Ferris, 5 Duer, 50. And see Moore v. Eastman, 1 Hun, 578; S. C. 4 N. Y. Sup. Ct. (T. & C.) 37; Lewis v. Littlefield, 15 Me. 235; 1 Pars. on Cont. 264; Burnard v. Haggis, 14 C. B. (N. S.) 45.

[24] Wilt v. Welsh, 6 Watts, 9; Penrose v. Curren, 3 Rawle, 351, 24 Am. Dec. 356; Livingston v. Cox, 6 Pa. St. 360.

[25] Green v. Greenbank, 2 Marsh. 485.

in which the form of action does not suppose that a contract has existed; but where the gravamen of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense. For simple deceit on a contract of sale or exchange there is no cause of action, unless some damage or injury results from it; and proof of damage could not be made without referring to and proving the contract. An action on the case for deceit on a sale is an affirmance by the plaintiff of the contract of sale; and the liability of the defendant in such an action could not be established without taking notice of and proving the contract."[26] And the same rule applies if, in the purchase of property, he is guilty of fraud or deception, by means whereof the owner is induced to make a sale.[27]

The question whether an infant is liable in tort for falsely representing himself to be of full age, whereby he induces another to contract with him to his prejudice, is one upon which great differences of judicial opinion have been expressed. In England it is thoroughly established that he is not liable.[28] The English cases have often been approved in this country, and the tendency of authority here is with them.[29] But other cases hold the contrary.[30]

[26] Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659, per Kellogg, J. See Graves v. Neville, 1 Keb. 778; Word v. Vance, 1 Nott & McC., 197, 9 Am. Dec. 683; Nolan v. Jones, 53 Ia. 387.

[27] Brown v. Dunham, 1 Root, 272. In Wallace v. Morss, 5 Hill, 391, an infant is held by the court (Cowen, J.), "chargeable by action for a tort in obtaining goods fraudulently, with an intention not to pay for them; but this is explained in a subsequent case as having been probably an action of trover to recover the value of goods obtained by false representations, and the title to which consequently did not pass." Campbell v. Perkins, 8 N. Y. 430, 440. It has been decided in Illinois, that if an infant makes a purchase for cash, and pretends to make payment by delivery of a check on a bank where he has no funds, the title to the property does not pass, and its value may be recovered in trover. Mathews v. Cowan, 59 Ill. 341.

[28] Johnson v. Pye, 1 Lev. 169; 1 Sid. 258, and 1 Keb. 905; Price v. Hewett, 8 Exch. 146; Liverpool, etc., Association v. Fairhurst, 9 Exch. 422; Bartlett v. Wells, 31 L. J. Q. 57; S. C. 1 B. & S. 836; Wright v. Leonard, 11 J. Scott (N. S.), 258; De Roo v. Foster, Ib. 272.

[29] Brown v. Dunham, 1 Root, 272; Geer v. Hovey, Ib. 179; Wilt

The protection against personal responsibility which the law accords to an infant does not go so far as to vest in him the title to property which he has obtained by fraud, or on a contract which he disaffirms. If he still retains the property when the contract is disaffirmed, he must restore it on demand, and on his failure to do so, the original owner may obtain it on replevin, or recover its value in an action of trover.[31] And where the property was obtained by fraud the infant has been held liable, though the conversion took place before the time when the price was payable by the terms of the fraudulent contract.[32]

As the doctrine *respondeat superior* rests upon the relation of master and servant, which depends upon contract, actual or implied, it is obvious that it can have no application in the case of an infant employer, and he, therefore, is not responsible for torts of negligence by those in his service.[33] Nor can he be made a trespasser by relation through the ratification of a

v. Welsh, 6 Watts, 9; Curtin v. Patton, 11 S. & R. 309; Stoolfodz v. Jenkins, 12 S. & R. 403; Kean v. Coleman, 39 Pa. St. 299, 80 Am. Dec. 524; Homer v. Thwing, 3 Pick. 492; Merriam v. Cunningham, 11 Cush. 40; Carpenter v. Carpenter, 45 Ind. 142; Burns v. Hill, 19 Ga. 22; Kilgore v. Jordan, 17 Texas, 341; Tucker v. Moreland, 10 Pet. 59; Slayton v. Barry, 175 Mass. 513, 56 N. E. 574, 78 Am. St. Rep. 510, 49 L. R. A. 560; Brooks v. Sawyer, 191 Mass. 151; New York B. L. B. Co. v. Fisher, 23 App. Div. 363, 48 N. Y. S. 152; Nash v. Jewett, 61 Vt. 501, 18 Atl. 47, 15 Am. St. Rep. 931, 4 L. R. A. 561.

[30] See Ward v. Vance, 1 N. & McCord, 197; Peigne v. Sutcliffe, 4 McCord, 387; Fritz v. Hall, 9 N. H. 441; Norris v. Vance, 3 Rich. 164; Seabrook v. Gregg, 2 S. C. (N. S.) 79. All the cases agree that, if an infant is sued on his contract, his fraud will not preclude his relying upon his infancy as a defense in that suit. Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146; Merriam v. Cunningham, 11 Cush. 40; Brown v. McCune, 5 Sandf. (S. C.) 244; Studwell v. Shafter, 54 N. Y. 249. There are statutes in some States rendering infants responsible for their false assertions of majority. See Schouler, Dom. Rel. 570; Ewell's Lead. Cas. 205, 206.

[31] Mills v. Graham, 1 New Rep. 140; Badger v. Phinney, 15 Mass. 359, 18 Am. Dec. 105; Walker v. Davis, 1 Gray, 506; Kilgore v. Johnson, 17 Tex. 341; Ashlock v. Vivell, 29 Ill. App. 388; Pars. on Cont. 5th ed. 319; Reeve, Dom. Rel. 244; Schouler, Dom. Rel. 555.

[32] Walker v. Davis, 1 Gray, 506; Schouler, Dom. Rel. 555, 556.

[33] Robbins v. Mount, 4 Robt. 553; S. C. 33 How. Pr. 34.

wrongful act which another has assumed to do on his behalf, but without his knowledge.[34]

It seems that if an infant tortiously convert the money of another to his own use, or tortiously dispose of the property of another, receiving money therefor, the tort may be waived and assumpsit maintained.[35]

§ 23. Parent's liability for torts of child. A father is not liable, merely because of the relation, for the torts of his child, whether the same are negligent or willful.[36] "Where a minor son who lives with his father and is under his father's control commits certain wrongful acts, but where the said acts have not been authorized by the father, are not done in his presence, have no connection with the father's business, are not ratified by the father, and from which the father receives no benefit, the father is not liable in a civil action for damages for such wrongful acts."[37] He is liable only on the same grounds that he would be liable for the wrong of any other person, as that he directed or ratified the act, or took the benefit of it, or that the child was at the time acting as his servant.[38] There is no

[34] Burnham v. Seaverns, 101 Mass. 260, 100 Am. Dec. 123. See Armitage v. Widoe, 36 Mich. 124. Nor is he liable as innkeeper upon the custom of the realm. Cross v. Andrews, Carth. 161; Cro. Eliz. 622.

[35] Bristow v. Eastman, 1 Esp. 172; Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290. See Peigne v. Sutcliffe, 4 McCord, 387; Munger v. Hess, 28 Barb. 75. The reasons for this rule are well set forth in Elwell v. Martin, 32 Vt. 217.

[36] Shockley v. Shepherd, 9 Houst. 271, 37 Atl. 173; Chastain v. Johns, 120 Ga. 977, 48 S. E. 343; Malmberg v. Bartos, 83 Ill. App. 481; Palm v. Iverson, 117 Ill. App. 535; Baker v. Morris, 33 Kan. 580; Smith v. Davenport, 45 Kan. 423, 25 Pac. 851, 23 Am. St. Rep. 737, 11 L. R. A. 429; Panley's Guardian v. Draine, 9 Ky. L. R. 693; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 432; Brohl v. Lingeman, 41 Mich. 711; Schlossberg v. Lahr, 60 How. Pr. 450; Kumba v. Gilham, 103 Wis. 312, 79 N. W. 329.

[37] Edwards v. Crume, 13 Kan. 348; Baker v. Morris, 33 Kan. 580, 7 Pac. 267, citing Baker v. Holdeman, 24 Mo. 219; Tift v. Tift, 4 Denio, 175; Moon v. Towers, 8 C. B. (N. S.) 611, 98 E. C. L. R. 611; McManus v. Crickett, 1 East, 106.

[38] Shockley v. Shepherd, 9 Houst. 271, 37 Atl. 173; Chastain v. Johns, 120 Ga. 977, 48 S. E. 343; Smith v. Davenport, 45 Kan. 423, 25 Pac. 851, 23 Am. St. Rep. 737, 11 L. R. A. 429; Hower v. Ulrich, 156 Pa. St. 410, 27 Atl. 37; Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325.

necessary presumption that the child is acting as a servant of the father,[39] but it will be so presumed when the child is living at home and using his father's team with which he does the wrong.[40]

§ 24. Torts by drunkards. The fact that a tort was committed while a defendant was intoxicated is no excuse whatever. This has been held in actions for slander.[41] It is conceivable, however, that the amount of the recovery might be considerably affected by a showing that the wrong was committed under such conditions that no one would have been likely to attach importance to the utterances.

§ 25. Torts by married women. At the common law where husband and wife jointly commit a tort, the action therefor is properly brought against the husband alone, for the whole may be assumed to be his act.[42] To charge him the action must be brought to a conclusion during their joint lives.[43] If she survives him the suit may proceed against her separately.[44] When a wrong is committed by the wife in the presence of her husband there is a presumption that she acted with his consent and under his influence, and consequently, that it is his wrong rather than that of the wife and should be redressed in a suit against him alone.[45] But this presumption may be rebutted by

[39] Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325.

[40] Schoefer v. Osterbrink, 67 Wis. 495, 30 N. W. 922.

[41] St. Ores v. McGlashen, 74 Cal. 148, 15 Pac. 452; McKee v. Ingalls, 5 Ill. 30; Reed v. Harper, 25 Ga. 87, 95 Am. Dec. 774.

[42] Com. Dig. Baron & Feme. V.; 2 Saund. Pl. & Ev. 192; McKeowen v. Johnson, 1 McCord, 578, 10 Am. Dec. 698; Cassin v. Delany, 38 N. Y. 178; Crow v. Manning, 45 La. Ann. 1221, 14 So. 122; Longey v. Leach, 57 Vt. 377.

[43] Wright v. Leonard, 11 C. B. (N. S.) 258, 266; Strouse v. Leiff, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622; Henley v. Wilson, 137 Cal. 273, 70 Pac. 21, 92 Am. St. Rep. 160; Bruce v. Bombeck, 79 Mo. App. 231; Fitzgerald v. Quam, 109 N. Y. 441, 17 N. E. 354; Presnell v. Moore, 120 N. C. 390, 27 S. E. 27; Crawford v. Doggett, 82 Tex. 139, 17 S. W. 929, 27 Am. St. Rep. 859.

[44] Capel v. Powell, 17 C. B. (N. S.) 744; Smith v. Taylor, 11 Geo. 20, 22; Estill v. Fort, 2 Dana, 237; Hawk v. Harman, 5 Binn. 43.

[45] Ball v. Bennett, 21 Ind. 427, 83 Am. Dec. 356; Baker v. Young, 44 Ill. 42, 92 Am. Dec. 149; Brazil v. Moran, 8 Minn. 236, 83 Am. Dec. 772; Quick v. Miller, 103 Pa. St. 67; Kosminsky v. Goldberg, 44 Ark. 401; Smith v. Schoene, 67 Mo. App. 604; Henderson v. Wendler, 39 S. C. 555, 17 S. E. 851; Ed

evidence.[46] In other cases of torts by the wife the husband is liable jointly with the wife.[47] And this rule applies to the antenuptial torts of the wife.[48]

While the husband is liable for the torts committed by the wife,[49] this liability only continues during coverture and cannot be enforced after a divorce is granted[50] nor against his estate after his death.[51] Nor is the husband liable for a tort committed by his wife before marriage and while she was the wife of another man.[52]

But the element of contract is as important here as in the law of infancy. The same reasons which would preclude the indirect redress of the infant's breach of contract, by treating it as a tort, will preclude the like redress in the case of the contract of a married woman.[53] And here, also, we encounter the same

wards v. Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789; Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791. Compare Hildreth v. Camp, 41 N. J. L. 306.

[46] Smith v. Schoene, 67 Mo. App. 604; Edwards v. Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789; Miller v. Sweitzer, 22 Mich. 391; Cassin v. Delaney, 38 N. Y. 178; 2 Bishop, Married Women, § 258; Nolan v. Traber, 49 Md. 460, 33 Am. Rep. 277; Bethel v. Otis, 92 Ia. 502, 61 N. W. 200; Ferguson v. Brooks, 67 Me. 251.

[47] 1 Chitty, Pl. 92; Bethel v. Otis, 92 Ia. 502, 61 N. W. 200; Baker v. Young, 44 Ill. 42; Carlton v. Haywood, 49 N. H. 314; Nolan v. Traber, 49 Md. 460, 33 Am. Rep. 277; Crawford v. Doggett, 82 Tex. 139, 17 S. W. 929, 27 Am. St. Rep. 859; Presnell v. Moore, 120 N. C. 390, 27 S. E. 27; Wheeler & W. Mfg. Co. v. Heil, 115 Pa. St. 487, 8 Atl. 616, 2 Am. St. Rep. 75; Handy v. Foley, 121 Mass. 259, 23 Am. Rep. 270; Head v. Briscoe, 5 C. & P. 484; Capel v. Powell, 17 C. B. (N. S.) 744.

[48] Bobe v. Frowner, 18 Ala. 89; Ferguson v. Collins, 8 Ark. 241; Knowing v. Manly, 49 N. Y. 192, 10 Am. Rep. 346; Hawk v. Harmon, 5 Binney, 43.

[49] Henly v. Wilson, 137 Cal. 273, 70 Pac. 21, 92 Am. St. Rep. 160; Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; Taylor v. Pullen, 152 Mo. 434, 53 S. W. 1086; Fitzgerald v. Quam, 109 N. Y. 441, 17 N. E. 354; Mangam v. Peck, 111 N. Y. 401, 18 N. E. 617; Presnell v. Moore, 120 N. C. 390, 27 S. E. 27; Henderson v. Wendler, 39 S. C. 555, 17 S. E. 851.

[50] Capel v. Powell, 17 C. B. (N. S.) 743; Ferguson v. Collins, 8 Ark. 241; Knowing v. Manly, 49 N. Y. 192, 10 Am. Rep. 346.

[51] Id.; Wright v. Leonard, 11 C. B. (N. S.) 258; Smith v. Taylor, 11 Ga. 20; Estill v. Fort, 2 Dana, 237; Kosminsky v. Goldberg, 44 Ark. 401.

[52] Culmer v. Wilson, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713.

[53] See Burnard v. Haggis, 14 C. B. (N. S.) 45; Culmer v. Wilson,

difficulties when we undertake to draw the line of distinction between cases which are really in their substance cases of contract, though a wrong may be involved, and cases in which a wrong stands apart from the contract. The English cases, which hold, as we have seen, that an infant cannot be made liable as for a tort for falsely affirming that he is of age, and thereby effecting a contract, are supported in their principle by others, which affirm that the wife may rely upon her coverture as a defense to contracts obtained by her on a false assertion that she was unmarried.[54]

In the recent changes in the common law effected by statute in the several states, whereby married women have been given an independent power to make contracts and to control property, it is not very clear how far the law of torts has been modified. We should probably be safe in saying that so far as they give validity to a married woman's contracts, they put her on the same footing with other persons, and when a failure to perform a duty under a contract is in itself a tort, it may doubtless be treated as such in a suit against a married woman.[55] The same would probably be true of any breach of a duty imposed upon a married woman as owner of property which she possesses and controls the same as if sole and unmarried. In a case of this sort the supreme court of Indiana says: "Where the wrong relates to the use or management of their separate estates, as in this case, the torts of married women, committed by the violation of any duty imposed upon them by law with respect to such estates, create the same liability against them as if they were unmarried. And this would be so without regard to the statute above referred to, under the maxim *sic utere*, etc. Having been relieved of their disabilities and empowered to own and control separate estates as *femmes sole*, they take the right with all its incidents, and must, therefore, like all other persons, use their property with due regard for the rights

13 Utah, 129, 44 Pac. 833, 37 Am. St. Rep. 713.

[54] See Cooper v. Witham, 1 Lev. 247; 1 Sid. 375; 2 Keb. 399. See Woodward v. Barnes, 46 Vt. 332, 14 Am. Rep. 626; Keen v. Coleman, 39 Pa. St. 299, 80 Am. Dec. 524.

[55] Culmer v. Wilson, 13 Utah, 129, 44 Pac. 833, 37 Am. St. Rep. 713.

of others."[56] In regard to the effect of such acts upon the liability of the husband for the wife's torts in general, there is a difference of opinion, explainable in part perhaps by the difference in the statutes under consideration. Some courts, applying the rule that statutes changing the common law are strictly construed and should not be deemed to abrogate it further than the language of the statutes clearly and necessarily requires,[57] hold, that the acts in question do not affect the common-law liability of the husband for his wife's torts.[58] Other courts hold that these acts have abrogated the reason upon which the common-law rule is founded and that consequently the rule has ceased to exist.[59] Some of the states have statutes which expressly exempt the husband from liability for the wife's torts, in which he in no way participated.[60]

[56] Mayhew v. Burns, 103 Ind. 328, 337, 2 N. E. 793; Henley v. Wilson, 137 Cal. 273, 70 Pac. 21, 92 Am. St. Rep. 160, 58 L. R. A. 941.

[57] 2 Lewis' Sutherland on Stat. Constr. § 573.

[58] Henley v. Wilson, 137 Cal. 273, 70 Pac. 21, 92 Am. St. Rep. 160, 58 L. R. A. 941; McElfresh v. Kirkendell, 36 Ia. 224; Seroka v. Kattenburg, 17 Q. B. D. 177; Taylor v. Pullen, 152 Mo. 434, 53 S. W. 1086; Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947; Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912, 54 A. S. R. 647, 30 L. R. A. 521; Holz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Choen v. Porter, 66 Ind. 194.

[59] Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578; Chicago, etc., R. R. Co. v. Dickson, 77 Ill. 331; Norris v. Corkhill, 32 Kan. 409, 4 Pac. 862, 49 Am. Rep. 489; Lane v. Bryant, 100 Ky. 138, 37 S. W. 584, 36 L. R. A. 709. And see generally Bethel v. Otis, 92 Ia. 502, 61 N. W. 200; McClure v. McMartin, 104 La. Ann. 496, 29 So. 227; Marcus v. Rovinsky, 95 Me. 106, 49 Atl. 420; Fitzgerald v. Quam, 109 N. Y. 441, 17 N. E. 354; Story v. Downey, 62 Vt. 243, 20 Atl. 321; Ricci v. Mueller, 41 Mich. 214; Merrill v. St. Louis, 12 Mo. App. 466.

[60] See Strouse v. Leipf, 101 Ala. 432, 14 So. 667, 14 Am. St. Rep. 122, 23 L. R. A. 622; Austin v. Cox, 118 Mass. 58; Burt v. McBain, 29 Mich. 259; Vocht v. Kuklence, 119 Pa. St. 365, 13 Atl. 198; Storey v. Downey, 62 Vt. 243, 20 Atl. 321. In Illinois, Michigan and Iowa, the statutes relative to the rights of married women have been held to entitle the wife to recover for her own use the damages suffered from a personal tort. Chicago, etc., R. R. Co. v. Dunn, 52 Ill. 260; Hennies v. Vogel, 66 Ill. 401; Chicago, etc., R. R. Co. v. Dickson, 67 Ill. 122; Berger v. Jacobs, 21 Mich. 215; Musselman v. Galligher, 32 Ia. 383; Pancoast v. Burnell, Id. 394; Mewhirter v. Hatten, 42 Ia. 288, 20 Am. Rep. 618. In New York it is held that the wife's

§ 26. Torts by private corporations. Corporations are responsible for the wrongs committed or authorized by them, under substantially the same rules which govern the responsibility of natural persons.[61] It was formerly supposed that those torts which involved the element of evil intent, such as batteries, libels, and the like, could not be committed by corporations, inasmuch as the state, in granting rights for lawful purposes, had conferred no power to commit unlawful acts; and such torts, committed by corporate agents, must consequently be *ultra vires,* and the individual wrongs of the agents themselves. But this idea no longer obtains.[62] The rule is now well settled that, while keeping within the apparent scope of corporate powers, corporations have a general capacity to render themselves liable for torts, except for those where the tort consists in the breach of some duty which from its nature could not be imposed upon or discharged by a corporation. The rule of liability embraces not only the negligence and omissions of its officers and agents who are put in charge of or employed in the corporate business, but also all tortious acts which have been authorized by the corporation, or which are done in pursuance of any general or special authority to act in its behalf on the subject to which they relate, or which the corporation has subsequently ratified.[63] And in deciding upon the liability the dis-

time in the household still belongs to the husband, and therefore he should sue for an injury which disables her from performing household duties. Brooks v. Schwerin, 54 N. Y. 343. And perhaps it would be held in any of the States that the husband might still sue for the consequential injury to himself. See Mewhirter v. Hatten, 42 Ia. 288, 20 Am. Rep. 618.

[61] Waters v. West Chicago St. R. R. Co., 101 Ill. App. 265; Fogg v. Boston, etc., R. R. Co., 148 Mass 513, 20 N. E. 109; Clifford v. Press Pub. Co., 78 App. Div. 79, 79 N. Y. S. 767; West Virginia Trans. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804; Southern Car & F. Co. v. Adams, 131 Ala. 147, 159, 32 So. 503.

[62] "The doctrine which was formerly sometimes asserted that an action will not lie against a corporation for a tort is exploded. The same rule in that respect now applies to corporations as individuals. They are equally responsible for injuries done in the course of their business by their servants." Field, J., Baltimore, etc., R. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 330.

[63] Mayor, etc., of Lyme Regis v. Henley, 1 Bing. (N. C.) 222, 240; Smith v. Birmingham Gas

position of the courts has been to consider corporate officers, agents and servants as possessing a large and liberal discretion, and to hold the corporation liable for all their acts within the most extensive range of the corporate powers.[64]

Co., 1 Ad. & El. 526; Philadelphia, etc., R. R. Co. v. Quigley, 21 How. 202; Thayer v. Boston, 19 Pick. 511; Monument Nat'l Bk. v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Sheldon v. Kalamazoo, 24 Mich. 383; Lynch v. Metr. El. Ry. Co., 90 N. Y. 77, 43 Am. Rep. 141; Erie City Iron Works v. Barber, 106 Pa. St. 125; Payne v. R. R. Co., 13 Lea, 507; Southern Car & F. Co. v. Adams, 131 Ala. 147, 32 So. 503; West Fla. Land Co. v. Studebaker, 37 Fla. 28, 19 So. 176; Central of Ga. Ry. Co. v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; Noblesville Gas & Imp. Co. v. Loehr, 124 Ind. 79, 24 N. E. 579; Walker v. Culman, 9 Kan. App. 691, 59 Pac. 606; Grand Fountain Order v. Murray, 88 Md. 422, 41 Atl. 896; Peterson v. Western Union Tel. Co., 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; Fitzgerald v. Fitzgerald, etc., Co., 44 Neb. 463, 62 N. W. 899; Hoboken Print. & Pub. Co. v. Kahn, 59 N. J. L. 218, 35 Atl. 1053, 59 Am. St. Rep. 585; Lorick v. Atlantic Coast Line R. R. Co., 129 N. C. 427, 40 S. E. 191; Dunn v. Agricultural Soc., 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754; Selinas v. Vt. State Agricultural Soc., 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114. So though the particular act was wilful and not directly authorized or even against instructions. Penn., etc., Co. v. Weddle, 100 Ind. 138; Evansville, etc., Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; Terre Haute, etc., Co. v. Jackson, 81 Ind. 19.

[64] Redf. on Railways, 3d ed. 510, citing Phil. & Read. R. R. Co. v. Derby, 14 How. 468, 483; Noyes v. Rutland & Burlington R. R. Co. 27 Vt. 110. See Hutchinson v. Western, etc., R. R. Co., 6 Heisk. 634; Jeffersonville R. R. Co. v. Rogers, 38 Ind. 116. Of course a corporation is not liable for acts of its officers and agents not within their express or implied authority. Noblesville Gas & Imp. Co. v. Loehr, 124 Ind. 79, 24 N. E. 579; Baltimore, etc., Turnpike Road v. Green, 86 Md. 161, 37 Atl. 642; Grand Fountain Order v. Murray, 88 Md. 422, 41 Atl. 896; Isaacs v. Third Ave. R. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; Ill. Cent. R. R. Co. v. Downey, 18 Ill. 259; Little Miami R. R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Miller v. Burlington, etc., R. R. Co., 8 Neb. 219. The fact that one corporation owns all the stock of another does not make it liable for the latter's negligence or other torts. Louisville Gas Co. v. Kaufman, 105 Ky. 131, 48 S. W. 434. In Illinois a corporation was held liable for the negligence of the servants of a receiver of the corporation, where the property had been returned to the corporation and the receiver discharged. Bartlett v. Cicero L. H. & R. Co., 177 Ill. 68, 52 N. E. 339, 69 Am. St. Rep. 206, 47 L. R. A. 715. See Lock v.

A corporation is liable for an assault and battery, when its agent in committing it was performing some act within the limits of his authority, but wrongfully or with excessive force.[65] So a corporation may be guilty of a libel or slander and held liable therefor.[66] The same reasons that sustain an action against a corporation for a libel would sustain one for a malicious prosecution; and though the courts of Missouri and Alabama at one time held that no such action would lie,[67] they have receded from this position [68] and it is now generally held that such action can be sustained.[69] A corporation may also be liable for false imprisonment, under circumstances corresponding to those which would sustain an action for any other forci-

Turnpike Co., 100 Tenn. 163, 47 S. W. 133; 5 Thomp. Corp. § 7151.

[65] Monument Bank v. Globe Works, 101 Mass. 57; Ramsden v. Boston, etc., R. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Brokaw v. New Jersey, etc., R. R. Co., 32 N. J. L. 328; Passenger R. R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Baltimore, etc., R. R. Co. v. Blocher, 27 Md. 277; Goddard v. Grand Trunk R. R. Co., 57 Me. 202, 2 Am. Rep. 39; Higgins v. Watervliet T. & R. Co., 46 N. Y. 23, 7 Am. Rep. 293; St. Louis, etc., R. R. Co. v. Dalby, 19 Ill. 353; Denver, etc., Co. v. Harris, 122 U. S. 597; Central of Ga. Ry. Co. v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634.

[66] American Casualty Co. v. Lea, 56 Ark. 539, 20 S. W. 416; Howland v. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656; Peterson v. Western Union Tel. Co., 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Sun Life Ins. Co. v. Bailey, 101 Va. 443, 44 S. E. 692; Howe Mach. Co. v. Souder, 58 Ga. 64; Evening Journal Co. v. McDermott, 44 N. J. L. 430, 43 Am. Rep. 392; Samuels v. Evening Mail Ass'n, 75 N. Y. 604; Lubricating Oil Co. v. Standard Oil Co., 42 Hun, 153.

[67] Childs v. Bank of Missouri, 17 Mo. 213; Owsley v. Montgomery, etc., R. R. Co., 37 Ala. 560.

[68] Boogher v. Life Ass'n, 75 Mo. 319; Iron Mt. Bank v. Merc. Bank, 4 Mo. App. 505; Jordan v. Ala., etc., R. R. Co., 74 Ala. 85, 49 Am. Rep. 800.

[69] Vance v. Erie R. R. Co., 32 N. J. L. 334; Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439; Edwards v. Midland Ry. Co., L. R. 6 Q. B. D. 287; Williams v. Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494; Morton v. Met. Life Ins. Co., 34 Hun, 366; Penn., etc., Co. v. Weddle, 100 Ind. 138; Reed v. Home Savings Bank, 130 Mass. 443; Willard v. Holmes, 142 N. Y. 492, 37 N. E. 480; Gulf, etc., R. R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

ble wrongs.[70] But to hold a corporation liable for malicious prosecution or false imprisonment it is necessary to show authority or ratification. Clerks and agents are not presumed to have authority to institute such proceedings.[71] A corporation may also be liable for frauds. "Strictly speaking, a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation."[72] A corporation has even been held responsible for a fraudulent issue of certificates of stock by its authorized agent, though the issue was in excess of its capital stock.[73] So

[70] Goff v. Great Western R. R. Co., 3 El. & El. 672; Roe v. Birkenhead, etc., R. R. Co., 7 Exch. 36; Frost v. Domestic, etc., Co., 133 Mass. 563; Am. Expr. Co. v. Patterson, 73 Ind. 430; Evansville, etc., Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; Carter v. Howe Machine Co., 51 Md. 290, 34 Am. Rep. 311; Wheeler, etc., Co. v. Boyce, 36 Kan. 350, 13 Pac. 609; Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426, 56 N. W. 9; Bingham v. Lipman, 40 Ore. 363, 67 Pac. 98.

[71] Bieswanger v. Am. Bonding & T. Co., 98 Md. 287, 57 Atl. 202. The corporation is not liable if what was done by the servants was not in the line of duty. Allen v. London, etc., R. R. Co., L. R. 6 Q. B. 65; Poulton v. London, etc., R. R. Co., 2 Q. B. 534; Edwards v. London, etc., R. R. Co., L. R. 5 C. P. 445. But although they exceed the powers conferred on them and do what the corporation is not authorized to do, so long as they are attempting to do what they believe pertains to the service, the corporation is liable. Lynch v. Metr. El. Ry. Co., 90 N. Y. 77, 43 Am. Rep. 141.

[72] Ranger v. Great Western R. R. Co., 5 H. L. Cas. 71, 86, per Lord Chancellor Cranworth. Houldsworth v. Glasgow Bank, L. R. 5 App. Cas. 317; Weir v. Bell, L. R. 3 Exch. D. 238; American Nat. Bank v. Hammond, 25 Colo. 367, 55 Pac. 1090; Mackey v. Commercial Bank, L. R. 5 C. P. 394; Fishkill Savings Inst. v. Nat. Bank, 80 N. Y. 162, 36 Am. Rep. 595; Craigle v. Hadley, 99 N. Y. 131.

[73] New York, etc., R. R. Co. v. Schuyler, 34 N. Y. 30; Tome v. Parkesburg Br. R. R. Co., 39 Md. 36, 17 Am. Rep. 540; Allen v. South Boston R. R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep.

it has been held that an action lies against a corporation for conspiracy.[74]

§ 27. Charitable corporations. A corporation organized and maintained for purely charitable purposes is not liable for the negligence or misfeasance of its agents or servants in the discharge of their duties.[75] The reason for the rule is that such a liability might dissipate the trust funds and extinguish the charity, and that public policy is best subserved by confining the remedy in such cases to an action against the persons actually guilty of the wrong complained of. The same rule applies to institutions and societies created by the state for public purposes, although they may be incorporated.[76] A fire insurance patrol has been held to be within the rule in Pennsyl-

185, 5 L. R. A. 716; Fifth Ave. Bank v. Forty-second St. etc., R. R. Co., 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331.

[74] Buffalo, etc., Co. v. Standard Oil Co., 106 N. Y. 669.

[75] Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; Plant System, etc., v. Dickenson, 118 Ga. 647, 45 S. E. 433; Downs v. Harper Hospital, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602; Pepke v. Grace Hospital, 130 Mich. 493, 90 N. W. 278; Collins v. N. Y. Post Graduate Med. School, etc., 59 App. Div. 63, 69 N. Y. S. 106; Fire Ins. Patrol v. Boyd, 120 Pa. St. 624, 15 Atl. 553, 6 Am. St. Rep. 745, 1 L. R. A. 417; Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; McDonald v. Mass. General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Corbett v. St. Vincent's Industrial School, 79 App. Div. 334, 79 N. Y. S. 369. See Hauns v. Central Ky. Lunatic Asylum, 103 Ky. 562, 45 S. W. 890. Such a corporation may be liable for negligence in employing a surgeon or interne. Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675. The supreme court of New Hampshire in a carefully considered opinion has recently held that such corporations owe duties to their employes, the same as other masters, and are liable for their neglect to an employe thereby injured. Hewitt v. Woman's Hospital Aid Ass'n, 73 N. H. 556.

[76] White v. Ala. Insane Hospital, 138 Ala. 479, 35 So. 454; Hern v. Iowa State Agricultural Soc., 91 Ia. 97, 58 N. W. 1092, 24 L. R. A. 655; Williamson v. Louisville Industrial School, 95 Ky. 251, 24 S. W. 1065, 44 Am. St. Rep. 243, 23 L. R. A. 200. In the latter volume is a note on the liability of a charitable institution for negligence. Moody v. State Prison, 128 N. C. 12; Overholser v. National Home for Disabled Soldiers, 68 Ohio St. 236, 67 N. E. 487, 96 Am. St. Rep. 658; McAndrews v. Hamilton Co., 105 Tenn. 399, 58 S. W. 483; Maia v. Eastern State Hospital, 97 Va. 507, 47 L. R. A. 577.

vania,[77] but otherwise in Massachusetts.[78] There is also a difference of opinion whether railroad hospitals and the like are within the exemptions.[79] A Y. M. C. A., as usually conducted, is not,[80] nor is a cemetery association.[81]

§ 28. Public corporations. Public corporations are of two sorts: *Quasi*-municipal corporations, such as counties, townships and school districts, and municipal corporations proper, such as incorporated cities, villages and towns.[82] The former class, as a general rule, are not liable for negligence in the exercise of their powers, or for the negligent or tortious acts of their officers, agents and servants, unless made so by statute.[83] But such *quasi*-corporations may be liable for negligence in the

[77] Fire Ins. Patrol v. Boyd, 120 Pa. St. 624, 15 Atl. 553, 6 Am. St. Rep. 745, 1 L. R. A. 417.

[78] Newcomb v. Boston Protection Department, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778.

[79] Plant System Relief & Hospital Dept. v. Dickerson, 118 Ga. 647, 45 S. E. 483; Wabash R. R. Co. v. Kelly, 153 Ind. 119, 52 N. E. 152, 54 N. E. 752; Haggerty v. St. Louis, etc., R. R. Co., 100 Mo. App. 424, 74 S. W. 456; Richardson v. Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95; Sawdey v. Spokane Falls, etc., Ry. Co., 34 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880; Union Pac. Ry. Co. v. Artist, 60 Fed. 365, 9 C. C. A. 75.

[80] Chapin v. Holyoke Y. M. C. A., 165 Mass. 280, 42 N. E. 1130.

[81] Donnelly v. Boston Catholic Cem. Ass'n, 146 Mass. 163, 15 N. E. 505. So of a church society. Davis v. Central Congregational Soc., 129 Mass. 367.

[82] Mower v. Leicester, 9 Mass. 247; Detroit v. Blakely, 21 Mich. 84; McCutcheon v. Homer, 43 Mich. 483; 1 Dillon, Munic. Corp. §§ 22–31; 2 Ibid. § 961.

[83] Pitkin County v. Ball, 22 Colo. 125, 43 Pac. 1000, 55 Am. St. Rep. 117; Bailey v. Fulton County, 111 Ga. 313, 36 S. E. 596; Board of Commissioners v. Daily, 132 Ind. 73, 31 N. E. 531; Rock Island L. & M. Co. v. Elliott, 59 Kan. 42, 51 Pac. 894; Williams v. Kearney County, 61 Kan. 708, 60 Pac. 1046; Downing v. Mason County, 87 Ky. 208, 8 S. W. 264, 12 Am. St. Rep. 473; Sherman v. Vermillion, 51 La. Ann. 880, 25 So. 538; Carter v. Worcester County, 94 Md. 621, 51 Atl. 830; State v. School Commissioners, 94 Md. 334, 51 Atl. 289; Taylor v. Avon, 73 Mich. 604, 41 N. W. 703; Bank v. Brainard School District, 49 Minn. 106, 51 N. W. 814; Gaare v. Clay County Comrs., 90 Minn. 530, 97 N. W. 422; Lefrois v. Monroe County, 162 N. Y. 563, 57 N. E. 185; Threadgill v. Anson County Comrs., 99 N. C. 352, 6 S. E. 189; Schroeder v. Multnomah County, 45 Ore. 92, 76 Pac. 772; Ford v. School District, 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607; Chick v. Newberry County, 27 S. C. 419, 3 S. E. 787; McAndrews v. Hamilton County, 105 Tenn. 399, 58 S. W. 483; Rhea

exercise of special powers and privileges voluntarily assumed, or conferred upon request, or imposed with the consent of the corporation, express or implied.[84] Referring to the rule of nonliability in case of such corporations, the court, in *Bigelow v. Randolph,* says: "This rule of law, however, is of limited application. It is implied in the case of towns only to the neglect or omission of a town to perform those duties which are imposed on all towns without their corporate assent, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it with its consent, express or implied, or a special authority is conferred on it at its request. In the latter case a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be if the same duties were imposed or the same authority conferred on them, including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents."[85]

In regard to municipal corporations proper, they have a twofold character. As local subdivisions of the state, they are vested with certain powers and duties which they exercise for the general public good and as agencies of the state in its administration of public affairs. They are also local bodies corporate, and as such are vested with powers and duties for the special benefit of the local inhabitants.[86] In regard to the for-

County v. Sneed, 105 Tenn. 581, 58 S. W. 1063; Fry v. Albemarle County, 86 Va. 195, 9 S. E. 1004, 19 Am. St. Rep. 879.

[84] Bigelow v. Randolph, 14 Gray, 541; Hannon v. County of St. Louis, 62 Mo. 313; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Bailey v. New York, 3 Hill, 531.

[85] Bigelow v. Randolph, 14 Gray, 541.

[86] Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Rowland v. Kalamazoo, 49 Mich. 553; Carrington v. St. Louis, 89 Mo. 208, 58 Am. Rep. 108; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Snider v. St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151; Bailey v. New York, 3 Hill, 531, 58 Am. Dec. 660; Springfield F. & M. Ins. Co. v. Keesville, 148 N. Y. 46, 42 N. E. 405, 51 Am. St. Rep. 667, 30 L. R. A. 660; Howard v. Brooklyn, 30 App. Div. 217; Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 797; Richmond v. Long, 17 Gratt. 374, 94 Am. Dec. 461; Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294; Kinnare v. Chicago, 171 Ill. 332, 49 N. E. 536; Murray v. Omaha, 66 Neb. 279, 92 N. W. 299, 103 Am. St. Rep. 702; Parks v. Greenville, 44

mer functions they are part of the governmental machinery of the state and enjoy the same immunities from liability as the state itself.[87] In regard to the latter, they partake of the nature of private corporations and are, in general, subject to the same rules of liability for their acts and neglects.[88] While the above distinction is generally recognized, there is considerable difference of opinion as to whether particular powers and duties belong to the one class or the other.[89]

There is a practical agreement that for a failure to perform a legislative, judicial or discretionary act or for neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever except the political responsibility to their corporators and to the state.[89a] The reason is that it is inconsistent with the nature of their powers that they

S. C. 168, 21 S. E. 540; Davis v. Knoxville, 90 Tenn. 599, 18 S. W. 254.

[87] Cases in last note; also Le Clef v. Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; Condict v. Jersey City, 46 N. J. L. 157; Hughes v. Auburn, 161 N. Y. 96, 55 N. E. 389; Davis v. Knoxville, 90 Tenn. 599, 18 S. W. 254; Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420; Stockwell v. Rutland, 75 Vt. 76, 53 Atl. 132.

[88] See cases cited in last two notes. In Springfield F. & M. Ins. Co. v. Keesville, 148 N. Y. 46, 42 N. E. 405, 51 Am. St. Rep. 667, 30 L. R. A. 660, the court says: "The distinction between public and private powers conferred upon municipal corporations, although the line of demarcation at times may be difficult to ascertain, is generally clear enough. . . . When we find that the power conferred has relation to public purposes and is for the public good it is to be classified as governmental in its nature and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only incidentally concerned, it is private in its nature and the municipal corporation in respect to its exercise is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for non-user or misuser; while in the latter case, it may be held to that degree of responsibility which would attach to an ordinary private corporation." Pages 52, 53.

[89] Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; Snider v. St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151; Maxmillian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Savings Society v. Philadelphia, 31 Pa. St. 185; Davis v. Knoxville, 90 Tenn. 599, 18 S. W. 254; Jones v. Williamsburg, 34 S. E. 883, 47 L. R. A. 294.

[89a] Anderson v. East, 117 Ind 126, 19 N. E. 726, 10 Am. St. Rep 35, 2 L. R. A. 712.

should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore, one shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire,[90] or because cattle are not prohibited from running at large,[91] or because "coasting" is not prevented in the highways,[92] or because the operation of an ordinance which prohibits the explosion of fire-works within the city is temporarily suspended,[93] or because provision is not made for lighting the streets.[94] And so a city is not liable for a failure to abate a nuisance,[95] or to pass and enforce proper police regulations.[96]

[90] Davis v. Montgomery, 51 Ala. 139, 23 Am. Rep. 545; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Patch v. Covington, 17 B. Mon. 722, 66 Am. Dec. 186. See, also, Howard v. San Francisco, 51 Cal. 52; Joliet v. Verley, 35 Ill. 58; Russell v. New York, 2 Denio, 461; Brinkmeyer v. Evansville, 29 Ind. 187; Hafford v. New Bedford, 16 Gray, 297; Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196; Grant v. Erie, 69 Pa. St. 420, 8 Am. Rep. 272.

[91] Kelly v. Milwaukee, 18 Wis. 83. See Mich., etc., R. R. Co. v. Fisher, 27 Ind. 96; Rivers v. Augusta, 65 Ga. 376, 38 Am. Rep. 787. Contra, Cochran v. Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728.

[92] Hutchinson v. Concord, 41 Vt. 271, 98 Am. Dec. 584. See Altvater v. Baltimore, 31 Md. 462; Burford v. Grand Rapids, 53 Mich. 98, 51 Am. Rep. 105; Lafayette v. Timberlake, 88 Ind. 330; Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1; Schultz v. Milwaukee, 49 Wis. 254, 35 Am. Rep. 779.

[93] Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451. See Ball v. Woodbine, 61 Ia. 83; Wheeler v. Plymouth, 116 Ind. 158, 18 N. E 532, 9 Am. St. Rep. 837; Lincoln v. Boston, 148 Mass. 578, 20 N. E. 329, 12 Am. St. Rep. 601, 3 L. R. A. 257; O'Rourke v. Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789.

[94] Freeport v. Isbell, 83 Ill. 440, 25 Am. Rep. 407.

[95] Anderson v. East, 117 Ind. 126, 19 N. E. 726, 10 Am. St. Rep. 35, 2 L. R. A. 712; James v. Harrodsburg, 85 Ky. 191, 3 S. W. 135, 7 Am. St. Rep. 589; Chattanooga v. Reid, 103 Tenn. 616, 53 S. W. 937; Miller v. Newport News, 101 Va. 432, 44 S. E. 712.

[96] Veraguth v. Denver, 19 Colo. App. 473, 76 Pac. 539; Harman v. St. Louis, 137 Mo. 494, 38 S. W. 1102; Butz v. Cavanagh, 137 Mo.

In maintaining a police department or fire department a municipal corporation is held to be acting in its public or governmental capacity and consequently it is not liable for the negligence or torts of its policemen,[97] or firemen,[98] in the discharge of

503, 38 S. W. 1104, 59 Am. St. Rep. 504; McDade v. Chester City, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. Rep. 681; Smith v. Selinsgrove, 199 Pa. St. 615, 49 Atl. 213; Howard v. Brooklyn, 30 App. Div. 217; Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294. But a different doctrine is maintained in Maryland where a municipal corporation has been held liable for a failure to suppress the nuisance of coasting. Taylor v. Cumberland, 64 Md. 68, 20 Atl. 1027. Or of cattle running at large. Cochran v. Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728. Also for a failure to enforce an ordinance against the fast riding of bicycles. Hagerstown v. Klotz, 93 Md. 437, 49 Atl. 836, 86 Am. St. Rep. 437, 54 L. R. A. 940. In this case the court says that a municipal corporation, having power to suppress such nuisances "is bound to exercise them for the public good and to protect persons and property, and its duty is not discharged by merely passing ordinances upon the subject. It can relieve itself of responsibility only by a vigorous attempt to enforce them." Page 440.

[97] Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; Stewart v. New Orleans, 9 La. Ann. 461; Buttride v. Lowell, 1 Allen, 172, 79 Am. Dec. 721; Pesterfield v. Vickers, 3 Cold. 205; Kuehn v. Milwaukee, 92 Wis. 263; Culver v. Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; Craig v. Charleston, 180 Ill. 154, 54 N. E. 184; Peters v. Lindsberg, 40 Kan. 654, 20 Pac. 490; Jolly's Admr. v. Hawesville, 89 Ky. 279, 12 S. W. 313; Calwell v. Boone, 51 Ia. 687, 33 Am. Rep. 154; Attaway v. Cartersville, 68 Ga. 740; Norristown v. Fitzpatrick, 94 Pa. St. 121, 39 Am. Rep. 771; Robinson v. Greenville, 42 Ohio St. 625.

[98] Davis v. Lebanon, 108 Ky. 688, 57 S. W. 471; Alexander v. Vicksburg, 68 Miss. 564, 10 So. 62; Irvine v. Chattanooga, 101 Tenn. 291, 47 S. W. 419; Dodge v. Granger, 17 R. I. 664, 24 Atl. 100, 15 L. R. A. 781; Jewett v. New Haven, 38 Conn. 368, 9 Am. Rep. 382; Greenwood v. Louisville, 13 Bush, 226, 26 Am. Rep. 263; Torbush v. Norwich, 33 Conn. 225, 9 Am. Rep. 395; Smith v. Rochester, 76 N. Y. 506; Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762; Robinson v. Evansville, 87 Ind. 334, 44 Am. Rep. 770; Grube v. St. Paul, 34 Minn. 402; Burrill v. Augusta, 78 Me. 118, 57 Am. Rep. 188; Howard v. San Francisco, 51 Cal. 52; Wilcox v. Chicago, 107 Ill. 334, 47 Am. Rep. 432; Hafford v. New Bedford, 16 Gray, 297; Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760. City held liable for negligence in making repairs on fire alarm system. Wagner v. Portland, 40 Ore. 389, 60 Pac. 985, 67 Pac. 300, 91 Am. St. Rep. 485. In Workman v. New

their duties. There is the same exemption from liability and for the same reason in respect to the sanitary service,[99] the maintenance of hospitals [1] and in the carrying on of the public schools.[2] In regard to sewers and drains the authorities hold that in devising and adopting a plan for such improvements, a municipality acts in its public or governmental capacity and, consequently, that it is not liable because of any defect or insufficiencies in such plan, such as an error in the location, size, grade or outlet of the sewer or drain.[3] But for any negligence in construction or maintenance the municipality is liable.[4] Al-

York, 179 U. S. 552, 21 S. C. Rep. 212, the city of New York was held liable in admiralty for the negligence of its fire department.

[99] Ogg v. Lansing, 35 Ia. 495, 14 Am. Rep. 499; McFadden v. Jewell, 119 Ia. 321, 93 N. W. 302, 97 Am. St. Rep. 321, 60 L. R. A. 401; Murtagh v. St. Louis, 44 Mo. 479; Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; White v. Marshfield, 48 Vt. 20; Summers v. Board, etc., 103 Ind. 262, 53 Am. Rep. 512; Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 31; Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; Missano v. New York, 160 N. Y. 123, 54 N. E. 744; Kempster v. Milwaukee, 103 Wis. 421, 79 N. W. 411; Condict v. Jersey City, 46 N. J. L. 157.

[1] Nicholson v. Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601; Maxmillian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Richmond v. Long, 17 Gratt. 374, 94 Am. Dec. 461; Lexington v. Batson, 118 Ky. 489.

[2] Kinnare v. Chicago, 171 Ill. 332, 49 N. E. 536; Howard v. Worcester, 153 Mass. 426, 27 N. E. 11, 25 Am. St. Rep. 651, 12 L. R. A. 160; Rock Island L. & M. Co. v. Elliott, 59 Kan. 42, 51 Pac. 894; State v. School Commissioners, 94 Md. 334, 51 Atl. 289; Bank v. Brainerd School District, 49 Minn. 106, 51 N. W. 814; Ford v. School District, 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607; Wixon v. Newport, 13 R. I. 454, 43 Am. Rep. 35; Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420.

[3] Chicago v. Seben, 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245; Child v. Boston, 4 Allen, 41, 81 Am. Dec. 680; Emery v. Lowell, 104 Mass. 13; Stock v. Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; Buckley v. New Bedford, 155 Mass. 64, 29 N. E. 201; Mills v. Brooklyn, 32 N. Y. 489; Johnston v. District of Columbia, 118 U. S. 19. But see North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821; Rice v. Evansville, 108 Ind. 7, 9 N. E. 139, 58 Am. Rep. 22; and cases cited in note 6, p. 79.

[4] Gilman v. Laconia, 55 N. H. 130, 20 Am. Rep. 175; Ashley v. Port Huron, 35 Mich. 296, 20 Am. Rep. 629; Taylor v. Austin, 32 Minn. 247; Vanderslice v. Philadelphia, 103 Pa. St. 102; Fort Wayne v. Coombs, 107 Ind. 75; Arnd v. Cullman, 132 Ala. 540, 31

though streets and highways are established and maintained for the use of the general public, yet it is a principle of nearly universal acceptation in this country, when a town is incorporated and is given control over the streets and walks within its corporate limits, and is empowered to provide the means to make and repair them, that the corporation not only assumes this duty, but by implication agrees to perform it for the benefit and protection of all who may have occasion to make use of these public easements; and that for any failure in the discharge of this duty the corporation is responsible to the party injured.[5] And it makes no difference whether the injury hap-

So. 478, 90 Am. St. Rep. 922; Spangler v. San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; Judd v. Hartford, 72 Conn. 350, 44 Atl. 510, 77 Am. St. Rep. 312; District of Columbia v. Gray, 6 App. D. C. 314; Murphy v. Indianapolis, 158 Ind. 238, 63 N. E. 469; Frostburg v. Dufty, 70 Md. 47, 16 Atl. 642; Frostburg v. Hutchins Bros., 70 Md. 56, 16 Atl. 380; Bates v. Westborough, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156; Haney v. Kansas City, 94 Mo. 334, 7 S. W. 417; Paine v. Delhi, 116 N. Y. 224, 22 N. E. 405, 5 L. R. A. 797; Kiesel v. Ogden City, 8 Utah, 237, 30 Pac. 758. Or by overloading. Hughes v. Auburn, 21 App. Div. 311, 47 N. Y. S. 235; King v. Granger, 21 R. I. 93, 79 Am. St. Rep. 779. Held liable for permitting sewer to become a nuisance. Langley v. Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Willett v. St. Albans, 69 Vt. 330, 38 Atl. 72. So for negligently permitting coal gas to escape into a sewer, causing explosion. Kibele v. Philadelphia, 105 Pa. St. 41. For negligently raising sewer grades at junction point. Defer v. Detroit, 67 Mich. 346, 34 N. W. 680; Rice v. Flint, 67 Mich. 401, 34 N. W. 719. Held not liable for death of child caused by insanitary sewers. Hughes v. Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636.

[5] Bradford v. Anniston, 92 Ala. 349, 8 So. 683, 25 Am. St. Rep. 60; Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389; Carney v. Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328; Byerly v. Anamosa, 79 Ia. 204, 44 N. W. 359; Kansas City v. Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; O'Neill v. New Orleans, 30 La. Ann. 220; Maus v. Springfield, 101 Mo. 613, 14 S. W. 630; Snook v. Anaconda, 26 Mont. 128, 66 Pac. 756; Turner v. Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Circleville v. Sohn, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777; Burrell v. Uncapher, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 664; Gonzales v. Galveston, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17; Clark v. Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281; Sutton v. Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; Weightman v. Washington, 1 Black, 39

pens by reason of a failure to keep the street in proper repair or from some defect in the plan for improving the street, whereby, as originally constructed, it is dangerous and unsafe for travel.[6] In regard to street cleaning and street sprinkling there are different views, some cases holding that these are public functions and others the contrary.[7]

The general rule is that in determining to undertake any public work or improvement and in devising and adopting the plan therefor a municipality acts in its legislative and governmental capacity and is not liable to a private action for any defect or insufficiency in the plan adopted.[8] But for negligence in executing the plan and constructing the work it is liable.[9] And so it will be liable for any direct invasion or phys-

Manchester v. Ericsson, 105 U. S. 347. *Contra*, Detroit v. Blakely, 21 Mich. 84, 4 Am. Rep. 450; McCutcheon v. Homer, 43 Mich. 483, 38 Am. Rep. 212; Young v. Charleston, 20 S. C. 116, 47 Am. Rep. 827. In the following cases the inconsistency of holding municipal corporations exempt from liability, when exercising public functions and yet holding them liable for negligence in the construction and repair of highways, is noticed and commented upon. Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; Snider v. St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151; Ford v. School District, 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607.

[6] Gould v. Topeka, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496; Blyhl v. Waterville, 57 Minn. 115, 58 N. W. 817, 47 Am. St. Rep. 596; Circleville v. Sohn, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777; Stone v. Seattle, 30 Wash. 65, 70 Pac. 249.

[7] City held not liable for death of child due to negligence of those engaged in cleaning the streets. Missano v. New York, 160 N. Y. 123, 54 N. E. 744. *Contra*, McFadden v. Jewell, 119 Ia. 321, 93 N. W. 302. Street sprinkling held governmental duty and city not liable for negligence of driver of sprinkling cart. Conelly v. Nashville, 100 Tenn. 262, 46 S. W. 565.

[8] Governor, etc., v. Meredith, 4 T. R. 794; Wilson v. New York, 1 Denio, 595; Mills v. Brooklyn, 32 N. Y. 489; White v. Yazoo, 27 Miss. 357; Lambar v. St. Louis, 15 Mo. 610; Detroit v. Beckman, 34 Mich. 125, 22 Am. Rep. 507; Delphi v. Evans, 36 Ind. 90, 10 Am. Rep. 12; Toolan v. Lansing, 38 Mich. 315; Foster v. St. Louis, 71 Mo. 157; Johnston v. Dist. of Columbia, 118 U. S. 19; Rozell v. Anderson, 91 Ind. 591; Packard v. Valtz, 94 Ia. 277, 62 N. W. 757, 58 Am. St. Rep. 396; Paine v. Delhi, 116 N. Y. 224, 22 N. E. 405, 5 L. R. A. 797; Willett v. St. Albans, 69 Vt. 330, 38 Atl. 72; Urquhart v. Ogdensburg, 91 N. Y. 67, 43 Am. Rep. 655. *Ante*, notes 3, 4 and 6.

[9] Chicago v. Seben, 165 Ill. 371, 46 N. E. 244; Chicago v. Joney,

ical injury to private property, as by turning water upon it or otherwise.[10] A municipal corporation is not responsible for the failure of its officers to discharge properly and effectually their official duties; for in respect to these the officers are not properly the servants or agents of the corporation, but act upon their own official responsibility, except as they may be specially directed by the corporate authority.[11] The liability of a municipality as the owner of property depends upon the use to which the property is put. If it is used for the purpose of carrying out its public functions then it is not liable for negligence in the care and management thereof. The rule has been applied in case of school buildings,[12] jails and lockups,[13] court

60 Ill. 383; Chicago v. Dermody, 61 Ill. 431; McCaughey v. Tripp, 12 R. I. 449; Johnston v. District of Columbia, 118 U. S. 19; Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78; Hannon v. St. Louis, 62 Mo. 313; Broadwell v. Kansas, 25 Mo. 213; Semple v. Vicksburg, 62 Miss. 63, 52 Am. Rep. 181; Logansport v. Dick, 70 Ind. 65; Princeton v. Gieske, 93 Ind. 102; Kranz v. Baltimore, 64 Md. 491; Hardy v. Brooklyn, 90 N. Y. 435, 43 Am. Rep. 182; Ironton v. Kelly, 38 Ohio St. 50; Fort Worth v. Crawford, 64 Tex. 202; Mootry v. Danbury, 45 Conn. 550, 29 Am. Rep. 703; Suffolk v. Parker, 79 Va. 660, 52 Am. Rep. 640; Keating v. Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421.

[10] Pennoyer v. Saginaw, 8 Mich. 534; Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Tate v. St. Paul, 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep. 501; Seifert v. Brooklyn, 101 N. Y. 136; Kiernan v. Jersey City, (N. J.) 13 Atl. 170.

[11] Thayer v. Boston, 19 Pick. 511; Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Martin v. Brooklyn, 1 Hill, 545; Lorillard v. Monroe, 11 N. Y. 392; Sherman v. Grenada, 51 Miss. 186; Barbour v. Ellsworth, 67 Me. 294; Prather v. Lexington, 13 B. Mon. 559, 56 Am. Dec. 585; Judge v. Meriden, 38 Conn. 90; Sheldon v. Kalamazoo, 24 Mich. 383; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Hunt v. Boonville, 65 Mo. 620, 27 Am. Rep. 299; Cooney v. Hartland, 95 Ill. 516; Wakefield v. Newport, 60 N. H. 374; Little v. Madison, 49 Wis. 605; Chope v. Eureka, 78 Cal. 588, 21 Pac. 364, 12 Am. St. Rep. 113, 4 L. R. A. 325; Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949; McCann v. Waltham, 163 Mass. 344, 40 N. E. 20; Horton v. Newell, 17 R. I. 571, 23 Atl. 910; Bates v. Rutland, 62 Vt. 178, 20 Atl. 278, 22 Am. St. Rep. 95, 9 L. R. A. 363.

[12] Bigelow v. Randolph, 14 Gray, 541; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Larrabee v. Peabody, 128 Mass. 561; Ford v. School District, 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607; Wixon v. Newport, 13 R. I. 454, 43 Am. Rep. 35; Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420.

[13] Moffitt v. Asheville, 103 N. C.

houses,[14] hospitals,[15] and to town and city halls.[16] In respect to property used for its private or corporate purposes and in respect to all property it owns and uses for profit, a municipal corporation is subject to the same responsibility as an individual or private corporation under the same circumstances.[17] And so as to nuisances which it creates or suffers upon its property.[18] And where a city derives a revenue from any service it will be liable for negligence therein.[19] The rule applies to water works, gas works, light works and the like, which the municipality owns and operates for public and private consumption.[20]

237; La Clef v. Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; Morris v. Board of Commissioners, 131 Ind. 285, 31 N. E. 77; White v. Board of Commissioners, 129 Ind. 396, 28 N. E. 846; Pfefferle v. Lyon Co., 39 Kan. 432, 18 Pac. 506; Hite v. Whitney Co. Ct., 91 Ky. 168, 15 S. W. 57, 11 L. R. A. 122; Webster v. Hillsdale, 99 Mich. 259, 58 N. W. 317; Lindley v. Polk County, 84 Ia. 308, 50 N. W. 975..

[14] Cunningham v. St. Louis, 96 Mo. 53, 8 S. W. 787; Kincaid v. Hardin County, 53 Ia. 430, 5 N. W. 589, 36 Am. Rep. 236; Desdall v. County of Olmstead, 30 Minn. 96, 14 N. W. 458, 44 Am. Rep. 185.

[15] Nicholson v. Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601. "The action of the city in obtaining and owning the land and erecting the hospital is as much an act of a governmental agent as the transportation of a patient thereto and his treatment therein would be." Page 250.

[16] Snider v. St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302. But if such a building is also used for profit the rule will be otherwise as to such use. Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 125.

[17] McMahon v. Dubuque, 107 Ia. 62, 77 N. W. 517; Moulton v. Scarborough, 71 Me. 267, 36 Am. Rep. 308; Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 125; Rowland v. Kalamazoo, 49 Mich. 553; Kennedy v. New York, 73 N. Y. 365, 29 Am. Rep. 169; Pittsburg v. Grier, 23 Pa. St. 54; 2 Dill. Munic. Corp. § 985 et seq.

[18] Cumberland, etc., Corp. v. Portland, 62 Me. 504; Waldron v. Haverhill, 143 Mass. 582, 10 N. E. 481; Gilluly v. Madison, 63 Wis. 518, 24 N. W. 137, 53 Am. Rep. 209; Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407; Schroeder v. Baraboo, 93 Wis. 95, 67 N. W. 27.

[19] Bodge v. Philadelphia, 167 Pa. St. 492, 31 Atl. 728.

[20] Scott v. Manchester, 2 H. & N. 204; Hourigan v. Norwich, 77 Conn. 358; Esberg Cigar Co. v. Portland, 34 Ore. 282, 55 Pac. 961, 43 L. R. A. 445, 75 Am. St. Rep. 651; Wilkins v. Rutland, 61 Vt. 336, 17 Atl. 735; Chicago v. Selz, 202 Ill. 545, 67 N. E. 386; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669. Compare O'Leary v. Board of Comrs., 79 Mich. 281, 44 N. W. 608, 19 Am. St. Rep

§ 29. **The state.** The state or general government may be guilty of individual wrongs; for while each is a sovereignty, it is a corporation also, and as such capable of doing wrongful acts. The difficulty here is with the remedy, not with the right. No sovereignty is subject to suits, except with its own consent.[21] But either this consent is given by general law, or some tribunal is established with power to hear all just claims. Or if neither of these is done, the tort remains; and it is always to be presumed that the legislative authority will make the proper provision for redress when its attention is directed to the injury.

169, 7 L. R. A. 170; Gross v. Water Comrs., 68 N. H. 389, 44 Atl. 529; Springfield F. & M. Ins. Co. v. Keesville, 148 N. Y. 46.

[21] United States v. Peters, 5 Cranch, 139; Osborn v. Bank of U. S., 9 Wheat. 738; United States v. McLemore, 4 How. 286; Hill v. United States, 9 How. 386; Splittorf v. State, 108 N. Y. 205, 15 N. E. 322; Lewis v. State, 96 N. Y. 71, 48 Am. Rep. 607; Carr v. United States, 98 U. S. 433; United States v. Lee, 106 U. S 196; Bigby v. United States, 188 U. S. 400. The exemption applies to boards and societies which are agencies of the state. Hern v Iowa State Agricultural Soc., 91 Ia. 97, 58 N. W. 1092, 24 L. R. A. 655; Lord & P. Chemical Co. v Board of Agriculture, 111 N. C 135, 15 S. E. 1032.

CHAPTER III.

WRONGS IN WHICH TWO OR MORE PERSONS PARTICIPATE.

§ 30. **What constitutes a joint wrong generally.** As a general rule all who participate in any manner in the commission of a tort are jointly and severally liable therefor.[1] One may participate in the commission of a tort by actively contributing to it, either in person or by his agent or servant, or by advising, aiding, procuring or directing it to be done, or by adopting or ratifying it after it has been accomplished.[2] The question of joint liability under various circumstances will be considered in the following sections. A few general illustrations are given here. Where the plaintiff was arrested by the same officer at the same time on two tax warrants, issued by different boards of assessors for different years, it was held that the members of the two boards were jointly liable for the arrest.[3] In New York, the officer who attached goods, the officer who

[1] Henry v. Carlton, 113 Ala. 636, 21 So. 225; Monat v. Wood, 22 Colo. 404, 45 Pac. 389; Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N. E. 553; MacVeagh v. Hanford, 29 Ill. App. 606; Cleveland v. Stillwell, 75 Ia. 466, 39 N. W. 711; Sharpe v. Williams, 41 Kan. 56, 20 Pac. 497; Chicago, etc., R. R. Co. v. Watkins, 43 Kan. 50, 22 Pac. 985; Lafeyth v. Emporia Nat. Bank, 53 Kan. 51, 35 Pac. 805; Bright v. Bell, 113 La. 1078, 37 So. 976; Martin v. Golden, 180 Mass. 549, 62 N. E. 977; Monson v. Rouse, 86 Mo. App. 97; D. M. Osborne Co. v. Pino Mfg. Co., 51 Neb. 502, 70 N. W. 1124; Carson v. Dessau, 142 N. Y. 445, 37 N. E. 493; Stephens v. Smathers, 124 N. C. 571, 32 S. E. 959; Wm. G Rogers Co. v. International Silver Co., 118 Fed. 133, 55 C. C. A. 83. Where one defendant wrongfully arrested the plantiff and took her to a lockup where she was detained by the other defendant, it was held that the two were jointly liable, but that the joint liability extended only to the time after the plaintiff was locked up. Martin v. Golden, 180 Mass. 549, 62 N. E. 977. So in Bath v. Metcalf, 145 Mass. 274, 14 N. E. 133.

[2] Ibid.; Mack v. Kelsey, 61 Vt. 399, 401, 402, 17 Atl. 780; Donovan v. Consolidated Coal Co., 88 Ill. App. 589, 597.

[3] Allison v. Hobbs, 96 Me. 26, 51 Atl. 245.

took them from him on an execution in the attachment suit, and the plaintiff in that suit were all held responsible as joint wrong-doers.[4] In Massachusetts, where different creditors, acting separately and without concert, caused their debtor to be arrested on their several writs by the same officer, their joint liability was affirmed on reasons that seem conclusive.[5] In Alabama it is held that "if several creditors sue out, at different times, separate writs of attachment against a common debtor, and cause them to be simultaneously levied by the same officer, the levying being wrongful, they will be regarded as joint wrong-doers, though they may have acted separately, without concert, and each was endeavoring to secure a priority of lien."[6] And this view is sustained by the weight of authority.[7] But it is held that to maintain a joint liability the writs must be levied at the same time on the same property by the same officer[8] and where the second writ was levied by the same officer on the same day, but later in the day, on the same and other goods and subject to the first levy, it was held there was no joint liability.[9] Concert and co-operation may doubtless make a joint wrong of several acts not otherwise connected,[10] and which, without co-operation, could only be treated as independent trespasses.[11] In an Indiana case G, one of the

[4] Sprague v. Kneeland, 10 Wend. 161. If one sells and another buys goods, knowing of the claim of another, the latter may hold them jointly liable for a conversion. Babcock v. Gill, 10 Johns. 287.

[5] Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727. Where a sheriff wrongfully, while goods are in his possession under a previous wrongful levy, attaches them again, he and the attaching creditors are jointly liable. Cox v. Hall, 18 Vt. 191.

[6] Harmon v. McRae, 91 Ala. 401, 408, 8 So. 548; Harris v. Russell, 93 Ala. 59, 9 So. 541; Vandiver v. Pollak, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118.

[7] Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Cole v. Edwards, 52 Neb. 711, 72 N. W. 1045; Koch v. Peters, 97 Wis. 492, 73 N. W. 25. See Eddy v. Howard, 23 Ia. 175; Miller v. Beck, 108 Ia. 575, 79 N. W. 344; Ellis v. Howard, 17 Vt. 330.

[8] Harris v. Russell, 93 Ala. 59, 9 So. 541.

[9] Torey v. Schneider, 74 Tex. 116, 11 S. W. 1068.

[10] See Higby v. Williams, 16 Johns. 215.

[11] Of the necessity of co-operation in some form to constitute the joint wrong, see Bard v. Yohn, 26 Pa. St. 482; Berry v. Fletcher 1 Dill. 67; Hilmes v. Stroebel, 59 Wis. 74; Blue v. Christ, 4 Ill. App.

defendants, seduced the plaintiff and continued to have sexual intercourse with her for a period of three years, during which the plaintiff became twice pregnant. K, a physician, at the instance of G and for the purpose of concealing the wrong, procured two abortions upon the plaintiff. It was held that the successive acts constituted but one wrong and that both were jointly liable for the entire damages.[12] "If each had acted independently," says the court, "the plaintiff might have been compelled to pursue them separately, although the consequences of their acts united. But Kimball was the hand of Gunder in furthering Gunder's wrong. The consequences of the operation were intentionally intermingled by Kimball with the natural consequences of Gunder's sexual intercourse with plaintiff. When Gunder came to Kimball, the incident was not closed; and Kimball willingly joined in and helped on a wrong that was not completed,—a wrong that constituted, when completed, but one cause of action against Gunder. And so, if Kimball chose to come in at any stage, he too is liable for the whole; for the law will not undertake to apportion the damages in such cases."

§ 31. Conspiracy. When a tort is committed in pursuance of a conspiracy, all the conspirators are jointly liable.[13] But the general rule is, that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action.[14] The damage

351; Gloss v. Black, 91 Pa. St. 418. For two separate injuries, one committed by one party and one by another, there is no joint liability. Hines v. Jarrett, 26 S. C. 480, 2 S. E. Rep. 393; Cooper v. Blair, 14 Ore. 255. See Ray v. Light, 34 Ark. 421.

[12] Gunder v. Tibbits, 153 Ind. 591, 55 N. E. 762. It was held to be immaterial that K did not know that G seduced the plaintiff.

[13] Severinghaus v. Beckman, 9 Ind. App. 388, 36 N. E. 716; Mendenhall v. Stewart, 18 Ind. App. 262, 47 N. E. 943; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840.

[14] Saville v. Roberts, 1 Ld. Raym. 374; Cotterell v. Jones, 11 C. B. 713; Sheple v. Page, 12 Vt. 519; Patten v. Gurney, 17 Mass. 186, 9 Am. Dec. 141; Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Laverty v. Vanarsdale, 65 Pa. St. 507; Herron v. Hughes, 25 Cal. 555; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172; Lasher v. Littell, 202 Ill. 551, 67 N. E.

is the gist of the action, not the conspiracy;[15] and though the conspiracy may be said to be of itself a thing amiss, it must nevertheless, until something has been accomplished in pursuance of it, be looked upon as a mere unfulfilled intention of several to do mischief.[16] When the mischief is accomplished, the conspiracy becomes important, as it affects the means and measure of redress; for the party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it. The significance of the conspiracy consists, therefore, in this: That it gives the person injured a remedy against parties not otherwise connected with the wrong.[17] It is also significant as constituting matter of aggravation, and as such tending to increase the plaintiff's recovery.[18]

Though a conspiracy is charged, yet if on the trial, the evidence connects but one person with the wrong actually com-

372; Buckley v. Mulville, 102 Ia. 602, 70 N. W. 107, 63 Am. St. Rep. 479; De Wolf v. Dix, 110 Ia. 553, 81 N. W. 779; Handley v. Louisville, etc., R. R. Co., 105 Ky. 162, 48 S. W. 429, 88 Am. St. Rep. 298; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; Commercial Union Ass'n Co. v. Shoemaker, 63 Neb. 173, 88 N. W. 156; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376; Delz v. Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755; Porter v. Mack, 50 W. Va. 581, 40 S. E. 459; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; Huttley v. Simmons, (1897) 1 Q. B. 181.

[15] Jones v. Baker, 7 Cow. 445; Hutchins v. Hutchins, 7 Hill, 104; Sheple v. Page, 12 Vt. 519; Laverty v. Vanarsdale, 65 Pa. St. 507; Adler v. Fenton, 24 How 407; Bush v. Sprague, 51 Mich. 41; Garing v. Fraser, 76 Me. 37; Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Commercial Union Ass'n Co. v Shoemaker, 63 Neb. 173, 88 N. W. 156; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840.

[16] Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Place v. Minster, 65 N. Y. 89; Cotterell v. Jones, 11 C. B. 713; Schwab v. Mabley, 47 Mich. 572; Bush v. Sprague, 51 Mich. 41; McHenry v. Sneer, 56 Ia. 649.

[17] *Ante*, note 13.

[18] Kimball v. Harman, 34 Md. 407; Street v. Packard, 76 Me. 148; Garing v. Fraser, 76 Me. 37.

mitted, the plaintiff may recover against him as if he had been sued alone.[19] It of course follows that a conspiracy, though alleged, need not be proved in any case, in order to recover against those who actually participated in the wrong charged.[20]

§ 32. **Adoption or ratification of a wrong.** In order to constitute one a wrong-doer by ratification, the original act must have been done in his interest, or been intended to further some purpose of his own. Lord Coke, on this subject, says: "He that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment." [21] The ratification should also be with full knowledge of the facts, or with the purpose of the party, without inquiry, to take the consequences upon himself.[22] It is not conclusive that the party receives and appropriates a benefit from what

[19] Severinghaus v. Beckman, 9 Ind. App. 388, 36 N. E. 716; Mendenhall v. Stewart, 18 Ind. App. 262, 47 N. E. 943; Young v. Gormley, 119 Ia. 546, 93 N. W. 965; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Keit v. Wyman, 67 Hun, 337, 22 N. Y. S. 133; Fillman v. Ryan, 168 Pa. St. 484, 32 Atl. 89.

[20] Young v. Gormley, 119 Ia. 546, 93 N. W. 965; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376.

[21] 4 Inst. 317. See Eastern Counties R. R. Co. v. Broom, 6 Exch. 314; Hull v. Pickersgill, 1 B. & B. 282; Wilson v. Tumman, 6 M. & Gr. 236; Harrison v. Mitchell, 13 La. Ann. 260; Collins v. Waggoner, Breese, 26; Beveridge v. Rawson, 51 Ill. 504; Reed v. Rich, 49 Ill. App. 262; Allred v. Bray, 41 Mo. 484; Grund v. Van Vleck, 69 Ill. 479; Vanderbilt v. Turnpike Co., 2 N. Y. 479; Brainerd v. Dunning, 30 N. Y. 211; Russo v. Maresca, 72 Conn. 51, 43 Atl. 552. The government is liable for the illegal acts of its officers which it expressly adopts. Wiggins v. United States, 3 Ct. Claims, 412. It was held in Wilson v Tumman, 6 M. & Gr. 236, that if a sheriff had made himself liable as trespasser, the subsequent ratification of his act by the plaintiff would not make him a trespasser also; the sheriff not being his agent, but the agent of the law. Following this decision are Tilt v. Jarvis, 7 U. C. C. P. 145; McLeod v. Fortune, 19 U. C. Q. B. 98. But see Murray v. Lovejoy, 2 Cliff, 191, and 3 Wall, 1; Knight v. Nelson, 117 Mass. 458.

[22] Holliday v. Jackson, 30 Mo. App. 263; Lewis v. Read, 13 M. & W. 834; Adams v. Freeman, 9 Johns. 118; Dally v. Young, 3 Ill. App. 39; Tucker v. Jerris, 75 Me. 184.

is done,[23] or that he employs counsel to defend the trespasser,[24] or that he takes steps in the direction of a compromise.[25] These are acts which any one may do for another as a matter of friendship or favor merely, and without contemplating further responsibility than is involved in the acts themselves. Merely approving a wrong or expressing pleasure or satisfaction at its being accomplished, does not amount to ratification,[26] but it may be otherwise in case of master and servant.[27]

Where a city approved, accepted and paid for street grading, which had been done in an illegal manner, it was held to have adopted the wrong.[28] Where a third party delivered a load of coal to the plaintiff, assuming to act as the servant of the defendant in so doing, though not such servant in fact, and negligently injured the plaintiff's property in making the delivery, the attempt of the defendant to collect the price of the coal was held to be a ratification of the act of the third party and to render the defendant liable for the negligence.[29]

§ 33. Joint liability of officer and party. Questions of ratification often arise between the party to a suit and the officer who serves his process.[30] If the officer exceeds his authority, the party is not responsible unless he advised or assisted the

[23] Holliday v. Jackson, 30 Mo. App. 263; Klotz v. Lindsay, 88 Mo. App. 594; Benton v. Beattie, 63 Vt. 186, 22 Atl. 422; Hyde v. Cooper, 26 Vt. 552; Lewis v. Read, 13 M. & W. 834. But, if a principal derives all the benefit derivable from his agent's tort and has the only interest in it, he is liable for the wrong. Dunn v. Hartford, etc., R. R. Co., 43 Conn. 434.

[24] Buttrick v. Lowell, 1 Allen, 172, 79 Am. Dec. 721; Eastern Counties R. R. Co. v. Broom, 6 Exch. 314. See Woollen v. Wright, 1 H. & C. 554.

[25] Roe v. Birkenhead, etc., Railway Co., 7 Exch. 36; S. C. 7 Eng. L and Eq. 546.

[26] Cooper v. Johnson, 81 Mo. 483; Hubbard v. Hunt, 41 Vt. 376; Langdon v. Bruce, 27 Vt. 657.

[27] Brown v. Webster City, 115 Ia. 511, 88 N. W. 1070.

[28] Brown v. Webster City, 115 Ia. 511, 88 N. W. 1070.

[29] Dempsey v. Chambers, 154 Mass. 330, 28 N. E. 279, 26 Am. St. Rep. 249, 13 L. R. A. 219. And see Dunn v. Hartford, etc., R. R. Co., 43 Conn. 434; Exum v. Brister, 35 Miss. 391.

[30] Perkins v. Proctor, 2 Wils. 382; Parsons v. Lloyd, 3 Wils. 341; Barker v. Braham, 3 Wils. 377; Currey v. Pringle, 11 Johns. 444; McGuinty v. Herrick, 5 Wend. 240; Jacques v. Parks, 96 Me. 268, 52 Atl. 763; Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866; Wing v. Hussey, 71 Me. 185.

officer therein.[31] Mere neglect to interpose objection is not sufficient, nor, it seems, is an expression of opinion that the officer's proceedings are warranted by law.[32] But where a plaintiff and his attorney were aware of all the facts concerning the levy upon property not belonging to the defendant in the writ, approved of it, and on request refused to consent to its being released, they were held jointly liable with the officer as trespassers.[33] Many cases go further than this, and hold the party responsible where the officer has departed from the command of his writ, or from his instructions, if the party has afterwards approved what was done, and has taken, or is seeking to take, a benefit from it.[34] Where, however, the plaintiff receives only such benefits as he would have been entitled to under a lawful service of the writ, he cannot, from this fact alone, be held to be a participant in the officer's trespasses.[35] If the party directs, advises or participates in the wrongful act he is, of course, liable jointly with the officer.[36] One method of ratification as between the party to the suit and the officer is by the former giving to the latter a bond of

[31] Wilson v. Tumman, 6 M. & Gr. 244; Whitmore v. Green, 13 M. & W. 104; Walley v. McConnell, 13 Q. B. 911; Averill v. Williams, 4 Denio, 295, 47 Am. Dec. 252; Abbott v. Kimball, 19 Vt. 551, 47 Am. Dec. 708; People's B. & L. Ass'n v. McElroy, 79 Ill. App. 266; Murray v. Mace, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664; Teel v. Miles, 51 Neb. 542, 71 N. W. 296; Small v. Benfield, 66 N. H. 206, 20 Atl. 284.

[32] Hyde v. Cooper, 26 Vt. 552.

[33] Cook v. Hopper, 23 Mich. 511. A party who orders the sheriff to refuse sufficient bail and keep defendant in custody is liable. Gibbs v. Randlett, 58 N. H. 407.

[34] See Thompkins v. Haile, 3 Wend. 406; Root v. Chandler, 10 Wend. 111; Allen v. Crary, 10 Wend. 349, 25 Am. Dec. 566; Davis v. Newkirk, 5 Denio, 94; Ball v. Loomis, 29 N. Y. 412; Leach v. Francis, 41 Vt. 670; Stroud v. Humble, 2 La. Ann. 930; Bonnel v. Dunn, 28 N. J. L. 153; Knight v. Nelson, 117 Mass. 458; Wetzell v. Waters, 18 Mo. 396; Nelson v. Cook, 17 Ill. 443; Syndacker v. Brosse, 51 Ill. 357; Beveridge v. Rawson, 51 Ill. 504; Deal v. Bogue, 20 Pa. St. 228, 57 Am. Dec. 702; Reithmann v. Godsman, 23 Colo. 202, 46 Pac. 684.

[35] Hyde v. Cooper, 26 Vt. 552.

[36] Riethman v. Godson, 23 Colo. 202, 46 Pac. 684; Murray v. Mace, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664; Castile v. Ford, 53 Neb. 507, 73 N. W. 945; Streeter v. Johnson, 22 Nev. 194, 44 Pac. 819.

indemnity, or other security, against the consequences of his action.[37]

§ 34. Participation by attorneys. An attorney who delivers a writ to an officer for service does not personally assume any responsibility in respect thereto, except to this extent, that he is understood as directing the officer to proceed to obey the command of the writ. If, therefore, the writ is illegal, and the officer makes himself a trespasser in serving it, the attorney is liable as joint trespasser with him.[38] But if the officer exceeds the command of the writ, or does anything which its command, if legal, would not justify, the attorney is not responsible,[39] unless he counsels or assists in it, in which case his liability rests upon the same ground as that of any other participant in a trespass.[40] "An attorney is only liable where he institutes proceedings without authority from his client, or where he and his client fraudulently conspire to do an illegal act, or where he acts dishonestly, with some sinister view, or for some improper purpose of his own which the law considers malicious."[41]

§ 35. Joint liability of officer and deputy. Whenever an officer is authorized by law to appoint a deputy who shall be empowered to perform his official duties, the rule is general that the principal shall respond for all the deputy's misfeasances or nonfeasances, while he acts by color of his appointment. Taking the case of the sheriff as an illustration, the rule is laid down very clearly in the numerous cases cited in the

[37] Murray v. Lovejoy, 2 Cliff. 191, and 3 Wall. 1; Herring v. Hoppock, 15 N. Y. 409, 413; Root v. Chandler, 10 Wend. 110, 25 Am. Dec. 546; Knight v. Nelson, 117 Mass. 458; Lewis v. Johns, 34 Cal. 629; Crossman v. Owen, 62 Me. 528; Rice v. Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609; Ahearn v. Connell, 72 N. H. 238, 56 Atl. 189; Dyett v. Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533.

[38] Burnap v. Marsh, 13 Ill. 535; Johnson v. Bouton, 35 Neb. 898, 53 N. W. 995.

[39] Seaton v. Cordray, Wright (Ohio), 102; Averill v. Williams, 1 Denio, 501; Adams v. Freeman, 9 Johns. 118; Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83; Cook v. Hopper, 23 Mich. 511.

[40] Hardy v. Keeler, 56 Ill. 152; Cook v. Hopper, 23 Mich. 511; MacVeagh v. Hanford, 29 Ill. App. 606; Tenney v. Harvey, 63 Vt. 520, 22 Atl. 659.

[41] Farmer v. Crosby, 43 Minn. 459, 461, 45 N. W. 866. And see Roth v. Shupp, 94 Md. 55, 50 Atl. 430.

margin, that the sheriff is liable to the plaintiff in the writ for the deputy's misconduct or neglect to his injury.[42] But he is also liable for the deputy's misfeasances and nonfeasances which injure the defendant[43] or any third person.[44] Nevertheless, the fact that the sheriff is responsible does not relieve the deputy, who is equally liable with the sheriff for all his positive misfeasances;[45] but when a mere neglect to perform an official duty is complained of, only the sheriff can be sued, because only upon him does the official duty rest.[46]

§ 36. **Joint liability for slander.** It is held that there can be no joint liability for slander, because there can be no joint utterance. He alone can be liable who spoke the words; and if two or more utter the same slander at the same time, still the utterance of each is individual, and must be the subject of a separate proceeding for redress.[47] It has been said, however, that if several unite in singing the same defamatory song, the singing may be treated as the joint slander of all;[48] but this is

[42] Blunt v. Sheppard, 1 Mo. 219; Marshall v. Hosmer, 4 Mass. 60; Esty v. Chandler, 7 Mass. 464; McIntyre v. Trumbull, 7 Johns. 35; Pond v. Leman, 45 Barb. 152; Mason v. Ide, 30 Vt. 697; Seaver v. Pierce, 42 Vt. 325; Stimpson v. Pierce, 42 Vt. 334; Whitney v. Farrar, 51 Me. 418; Remlinger v. Weyker, 22 Wis. 383; Prosser v. Coots, 50 Mich. 262; Grabenheimer v. Budd, 40 La. Ann. 107, 3 So. 724; Case v. Hulsebush, 122 Ala. 212, 26 So. 155; Frizzell v. Duffer, 58 Ark. 612, 25 S. W. 1111.

[43] Woodgate v. Knatchbull, 2 T. R. 148; Grunnell v. Phillips, 1 Mass. 529; Knowlton v. Bartlett, 1 Pick. 270. See Morgan v. Chester, 4 Conn. 387; Waterbury v. Westervelt, 9 N. Y. 598.

[44] Ackworth v. Kempe, Doug. 41; Campbell v. Phelps, 17 Mass. 244; Norton v. Nye, 56 Me. 211; Rider v. Chick, 59 N. H. 50.

[45] Purrington v. Loring, 7 Mass. 388; Ross v. Philbrick, 39 Me. 29; Remlinger v. Weyker, 22 Wis. 383.

[46] Cameron v. Reynolds, Cowp. 403; Hutchinson v. Parkhurst, 1 Aik. 258; Buck v. Ashley, 37 Vt. 475; Armistead v. Marks, 1 Wash. (Va.) 325; Rose v. Lane, 3 Hump. 218; Paddock v. Cameron, 8 Cow. 212. The rule seems to be different in Massachusetts. Draper v. Arnold, 12 Mass. 449.

[47] Chamberlain v. Goodwin, Cro. Jac. 647; Swithin v. Vincent, 2 Wils. 227; Chamberlaine v. Willmore, Palm. 313; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; State v. Roulstone, 3 Sneed, 107; Webb v. Cecil, 9 B. Mon. 198, 48 Am. Dec. 423; Blake v. Smith, 19 R. I. 476, 478, 34 Atl. 995. But see Burdick on Torts, page 300, where it is maintained that there may be a joint liability.

[48] *Dictum*, Thomas v. Rumsey, 6 Johns. 26, 31. Even here, however, we suppose the person

on grounds that distinguish it from an ordinary speaking; each speaker having his part in a joint utterance, and the individual voice being a part only of what reaches the ear of the hearer as a whole.

§ 37. **Joint liability in case of negligent injuries.** In respect to negligent injuries, there is considerable difference of opinion as to what constitutes joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities.[49] The authorities are, perhaps, not agreed beyond this, that where two or more owe to another a common duty and by a common neglect of that duty such other person is injured, then there is a joint tort with joint and several liability.[50] The weight of authority will, we think, support the more general proposition, that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concert of action.[51] In a recent New Jersey case it is said: "If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well settled principles, each, any or all of the tort feasors may be held. But when each of two or more persons owes to another a separate duty which each wrongfully neglects to perform, then although the duties were diverse and disconnected and the negligence of each was without concert, if such several neglects concurred and united together

wronged might bring his separate action for the tenor slander, the bass slander, etc.

[49] The following are some of the more recent cases in which the question has been especially considered: Richmond, etc., R. R. Co. v. Greenwood, 99 Ala. 501, 14 So. 495; Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; Cleveland v. Bangor, 87 Me. 259, 32 Atl. 892; Matthews v. Delaware, etc., R. R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261; Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676; Wiest v. Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666; Swain v. Tenn. Copper Co., 111 Tenn. 430, 78 S. W. 93.

[50] See Matthews v. Delaware, etc., R. R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261; Elliott v. Field, 21 Colo. 378, 41 Pac. 504; and cases cited in last note.

[51] See cases cited in following notes.

in causing injury, the tort is equally joint and the tort feasors are subject to joint and several liability."[52]

By the weight of authority, if a person is injured by a collision between the trains or cars of two companies, then, if both companies are negligent, both are jointly and severally liable.[52a] So if a person is injured by a defect or obstruction in a public street and such defect or obstruction was negligently caused by some third party, such as a street railroad company, with respect to its track, or a contractor doing work in the street, or by a company maintaining electric wires, or an abutting owner, and the municipality is also negligent in permitting such defect to exist or remain, then the municipality and such third party are jointly liable.[53] But there is a strong dissent from this view.[54] A horse was killed in the street by

[52] Matthews v. Delaware, etc., R. R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261. The more restricted view of joint liability is well presented by the Indiana court of appeals in the following case: Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522.

[52a] Washington, etc., R. R. Co. v. Hickey, 5 App. D. C. 436; St. Louis, etc., R. R. Co. v. Hopkins, 100 Ill. App. 567; Matthews v. Delaware, etc., R. R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261; Colegrove v. New York, etc., R. R. Co., 20 N. Y. 492, 75 Am. Dec. 418. But see Richmond & D. R. R. Co. v. Greenwood, 99 Ala. 501, 14 So. 495.

[53] Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St Rep. 171; Elliott v. Field, 21 Colo. 378, 41 Pac. 504; Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696; Chicago, etc., R. R. Co. v. Harrington, 192 Ill. 9, 61 N. E. 450; Union St. Ry. Co. v. Stone, 54 Kan. 83, 37 Pac. 1012; Kansas City v. File, 60 Kan. 157, 55 Pac. 877; Cumberland Tel. & Tel. Co. v. Ware, 115 Ky. 581, 74 S. W. 289; Cline v. Crescent City R. R. Co., 41 La. Ann. 1031, 6 So 851; Cline v. Crescent City R. R. Co., 43 La. Ann. 327, 9 So. 122, 26 Am. St. Rep. 187; Berkley v. Wilson, 87 Md. 219, 39 Atl. 502; Conowingo Bridge Co. v. Hedrick, 95 Md. 669, 53 Atl. 430; Corey v. Havener, 182 Mass. 250, 65 N. E 69; McBride v. Scott, 125 Mich 517, 84 N. W. 1079; McClelland v. St. Paul, etc., Ry. Co., 58 Minn 104, 59 N. W. 978; Ray v. Jones & Adams Co., 92 Minn 101, 99 N. W 782; Matthews v. Delaware, etc R. R. Co., 56 N. J. L. 34, 27 Atl 919, 22 L. R. A. 261; United Electric Ry. Co. v. Shelton, 89 Tenn 423, 14 S. W. 863, 24 Am. St. Rep 614; Wilder v. Stanley, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479; Dufur v. Boston & M. R. R. Co., 75 Vt 165, 53 Atl. 1058; Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744.

[54] Richmond, etc., R. R. Co v. Greenwood, 99 Ala 501, 14 So 495; Cleveland v. Bangor, 87 Me

coming in contact with a telephone wire which had fallen across a trolley wire, and become charged with a dangerous current. The fall of the wire was due to the negligence of the telephone company and the trolley company was negligent in not providing guards. It was held to be a case of joint liability.[55] Plaintiff's colt got into the defendant's lot through a defective fence which it was the defendant's duty to maintain. A stranger attempted to drive the colt back and negligently caused him to run into a barbed wire fence, whereby he was injured. The negligence of the two was concurrent and they were held jointly liable.[56] Two persons on motor cycles passed the wagon in which the plaintiff was riding, one on each side, whereby his horse was frightened and he was injured. They were held jointly liable. "It makes no difference," says the court, "that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each. If each contributed to the injury, that is enough to bind both."[57] Two buildings owned in severalty by the two defendants fell at the same time, owing to weak walls, and crushed the plaintiff's building. A joint action was sustained.[58] So where two independently set fires which come together and after their union destroyed the plaintiff's property.[59] Where two or more are unlawfully or negligently racing horses on a street and one injures a traveler, they are all jointly and severally

259, 32 Atl. 892; Trowbridge v. Forepaugh, 14 Minn. 133; Dutton v. Lansdowne Bor., 198 Pa. St. 563, 48 Atl. 494, 82 Am. St. Rep. 814, 53 L. R. A. 469; Wiest v. Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666; Goodman v. Coal Tp., 206 Pa. St. 621, 56 Atl. 65; Howard v. Union Traction Co., 195 Pa. St. 391, 45 Atl. 1076.

[55] United Electric Ry. Co. v. Shelton, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614. A similar case and same ruling: Cumberland Tel. & Tel. Co. v. Ware, 115 Ky. 581, 74 S. W. 289; City Electric St. Ry. Co. v. Conery, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570.

[56] Wilder v. Stanley, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479.

[57] Corey v. Havener, 182 Mass. 250, 65 N. E. 69.

[58] Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744. Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676, is a similar case but the decision is put on somewhat different grounds.

[59] McClellan v. St. Paul, etc., Ry. Co., 58 Minn. 104, 59 N. W. 978.

liable.[60] Where the dogs of different owners unite in doing damage a joint action will not lie.[61]

§ 38. **In case of nuisances.** It is laid down as a general proposition by the court of appeals of New York that, where two or more persons by their several acts or omissions maintain a public or common nuisance, they are jointly and severally liable for the damages caused thereby.[62] In the case referred to three persons owned in severalty three brick houses forming a solid block. They were destroyed by fire and the front walls were left in an unsafe condition. The whole front wall afterwards fell into the street and killed the plaintiff's son, who was on the sidewalk at the time, about opposite the line between two of the houses and where no part of the third wall fell upon him. The defendants were held to be jointly liable.[63] But where different proprietors, on a stream, each acting independently and for his own purposes, conduct filth or refuse into the stream from their respective estates, they are held not to be jointly liable.[64] So where several proprietors drain their premises into the same ditch or water way and the combined waters flood or otherwise damage a lower proprietor.[65] But it would be otherwise if there was some concert of action, as if they joined in constructing or maintain-

[60] Holloway v. McIntosh, 7 Kan. App. 34, 51 Pac. 963; Hanrahan v. Cochran, 12 App. Div. 91, 42 N. Y. S. 1031.

[61] Nierenberg v. Wood, 59 N. J. L. 112, 35 Atl. 654; Dyer v. Hutchins, 87 Tenn. 198, 10 S. W. 194.

[62] Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676. See also Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522.

[63] Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744, is a similar case.

[64] Chipman v. Palmer, 77 N. Y. 51; Gallagher v. Kemmerer, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673; Little Schuylkill, etc., Co. v. Richards, 57 Pa. St. 142, 98 Am. Dec. 209; Sellick v. Hall, 47 Conn. 260; Lull v. Fox & Wis. Imp. Co., 19 Wis. 100; Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; Bowman v. Humphrey, 124 Ia. 744, 100 N. W. 854. *Contra*, West Muncie Strawboard Co. v. Slack, 164 Ind. 21.

[65] Bonte v. Postel, 109 Ky. 64, 58 S. W. 536, 51 L. R. A. 187; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; Chicago, etc., R. R. Co. v. Glenney, 118 Ill. 487; Miller v. Highland Ditch Co., 84 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254.

ing the ditch.[66] The same rule applies to the pollution of the atmosphere as to the pollution of a stream. And where different factories or works, owned and carried on by different proprietors, each discharge volumes of smoke and gasses into the atmosphere which mingle and spread over the surrounding territory, injuring vegetation and affecting the health and comfort of those who live in the vicinity, each proprietor is liable only for the proportion of the damage caused by him, and not jointly and severally for the entire damage.[67]

§ 39. **In case of master and servant.** The master and servant are in general jointly and severally liable for the tortious act of the servant committed in the course of the master's business.[68] In one of the cases cited, where the engineer of one train was injured in a collision with another train, due to the negligence of the latter train, the court in holding the company and the delinquent engineer jointly liable, says: "The servant is liable because of his own misfeasance or wrongful act, in breach of his duty to so use that which he controlled as

[66] Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656.

[67] Swain v. Tenn. Copper Co., 111 Tenn. 430, 78 S. W. 93; Harley v. Merrill Brick Co., 83 Ia. 73.

[68] Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433; Green v. Berge, 105 Cal. 49, 38 Pac. 509; Baird v. Shipman, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128; Vigeant v. Scully, 35 Ill. App. 44; Central of Georgia Ry. Co. v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; Indiana N. & T. Co. v. Lippincott Gas Co., 165 Ind. 361; Cincinnati, etc., Ry. Co. v. Cook, 113 Ky. 161, 67 S W. 383; Whittaker v. Collins, 34 Minn. 299; Schumfert v. Southern Ry. Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802; Gardner v. Southern Ry. Co., 65 S. C 341, 43 S. E. 816; Able v. Southern Ry. Co., 73 S. C. 173; McHugh v Northern Pac. Ry. Co., 32 Wash. 30, 72 Pac. 450; Morrison v. Northern Pac. Ry. Co., 34 Wash. 70, 74 Pac. 1064; Cary v. Webster, 1 Str. 480; Wilson v. Peto, 6 More, 47; Johnson v. Barber, 10 Ill. 425; Carman v. Steubenville, etc., R. R. Co., 4 Ohio St. 399; Suydam v. Moore, 8 Barb. 358, 363; Bailey v. Bailey, 61 Me. 361; Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507; Phelps v. Wait, 30 N. Y. 78; Montfort v. Hughes, 3 E. D. Smith, 591. Perhaps the courts of Massachusetts would not sustain a joint liability, unless the master was present and participating. See Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745, and see McIntyre v. Southern Ry. Co., 131 Fed. 985, — C. C. A. —; McNemar v. Cohn, 115 Ill. App. 31.

not to injure another. The master is liable because he acts by his servant, and is, therefore, bound to see that no one suffers legal injury through the servant's wrongful act done in the master's service within the scope of the agency. Both are liable jointly, because from the relation of master and servant they are united or identified in the same tortious act resulting in the same injury."[69]

§ 40. **Joint liability in other cases.** Each partner is the agent of all in the transaction of the partnership business and all are liable for the tort of any one of the firm committed within the scope of such agency.[70] But it is held that this rule does not apply to malicious torts.[71] Where a railroad is leased, both the lessor and lessee are jointly and severally liable for the negligence of the latter in the operation of the road.[72] But

[69] Schumpert v. Southern Ry. Co., 65 S. C. 332, 338, 43 S. E. 813, 95 Am. St. Rep. 802. And see 1 Shear. & R. Neg. § 248.

[70] Austin v. Appling, 88 Ga. 54, 13 S. E. 955; Miller v. Phoenix Ins. Co., 109 Ill. App. 624; Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90; Taylor v Thompson, 62 App. Div. 159, 70 N. Y. S. 997. In an action of tort for malpractice growing out of a contract for professional services of a firm of physicians, only the negligent partner was sued. *Held*, that as the gist of the action was the breach of the contract, all persons jointly liable on the contract must be joined. Whittaker v. Collins, 34 Minn. 299, 57 Am. Rep 55.

[71] Swenson v. Erickson, 90 Ill. App. 358; Noblett v. Bartsch, 31 Wash. 24, 71 Pac. 551, 96 Am. St. Rep. 886; Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089. In Haney Mfg. Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073, all the partners were held liable for a slander uttered by one in course of the partnership business, but the contrary is held in Hendricks v. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835.

[72] Central of Georgia Ry. Co. v. Wood, 129 Ala. 483, 29 So. 775; Driscoll v. Norwich, etc., R. R. Co., 65 Conn. 230, 32 Atl. 354; Pennsylvania Co. v. Sloan, 125 Ill. 72, 17 N. E. 37, 8 Am. St Rep 337; Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559; Chicago, etc., R. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290; Suburban R. R. Co. v. Balkwill, 195 Ill. 535, 63 N. E. 389; Chicago, etc., R. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050; Nugent v. Boston, etc., R. R. Co., 80 Me. 62, 12 Atl. 797; Logan v. North Carolina R. R. Co., 116 N. C. 940, 21 S. E. 959; Tillett v. Norfolk, etc., R. R. Co., 118 N. C. 1031, 24 S. E. 111; Kinney v. North Carolina R. R. Co., 122 N. C. 961, 30 S. E. 313; Harden v. North Carolina R. R. Co., 129 N. C. 354, 40 S. E. 184, 85 Am. St. Rep. 747 55 L. R. A. 784; Harmon v. Columbia, etc., R. R. Co., 28 S. C. 401, 5 S. E. 835, 13 Am.

where the lease is sanctioned by legislative authority and the lessee is given exclusive possession and control of the road, the lessee is alone liable.[73] So the landlord and tenant may be jointly liable for a defect in the leased premises.[74]

§ 41. **General consequences of joint liability.** Where two or more are jointly liable for a wrong, the law compels each to assume and bear the responsibility of all.[75] To require the party injured to ascertain and point out how much of the injury was done by one person and how much by another, or what share of responsibility is fairly attributable to each as between themselves, and to leave this to be apportioned among them by the jury according to the mischief found to have been done by each, would, in many cases, be equivalent to a practical denial of justice. The law does not require this, but on the other hand permits the party injured to treat all concerned in the injury as constituting together one party, by their joint co-operation accomplishing certain injurious results, and liable to respond to him in a gross sum as damages.[76]

But while the law permits all the wrong-doers to be pro-

St. Rep. 686; Parr v. Spartenburg, etc., R. R. Co., 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826; Cogswell v. West St., etc., Elec. Ry. Co., 5 Wash. 46, 31 Pac. 411; Ricketts v. Chesapeake, etc., Ry. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901; Fisher v. West Virginia, etc., Ry. Co., 39 W. Va. 366, 19 S. E. 382, 23 L. R. A. 758.

[73] Pinkerton v. Pa. Traction Co., 193 Pa. St. 229, 44 Atl. 284; Virginia Midland Ry. Co. v. Washington, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344; Hayes v. Northern Pac. R. R. Co., 74 Fed. 279, 20 C. C. A. 52. In St. Louis, etc., Ry. Co. v. Trigg, 63 Ark. 536, 40 S. W. 579, a railroad and its receivers were held jointly liable for a nuisance caused by an embankment so negligently constructed as to flood the plaintiff's land.

[74] Joyce v. Martin, 15 R. I. 558, 10 Atl. 617.

[75] Miller v. Fenton, 11 Paige, 18; Nelson v. Cook, 17 Ill. 443; Turner v. Hitchcock, 20 Ia. 310; McManus v. Lee, 43 Mo. 206, 97 Am. Dec. 386; Wallace v. Miller, 15 La. Ann. 449; Lewis v. Johns, 34 Cal. 629; Shepherd v. McQuilkin, 2 W. Va. 90; Woodbridge v. Conner, 49 Me. 353, 77 Am. Dec. 263; Brown v. Perkins, 1 Allen, 89; Barden v. Felch, 109 Mass. 154; Johnson v. Barber, 10 Ill. 425.

[76] Page v. Freeman, 19 Mo. 421; Wright v. Lathrop, 2 Ohio 33, 15 Am. Dec. 529; Hawkins v. Hatton, 1 N. & McC. 318, 9 Am. Dec. 700; Knickerbacker v. Colver, 8 Cow. 111; Knott v. Cunningham, 2 Sneed, 204; McGehee v. Shafer, 15 Texas, 198; Turner v. Hitchcock, 20 Ia. 310; Wheeler v. Worcester, 10 Allen, 591; Henry v.

ceeded against jointly, it also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy regardless of the participation of the others. While the wrong is joint it is also in contemplation of law several; and while the person injured may pursue all, so he may pursue any number of those who are legally chargeable with the wrong; if one is sued alone, it is no defense to him that others are not brought in to share the responsibility; if all are sued, one cannot excuse himself by showing the insignificance of his participation as compared with that of others.[77] Each is responsible for the whole, and the degree of his blamableness as between himself and his associates is immaterial.[78] Where one joint tort feasor is sued

Carlton, 113 Ala. 636, 21 So. 225; Grundell v. Union Iron Works, 127 Cal. 438, 59 Pac. 826, 78 Am. St. Rep. 75, 47 L. R. A. 467; Monat v. Wood, 22 Colo. 404, 45 Pac. 389; Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N. E. 553; Roodhouse v. Christian, 55 Ill. App. 107; Lafeyth v. Emporia Nat. Bank, 53 Kan. 51, 35 Pac. 805; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; Allison v. Hobbs, 96 Me. 26, 51 Atl. 245; Corey v. Havener, 182 Mass. 250, 65 N. E. 69; Monson v. Rouse, 86 Mo. App. 97; D. M. Osborne Co. v. Pino Mfg. Co., 51 Neb. 502, 70 N. W. 1124; Stevens v. Smathers, 124 N. C. 571, 32 S. E. 959.

[77] Farebrother v. Ansley, 1 Camp. 343; Wilson v. Milner, 2 Camp. 452; Pitcher v. Bailey, 8 East, 171; Booth v. Hodgson, 6 T. R. 405; Merryweather v. Nixan, 8 T. R. 186; Vose v. Grant, 15 Mass. 505; Wheeler v. Worcester, 10 Allen, 591; Campbell v. Phelps, 1 Pick. 62, 41 Am. Dec. 139; Thweatt v. Jones, 1 Rand. 328, 10 Am. Dec. 538; Dupuy v. Johnson, 1 Bibb, 562; Acheson v. Miller, 18 Ohio, 1; Wallace v. Miller, 15 La. Ann. 449; Moore v. Appleton, 26 Ala. 633; Rhea v. White, 3 Head, 121; Murphy v. Wilson, 44 Mo. 313, 100 Am. Dec. 290; Silbers v. Nerdlinger, 30 Ind. 53; Bishop v. Ely, 9 Johns. 294; Grundell v. Union Iron Works, 127 Cal. 438, 59 Pac. 826, 78 Am. St. Rep. 75, 47 L. R. A. 467; Hoosier Stone Co. v. McCain, 133 Ind. 231, 31 N. E. 956; McVey v. Manatt, 80 Ia. 132, 45 N. W. 548; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; Berkson v. Kansas City Cable Ry. Co., 144 Mo. 211, 45 S. W. 1119. The plaintiff may even bring different forms of action against the different participants in the wrong; as trespass against one, trover against another, and so on. DuBose v. Marx, 52 Ala. 506.

[78] West Chicago St. Ry. Co. v. Feldstein, 69 Ill. App. 36; Hume v. Oldacre, 1 Stark. 351; Bell v. Morrison, 27 Miss. 68; Huddleston v. West Bellevue, 111 Pa. St. 110. If punitory damages are sought, they must be assessed only as the most innocent defend-

he cannot compel the plaintiff to make the others parties,[79] or complain because they have not been joined.[80] And where two or more are sued one cannot complain because another has been dismissed out of court [81] or been acquitted.[82] Though two or more are sued and a joint tort alleged, the general rule is that a recovery may be had against one only.[83] But a different rule is held in Pennsylvania.[84] Where the suit is against several joint wrong-doers, the judgment must be for a single sum against all the parties found responsible.[85]

§ 42. **Effect of judgment against less than all.** The general rule in this country is that a judgment against one joint tort-feasor is no bar to the prosecution of a suit against any or all the others, but that the injured party may bring separate suits against the wrong-doers, and proceed to judgment in each, and that no bar arises as to any of them until satisfaction is

ant is liable for them. If he is not liable at all for such, none should be given. McCarthy v. De Armit, 99 Pa. St. 63.

[79] Hoosier Stone Co. v. McCain, 133 Ind. 231, 31 N. E. 956.

[80] Berkson v. Kansas City Cable Ry. Co., 144 Mo. 211, 45 S. W. 1119; Coleman v. Bennett, 111 Tenn. 705, 69 S. W. 734.

[81] Sharpe v. Williams, 41 Kan. 56, 20 Pac. 497.

[82] San Antonio Gas Co. v. Singleton, 24 Tex. Civ. App. 341, 59 S. W. 920.

[83] Wallace v. Stevens, 74 Tex. 559, 12 S. W. 283; Wyss v. Grunert, 108 Wis. 38, 83 N. W. 1095; Atlantic, etc., R. R. Co. v. Laird, 164 U. S. 393, 17 S. C. 720, 41 L. Ed. 485. In the last case it is held "that allegations alleging a joint relationship and the doing of negligent acts jointly are divisible. and that a recovery may be had where the proof establishes the connection of but one of the defendants with the acts averred." See also Winslow v. Newlan, 45 Ill. 145; Carpenter v. Lee, 5 Yerg. 265; Swigart v. Graham, 7 B. Mon. 661; Tompkins v. Clay St. R. R. Co., 66 Cal. 163, 4 Pac. 1165.

[84] Wiest v. Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666; Rowland v. Philadelphia, 202 Pa. St. 50, 51 Atl. 589; Minnich v. Lancaster, etc., Ry. Co., 203 Pa. St. 632, 53 Atl. 501; Sturzebecker v. Inland Traction Co., 211 Pa. St. 156.

[85] Pardridge v. Brady, 7 Ill. App. 639; Nashville, etc., Ry. Co. v. Jones, 100 Tenn. 512, 45 S. W. 681. In South Carolina, at an early day, the practice of apportioning damages among wrong-doers, by the verdict, appears to have been sanctioned and established. Smith v. Singleton, 2 McMul. 184, 39 Am. Dec. 122. But see Berry v. Fletcher, 1 Dill. 67. The fact that the liability of some is limited does not prevent a judgment for the full amount of

received.[86] But in England and some of the states a judgment against one is held to bar any further proceedings against the others jointly liable.[87] In still other states it is held that when execution is taken out by the plaintiff on one judgment, he has thereby made his final election and that a final judgment and an execution, or an order for an execution against one of several joint wrong-doers is a discharge of all the others.[88]

damages suffered against others. Grundell v. Union Iron Works, 127 Cal. 438, 59 Pac. 826, 78 Am. St. Rep. 75, 47 L. R. A. 467.

[86] *New York:* Livingston v. Bishop, 1 Johns. 290; Knickerbacker v. Colver, 8 Cow. 111. *Kentucky:* Elliott v. Porter, 5 Dana, 299, 30 Am. Dec. 689; Sharp v. Gray, 5 B. Mon. 4; United Society v. Underwood, 11 Bush, 265, 21 Am. Rep. 214. *Massachusetts:* Elliott v. Hayden, 104 Mass. 180; Knight v. Nelson, 117 Mass. 458. See Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727; Brown v. Cambridge, 3 Allen, 474. *West Virginia:* Griffie v. McClung, 5 W. Va. 131. *Connecticut:* Morgan v. Chester, 4 Conn. 387; Ayer v. Ashmead, 31 Conn. 447, 83 Am. Rep. 154. *Ohio:* Wright v. Lathrop, 2 Ohio, 33, 15 Am. Dec. 529. *Vermont:* Sanderson v. Caldwell, 2 Aik. 195; Stewart v. Martin, 16 Vt. 397. *Iowa:* Turner v. Hitchcock, 20 Ia. 310; Cushing v. Hederman, 117 Ia. 637, 91 N. W. 940, 94 Am. St. Rep. 320. *Texas:* McGehee v. Shafer, 15 Texas, 198. *Illinois:* Union, etc., Co. v. Shacklett, 19 Ill. App. 145; Roodhouse v. Christian, 158 Ill. 137, 41 N. E. 748. *California:* Dawso v. Schloss, 93 Cal. 194, 29 Pac. 31. *Maine:* Cleveland v. Bangor, 87 Me. 259, 32 Atl. 892. *Tennessee:* Christian v. Hoover, 6 Yerg. 505; Knott v. Cunningham, 2 Sneed, 204.

[87] Brown v. Wootton, Cro. Jac. 73, Yelv. 67; Buckland v. Johnson, 15 C. B. 145; King v. Hoare, 13 M. & W. 494, 504; Brinsmead v. Harrison, L. R. 6 C. P. 584; Hunt v. Bates, 7 R. I. 217, 8 Am. Dec. 597; Wilkes v. Jackson, 2 H. & M. (Va.) 355; Petticolas v. Richmond, 95 Va. 456, 28 S. E. 566. In Parmenter v. Barstow, 21 R. I. 410, 43 Atl. 1035, the doctrine of Hunt v. Bates, 7 R. I. 217, is limited to cases where the former judgment was in trespass or trover for property taken and converted and the effect of the judgment was to vest title in the tort feasor.

[88] *Indiana:* Allen v. Wheatley, 3 Blackf. 332; approved in Fleming v. McDonald, 50 Ind. 278, 19 Am. Rep. 711. *Maine:* White v. Philbrick, 5 Me. 147, 17 Am. Dec. 214. *Alabama:* Golding v. Hall, 9 Port. 169; Blann v. Crocheron, 20 Ala. 320. *Missouri:* Page v. Freeman, 19 Mo. 421. *Michigan:* Boardman v. Acer, 13 Mich. 77. Compare Brady v. Whitney, 24 Mich. 154; Kenyon v. Woodruff, 33 Mich. 310. If judgment is taken against one alone, tender of payment upon that is no bar, unless the plaintiff elects to receive

The doctrine which prevails in the majority of the States has met with the approval of the federal courts,[89] and there seems to be no good reason why it should not be generally accepted and followed.[90] And where two persons are severally, though not jointly liable for the same tort, a judgment against one is no bar to a suit against the other.[91]

Enforcing satisfaction of his damages by the collection of one judgment, will not preclude the plaintiff from collecting his costs in other judgments. He is entitled to take out executions for their collection.[92] A partial satisfaction of a judgment against one joint wrong-doer is no bar to a suit against another.[93] It, of course, follows from the foregoing that, where there are several judgments, the payment or satisfaction of one discharges all.[94]

§ 43. **Effect of release or other settlement with one joint wrong-doer.** If the injured party accepts a satisfaction voluntarily made by one joint wrong-doer, it will work a discharge of all the others.[95] And so a release of one releases all,[96] al-

it. Blann v. Crocheron, 20 Ala. 320.

[89] Murray v. Lovejoy, 2 Cliff. 191; S. C. 3 Wal. 1.

[90] Perhaps if a levy on chattels has been made, sufficient to satisfy the judgment, that should at least suspend all further remedy for the time. See Kenyon v. Woodruff, 33 Mich. 310; F. & M. Bank v. Kingsley, 2 Doug. (Mich.) 379; Freeman, Judgments, § 475, and cases cited.

[91] Cleveland v. Bangor, 87 Me. 259, 32 Atl. 892.

[92] Windham v. Wither, Stra. 515; Livingston v. Bishop, 1 Johns. 290, 293; Knickerbacker v. Colver, 8 Cow. 111; First Nat. Bank v. Piano Co., 45 Ind. 5; Ayer v. Ashmead, 31 Conn. 447, 83 Am. Rep. 154. See Lord v. Tiffany, 98 N. Y. 412, 50 Am. Rep. 689. In a joint action for libel several judgments were rendered. The smaller judgment was paid. Upon payment of costs the other defendant was entitled to have the judgment against him satisfied. Breslin v. Peck, 38 Hun, 623.

[93] McVey v. Manatt, 80 Ia. 132, 45 N. W. 548.

[94] Ashcraft v. Knoblock, 146 Ind. 169, 45 N. E. 69; Snyder v. Witt, 99 Tenn. 618, 42 S. W. 441.

[95] Chetwood v. Cal. Nat. Bank, 113 Cal. 414, 45 Pac. 704; Bowman v. Davis, 13 Colo. 297, 22 Pac. 507; Seither v. Phila. Traction Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54; Turner v. Hitchcock, 20 Ia. 310; Tompkins v. Clay St. R. R. Co., 66 Cal. 164; Urton v. Price, 57 Cal. 270; Lord v. Tiffany, 98 N. Y. 412, 50 Am. Rep. 689. Note taken from one, but not paid, is no satisfaction. Ayer v. Ashmead, 31 Conn. 447 83 Am

though the release expressly stipulates that the other defendants shall not be released.[97] And this rule is held to apply even though the one released was not in fact liable.[98] "It does not lie in the mouth of such a plaintiff to say he had no cause of action against one who paid him for his injuries, for the law presumes that the one who paid committed the trespass and occasioned the whole injury."[99] But an acceptance of money or other consideration from one joint tort feasor is not a discharge of the others, where there is no satisfaction or release, but the amount received may be shown in mitigation of damages.[1] Nor is a mere agreement not to sue though given for a valuable consideration.[2] It has been decided in Indiana

Rep. 154, lays down the general rule. See Allison v. Connor, 36 Mich. 283; Gilpatrick v. Hunter, 24 Me. 18, 41 Am. Dec. 370; Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534; Bronson v. Fitzhugh, 1 Hill, 185.

[96] Aldrich v. Parnell, 147 Mass. 409, 18 N. E. 170; McBride v. Scott, 132 Mich. 176, 93 N. W. 243, 102 Am. St. Rep. 416; Sunlin v. Skutt, 133 Mich. 208, 94 N. W. 733; Hubbard v. St. Louis, etc., R. R. Co., 173 Mo. 249, 72 S. W. 1073; Seither v. Phila. Traction Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54; Williams v. Le Bar, 141 Pa. St. 149, 21 Atl. 525; McGehee v. Shafer, 15 Tex. 198. But in Louisville, etc., Mail Co. v. Barnes, 117 Ky. 860, it is held that a release of one upon receiving a partial satisfaction from him is no bar to a suit against the others.

[97] Mitchell v. Allen, 25 Hun, 542; Seither v. Phila. Traction Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54; McBride v. Scott, 132 Mich. 176, 93 N. W. 243, 102 Am. St. Rep. 416.

[98] Miller v. Beck, 108 Ia. 575, 79 N. W. 344; Hubbard v. St. Louis, etc., R. R. Co., 173 Mo. 249, 72 S. W. 1073; Seither v. Phila. Traction Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54. But in Thomas v. Central R. R. Co., 194 Pa. St. 511, 45 Atl. 344, it is held, without referring to the preceding case, or citing any authority, that a release of one who is not liable is not a release of one who is. And see Turner v. Hitchcock, 20 Ia. 310.

[99] Hubbard v. St. Louis, etc., R. R. Co., 173 Mo. 249, 72 S. W. 1073.

[1] Chicago, etc., R. R. Co. v. Hines, 82 Ill. App. 488; Knapp v. Roche, 94 N. Y. 329; Sloan v. Herrick, 49 Vt. 327; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830.

[2] Robertson v. Trammell, 98 Tex. 364; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271, citing Snow v. Chandler, 10 N. H. 92; Knapp v. Roche, 94 N. Y. 329; Bloss v. Plymale, 3 W. Va. 393; Sloan v. Herrick, 49 Vt. 327; Brown v. Marsh, 7 Vt. 320; Chamberlain v. Murphy, 41 Vt. 110; Ellis v. Esson, 50 Wis. 138; Parmelee v. Lawrence, 44 Ill. 405.

that where the wrong consisted in the conversion by two of certain specific items of property, it was competent to settle with one on his returning a part of what had been taken, and to proceed afterward against the other.[3] The decision was expressly confined to the specific facts, and could not safely be carried very far. But where property has been converted, a settlement in respect to a part of it is no bar to a suit for the conversion of the remainder.[4] The foregoing rules in regard to the effect of a judgment against one joint tort feasor, or of a release or satisfaction to one, are held to apply equally where two or more are severally, though not jointly, liable for the same tort.[5]

§ 44. **Contribution and indemnity as between wrong-doers.** As under the rules already laid down the party wronged may, at his election, compel any one of the parties chargeable with the act, or any number less than the whole, to compensate him for the injury, it becomes a consideration of the highest importance to the person or persons thus singled out and compelled to bear the loss, whether the others who were equally liable may be compelled to contribute for his relief. The general rule is that they cannot be,[6] and this rule is founded upon the maxim that no man can make his own misconduct the ground for an action in his own favor. But where one is liable

[3] Fitzgerald v. Smith, 1 Ind. 310.

[4] McCrills v. Hawes, 38 Me. 566; citing Benbridge v. Day, 1 Salk. 218.

[5] Miller v. Beck, 108 Ia. 575, 79 N. W. 344; Cleveland v. Bangor, 87 Me. 259, 32 Atl. 892. And see Aldrich v. Parnell, 147 Mass. 409, 18 N. E. 170.

[6] Merryweather v. Nixon, 8 T. R. 186; Pearson v. Skelton, 1 M. & W. 504; Wooley v. Batte, 2 C. & P. 417; Adamson v. Jarvis, 4 Bing. 66; Colburn v. Patmore, 1 C. M. & R. 73; Mitchell v. Cockburne, 2 H. Bl. 379; Cumpston v. Lambert, 18 Ohio, 81, 51 Am. Dec. 442; Selz v Unna, 6 Wal. 327; Minnis v. Johnson, 1 Duv. 171; Armstrong Co. v. Clarion Co., 66 Pa. St. 218, 5 Am. Rep. 368; Coventry v. Barton, 17 Johns. 142, 8 Am. Dec. 376; Rhea v. White, 3 Head, 121; Percy v. Clary, 32 Md. 245; Spalding v. Oakes, 42 Vt. 343; Churchill v. Holt, 131 Mass. 67, 41 Am. Rep. 191; Johnson v. Torpy, 35 Neb. 604, 53 N. W. 575, 37 Am. St. Rep. 447; Torpy v. Johnson, 43 Neb. 882, 62 N. W. 253; Boyer v. Bolender, 129 Pa. St. 324, 18 Atl. 445, 15 Am. St. Rep. 723; Oakdale v. Gamble, 201 Pa. St. 289, 50 Atl. 971; Gulf, etc., Ry. Co. v. Galveston etc., Ry. Co., 83 Tex. 509, 18 S. W. 956.

for a tort solely because of his relation to the person who actually commits it, as in case of wrongs by agents and servants, and is compelled to pay the entire damage, he may have indemnity from the actual wrong-doer. Thus where the master has been compelled to pay damages to a third party on account of the servant's negligence, the latter is liable over to the master.[7] So a servant may have indemnity from the master, when he has unintentionally committed a wrong by obeying directions which he had no reason to suppose were illegal.[8] And where the plaintiff, as agent of the defendant and at her direction, employed an attorney and took proceedings to get possession of certain property and obtained such possession by means of such proceedings, and was afterwards held liable in trespass because the court had no jurisdiction, it was held that he could maintain a suit against the defendant for indemnity.[9] So a city which has been made liable for a defective street, may have indemnity from one actually causing the defect without authority from the city.[10] So where mail contractors negligently obstructed a sidewalk affording access to a station whereby a passenger was injured, who recovered a judgment against the railroad company, they were held liable to indemnify the company.[11] A railroad company negligently frightened the plaintiff's horse which ran away and injured

[7] Georgia Southern, etc., Ry. Co. v. Jossey, 105 Ga. 271, 31 S. E. 179; and see Mainwaring v. Brandon, 8 Taunt. 202; S. C. 2 Moore, 125; Respass v. Morton, Hardin, 234; Smith v. Foran, 43 Conn. 244, 21 Am. Rep. 647; Grand Trunk R. R. Co. v. Latham, 63 Me. 177.

[8] Humphries v. Pratt, 2 D. & Clark, 288; Morris v. Brokley, 8 East. 172, note; Walker v. Hunter, 2 M. G. & S. 324; Bond v. Ward, 7 Mass. 125; Spangler v. Commonwealth, 16 S. & R. 68, 16 Am. Dec. 548; Commonwealth v. Van Dyke, 57 Pa. St. 34; Tarr v. Northey, 17 Me. 113, 35 Am. Dec. 232; Howard v. Clark, 43 Mo. 344; Chamberlain v. Beller, 18 N. Y. 115; Howe v. Buffalo, etc., R. R. Co., 37 N. Y. 297; Nelson v. Cook, 17 Ill. 446; Grace v. Mitchell, 31 Wis. 533, 11 Am. Rep. 613; Long v. Neville, 36 Cal. 455, 95 Am. Dec. 199.

[9] Culmer v. Wilson, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713.

[10] Gridley v. Bloomington, 68 Ill. 47; Chicago v. Robbins, 2 Black, 418. And see Detroit v. Chaffee, 70 Mich. 80, 37 N. W. 882; Minneapolis Mill Co. v. Wheeler, 31 Minn. 121.

[11] Old Colony R. R. Co. v. Slavens, 148 Mass. 363, 19 N. E. 372, 12 Am. St. Rep. 558.

C. The latter recovered a judgment against the plaintiff for his injuries. In a suit by the plaintiff against the railroad company for indemnity it was held that, though the judgment established that the plaintiff was negligent, yet if his negligence consisted solely in his being where he was at the time, and the railroad company could have prevented the accident by due care, then the plaintiff could recover.[12]

The foregoing are cases of indemnity; that is to say, cases in which the party actually in the wrong was compelled to relieve of the whole burden the party only technically in the wrong. But there are cases of contribution which are supported by reasons equally satisfactory. Two persons, we will suppose, are jointly concerned in a transaction, and in carrying it out according to arrangement and without any intent to injure others, they are nevertheless made liable by some invasion of another's right. Here if one were compelled to make good the loss, we should say his right to contribution was undoubted. As between himself and his associate he was not a wrong-doer at all.[13]

An attempt has been made in some cases to lay down a general rule by which it may be determined in every case whether the party is or is not entitled to contribution. Thus, in Ohio, the judicial conclusion is, that "the common-sense rule and the legal rule are the same, namely, that when parties think they are doing a legal and proper act, contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere."[14] This statement is a little inaccurate, in that it denies redress in the cases only in which parties are conscious of wrong-doing. There are many cases in which the

[12] Nashua Iron & Steel Co. v. Worcester, etc., R. R. Co., 62 N. H. 159.

[13] Bailey v. Bussing, 28 Conn. 455; Wooley v. Batte, 2 C. & P. 417; Pearson v. Skelton, 1 M. & W. 504; Horbach's Administrator v. Elder, 18 Pa. St. 33; Moore v. Appleton, 26 Ala. 633. See Nickerson v. Wheeler, 118 Mass. 295.

[14] Acheson v. Miller, 2 Ohio St. 203. This was a case of contribution as between sureties, a part of whom had become trespassers in an endeavor to enforce payment of the debt by the principal. The rule as stated in the Ohio case is adopted in Farwell v. Bicker, 129 Ill. 261, 21 N. E. 792, 16 Am. St. Rep. 267, 6 L. R. A. 400. See Grund v. Van Vleck, 69 Ill. 479; Ives v. Jones, 3 Ired. L. 538, 40 Am. Dec. 421.

absence of consciousness of wrong could not excuse a man either in law or morals. An English case states the rule more concisely as follows: "The rule that the wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." [15] If he knew the act was illegal, or if the circumstances were such as to render ignorance of the illegality inexcusable, then he will be left by the law where his wrongful action has placed him.[16]

The right of contribution has been applied to the case of two counties, one of which had been compelled to pay damages to a person who had been injured by the breaking down of a bridge which both were under obligation to maintain.[17] Where two or more attaching creditors, acting in good faith, cause attachments to be levied on the same property at the same time and it turns out that they were in the wrong and one is compelled to pay damages, he may have contribution from the others.[18]

[15] Adamson v. Jarvis, 4 Bing. 66, 73, per Best, C. J. See Betts v. Gibbons, 2 Ad. & El. 57, 74; Humphreys v. Pratt, 2 Dow. & Cl. 288; Avery v. Halsey, 14 Pick. 174; Jacobs v. Pollard, 10 Cush. 287, 289, 5 Am. Dec. 105, per Bigelow, J.; Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320; Johnson v. Torpy, 35 Neb. 604, 53 N. W. 575, 37 Am. St. Rep. 447; Torpy v. Johnson, 43 Neb. 882, 62 N. W. 253.

[16] See cases cited in note 6, p 104, *ante*. Also Spalding v. Oaks, 42 Vt. 343; Cumpston v. Lambert, 18 Ohio, 81, 51 Am. Dec. 442.

[17] Armstrong Co. v. Clarion Co., 66 Pa. St. 218, 5 Am. Rep. 368.

[18] Vandiver v. Pollak, 97 Ala. 467, 12 So. 473; Farwell v. Bicker, 129 Ill. 261, 21 N. E. 792, 16 Am. St. Rep. 267, 6 L. R. A. 400. And see Janvrin v. Curtis, 63 N. H. 312; Goldsborough v. Darst, 9 Ill. App. 205.

CHAPTER IV.

OF THE REMEDIES FOR TORTS.

§ 45. Redress by the party's own act. In a few cases the party injured is allowed to redress his own wrong, in whole or in part, without calling in the aid of the law. But the cases in which this is permitted are not numerous, and they are in the main cases of urgency, in which a resort to the ordinary remedies would be inadequate to complete justice. A general permission to every man to take the law into his own hands for his own redress, would be subversive of civil government; the permission cannot safely go beyond those cases in which force is justifiable in defense of person or property, and other cases resting on similar reasons.

§ 46. Abatement of nuisance. One instance in which redress by the act of the party is admitted, is where a nuisance exists to his prejudice; either a private nuisance, or a public nuisance from which he suffers a special and peculiar injury. The redress here consists in removing that which constitutes the nuisance, and it is allowed, not because of any injury it may have done, but to prevent the injury it may do. It is, therefore, in some sense, a preventive remedy, not a compensatory remedy: for damages suffered the party is left to the ordinary action.

The question who may abate a nuisance may depend upon whether the nuisance is public or private. If it is a private nuisance, he only can abate it who is injured by its continuance: if it is a public nuisance, he only may abate it who suffers a special grievance not felt by the public in general. Therefore, if one places an obstruction in a public street, an individual who is incommoded by it may remove it;[1] but un-

[1] Lincoln v. Chadbourne, 56 Me. 197; Corthell v. Holmes, 88 Me. 376, 34 Atl. 173; Pontiac, etc., Plank Road Co. v. Hilton, 69 Mich. 115, 36 N. W. 739; Johnson v. Maxwell, 2 Wash. 482, 27 Pac. 1071. So of an obstruction to navigation. State v. Parrott, 71

less he has occasion to make use of the highway he must leave the public injury to be redressed by the public authorities.[2] It is the existence of an emergency which justifies the interference of the individual.[3] Generally whenever a public nuisance obstructs the exercise of a private right, the party hindered may abate the same.[4] Private nuisances may be abated by the party injured and one may enter upon another's property for the purpose.[5] In all cases one who attempts to abate a thing as a nuisance, acts at his peril and will be liable for the consequences, unless he can establish the fact of nuisance.[6]

In permitting this redress, certain restrictions are imposed to prevent abuse or unnecessary injury. One of these is, that the right must not be exercised to the prejudice of the public peace: therefore, if the abatement is resisted, it becomes necessary to seek in the courts the ordinary legal remedies.[7] Another is that, as a general rule, before resorting to such extreme

N. C. 311, 17 Am. Rep. 5; Larson v. Furlong, 63 Wis. 323. But an encroachment on a public way not amounting to an obstruction of the travelled part of the road will not justify an individual in abating it. Godsell v. Fleming, 59 Wis. 52.

[2] Mayor of Colchester v. Brooke, 7 Q. B. 339; Dimes v. Pettey, 15 Q. B. 276; Davies v. Mann, 10 M. & W. 546; Bateman v. Bluck, 18 Q. B. 870; Arundel v. McCulloch, 10 Mass. 70; Brown v. Perkins, 12 Gray, 89; Lansing v. Smith, 8 Cow. 146; Rogers v. Rogers, 14 Wendell, 131; Ely v. Supervisors, 36 N. Y. 297; Burnham v. Hotchkiss, 14 Conn. 311; State v. Paul, 5 R. I. 185; Amoskeag Co. v. Goodale, 46 N. H. 53; Philber v. Matson, 14 Pa. St. 306; Gates v. Blincoe, 2 Dana, 158; 26 Am. Dec. 440; Gray v. Ayers, 7 Dana, 375, 32 Am. Dec. 107; Selman v. Wolfe, 27 Texas, 68; Moffett v. Brewer, 1 Ia. 348.

[3] Corthell v. Holmes, 87 Me. 24, 32 Atl. 715.

[4] Brown v. DeGroff, 50 N. J. L. 409, 14 Atl. 219.

[5] Winchell v. Clark, 68 Mich. 64, 35 N. W. 907; Liles v. Cawthorn, 78 Miss. 559, 29 So. 834; Martin v. Gainesville, etc., R. R. Co., 78 Ga. 307. A dog which prowls about one's buildings at night howling and annoying the inmates may be abated as a nuisance. Meneley v. Carson, 55 Ill. App. 74.

[6] People v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522.

[7] Pontiac, etc., Plank Road Co. v. Hilton, 69 Mich. 115, 36 N. W. 739; Miller et al. v. Burch, 32 Texas, 208, 5 Am. Rep. 242; Day v. Day, 4 Md. 262; Turner v. Holtzman, 54 Md. 148; Graves v. Shattuck, 35 New Hamp. 257, 69 Am. Dec. 536; Perry v. Fitzhowe, 8 Q. B. 757; Baldwin v. Smith, 82 Ill. 162. In the case last mentioned, the question mainly dis

measures, the party responsible for the nuisance should be notified of its existence, and requested to remove it; and the forcible abatement would only be justified when, after lapse of reasonable time, the request was not complied with.[8] This, however, is by no means a universal rule and it would seem that notice is not essential where the grievance has arisen from the positive wrongful act or gross negligence of the party responsible for its continuance, or where it threatens such immediate injury to life or health that the allowance of time for its removal, beyond what is absolutely essential, could not reasonably be demanded.[9] Under this rule, if the nuisance were merely permitted by the alienee of the party creating it, notice to remove it would be essential in all cases which were not of extreme urgency;[10] and in such cases this is obviously a very proper requirement.

Another limitation upon the right is, that in its exercise the party must inflict as little injury as possible.[11] The fact that he is taking the law into his own hands, imposes upon him a

cussed was whether, when the nuisance consists in a dwelling house which is inhabited, and which has been wrongfully erected where the defendant had a right of common, the latter could lawfully pull it down while the family were in it; and the conclusion was that from the necessary tendency of such an act to a breach of the peace, the law could not permit it. In some cases, however, parties have been held justified in removing houses which were nuisances, even while the families were in them. Davis v. Williams, 16 Q. B. 546; Burling v. Read, 11 Q. B. 904; Meeker v. Van Rensselaer, 15 Wend. 397. But where notice of the intention to remove was not given, it was held to be unjustifiable. Jones v. Jones, 1 H. & C. 1.

[8] Perry v. Fitzhowe, 8 Q. B. 776; Burling v. Read, 11 Q. B. 904; Davies v. Williams, 16 Q. B. 546; Jones v. Jones, 1 H. & C. 1; Meeker v. Van Rensselaer, 15 Wend. 397; State v. Parrott, 71 N. C. 311, 17 Am. Rep. 5.

[9] Best, J., in Earl of Lonsdale v. Nelson, 2 B. & C. 302, 311.

[10] Penruddock's Case, 5 Rep. 101; Jones v. Williams, 11 M. & W. 176; Van Wormer v. Albany, 15 Wend. 262; Meeker v. Van Rensselaer, 15 Wend. 397. In the two cases last cited, buildings were torn down as nuisances during the prevalence of Asiatic cholera, no previous notice having been given, except to the tenants, to remove. And see Hart v. Albany, 3 Paige, 213; Occum Co. v. Sprague Co., 34 Conn. 529; Shepard v. People, 40 Mich. 487.

[11] Corthell v. Holmes, 88 Me. 376, 34 Atl. 173. And see Roberts v. Rose, L. R. 1 Exch. 82; Mark v. Hudson, etc., Co., 103 N. Y. 28.

special obligation to keep clearly within the necessity which justifies it; and if he is guilty of wanton or unnecessary violence, he is liable for the excess.[12] A building is not to be destroyed merely because the use to which it is put is a nuisance;[13] nor because it has become offensive, if the cause of offense can otherwise be removed. The nuisance of a bawdy house is not in the building itself, but in the character of its occupation;[14] and a barn which has become offensive by reason of the accumulation of filth, is to be cleaned instead of destroyed, when cleaning is practicable.[15] It is only where an erection or structure in itself constitutes a nuisance because of its being erected in a public street, or without right either on public or private grounds that its demolition and removal can be justified.[16]

Abatement of the nuisance by the act of the party aggrieved

[12] Greenslade v. Halliday, 6 Bing. 379; Roberts v. Rose, L. R. 1 Exch. 82; State v. Moffett, 1 Greene (Iowa), 247; Moffett v. Brewer, Ibid. 348; Indianapolis v. Miller, 27 Ind. 394; Cobb v. Bennett, 75 Pa. St. 326, 15 Am. Rep. 752.

[13] Bristol Door & L. Co. v. Bristol, 97 Va. 304, 33 S. E. 588, 75 Am. St. Rep. 783; Welch v. Stowell, 2 Doug. Mich. 332; Barclay v. Commonwealth, 25 Pa. St. 503, 64 Am. Dec. 715; State v. Paul, 5 R. I. 185; State v. Keeran, 5 R. I. 497; Ely v. Supervisors of Niagara, 36 N. Y. 297; Miller v. Burch, 32 Texas, 208, 5 Am. Rep. 242; Brown v. Perkins, 12 Gray, 89; Earp v. Lee, 71 Ill. 193, 5 Am. Rep. 242. In Van Wormer v. Albany, 15 Wend. 262, and Meeker v. Van Rensselaer, Ib. 397, the destruction of the building itself seems to have been justified, on the ground, apparently, that it was impossible otherwise to remove the cause of disease. This subject was fully and carefully considered, and the authorities collected in Brightman v. Bristol, 65 Me. 426, 20 Am. Rep. 711. The case was one where a building, in which a business offensive from its smells was carried on, was torn down to abate the nuisance. This method of abatement was held unjustifiable, and the proprietor recovered the full value of his building.

[14] King v. Rosewell, 2 Salk. 459; Welch v. Stowell, 2 Doug. Mich. 332; Ely v. Supervisors of Niagara, 36 N. Y. 297.

[15] The nuisance of a pond of water is not to be abated by filling it up. Finley v. Hershey, 41 Ia. 389. A tannery is not *per se* a nuisance, and should not be abated as such without proper legal proceedings. Marshall v. Street Commissioner, 36 N. J. L. 283.

[16] Barclay v. Commonwealth, 25 Pa. St. 503. 64 Am. Dec. 715.

does not preclude an action for damages. "It is a preventive remedy merely, and resembles more an entry into land, or recapture of personal property. Neither will bar an action for the original invasion of the plaintiff's right." [17]

§ 47. Recaption or reprisal is a remedy by the act of the party himself, where any of his personal property, or any person to whose custody he is entitled, is taken or detained away from him. This consists in retaking the same into his own possession whenever or wherever he may peaceably do so. But this right is subordinate to the preservation of the public peace; for "the public peace is a superior consideration to any man's private property," and "if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease; the strong would give law to the weak, and every man would revert to a state of nature." [18] But many courts hold that reasonable force may be used to regain possession, especially if the recaption is immediate or on fresh pursuit.[19]

[17] Pierce v. Dart, 7 Cow. 609, 612. See, also, Wetmore v. Tracy, 14 Wend. 250, 28 Am. Dec. 525; State v. Moffett, 1 Greene, (Iowa) 247.

[18] 3 Bl. Com. 4; see Davis v. Whebridge, 2 Strob. 232; Hyatt v. Wood, 4 Johns. 150, 158, 4 Am. Dec. 258; Higgins v. State, 7 Ind. 549; Harris v. Marco, 16 S. C. 575; Kirby v. Foster, 17 R. I. 437, 22 Atl. 1111, 14 L. R. A. 317; Andre v. Johnson, 6 Blackf. 375; Bobb v. Bosworth, Litt. Select. Cas. 81, 12 Am. Dec. 273; Fredericksen v. Singer Mfg. Co., 38 Minn. 356; Bliss v. Johnson, 73 N. Y. 529; Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670; Winter v. Beebe, 126 Wis. 379; Sabre v. Mott, 88 Fed. 780. But the fact that a breach of the peace was committed in taking the property does not make the taking, if otherwise rightful, a trespass; it only subjects the party to a public prosecution. Brown v. Cram, 1 N. H 171; Blades v. Higgs, 10 C. B. (N. S.) 713; Mills v. Wooten, 59 Ill. 234.

[19] Winter v. Atkinson, 92 Ill. App. 162; Baldwin v. Hayden, 6 Conn. 453; Hemingway v. Hemingway, 48 Conn. 443, 19 Atl. 766; Commonwealth v. Donohue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L. R. A. 623; Hamilton v. Arnold, 116 Mich 684; State v. Dooley, 121 Mo. 591, 26 S. W. 558; Barr v. Post, 56 Neb. 698, 77 N. W. 133; State v. Elliot, 11 N. H. 540; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; Hopkins v. Dickson, 59 N. H. 235; State v. Morgan, 3 Ired. N. C. 186; Anderson v. State, 3 Bax. 608; Hodgedon v. Hubbard, 18 Vt. 504, 46 Am. Dec. 167; Bowman v. Brown, 55 Vt. 184; Hite v. Long, 6 Rand. (Va.) 457, 18 Am

In order to a correct understanding of this right of recaption, it is necessary to have in mind the different circumstances under which one's goods may be upon the premises of another, and the persons who may be responsible for their being there. It is a general rule, that the owner of real estate is entitled to exclusive possession thereof, and every unauthorized entry thereon is a trespass; but if one take the goods of another, and carry them upon his own land, the owner may enter to retake them, because the wrong of the other excuses the entry.[20] So if one, though not purposely a wrong-doer himself, has received possession from another whose possession was tortious, the owner may enter to retake them; the tort feasor being incapable of conferring any better right than he himself had.[21] So if one sells goods which are in his own possession, and nothing in the contract of sale indicates that they are to be delivered elsewhere than where they are, the sale itself is an implied license to the purchaser to enter and take the goods away; and this license being coupled with an interest, is incapable of being revoked.[22] So where one, upon his own land, has been rightfully in possession of property, but his right has terminated

Dec. 719; Blades v. Higgs, 10 C. B. (N. S.) 713, 100 E. C. L. R. 712. One may not retake property by violence where the title is disputed. Harris v. Marco, 16 S. C. 575. See further Commonwealth v. Kennard, 8 Pick. 133; State v. Forsythe, 89 Mo. 667; Lambert v. Robinson, 162 Mass. 34, 37 N. E. 753, 44 Am. St. Rep. 326; Storey v. State, 71 Ala. 329.

[20] Chapman v. Thumblethorp, Cro. Eliz. 329; Patrick v. Colerick, 3 M. & W. 483; Webb v. Beavan, 6 M. & G. 1055; Richardson v. Anthony, 12 Vt. 273; White v. Twitchell, 25 Vt. 620, 60 Am. Dec. 294; Spencer v. McGowen, 13 Wend. 256; Burns v. Johnson, 1 J. J. Marsh. 196; State v. Elliott, 11 N. H. 540; Sterling v. Warden, 51 N. H. 217, 228, 12 Am. Rep. 80; Allen v. Feland, 10 B. Mon. 306; Chambers v. Bedell, 2 W. & S. 125, 37 Am. Dec. 508; provided no more force is used than is necessary to accomplish it. Hopkins v. Dickson, 59 N. H. 235; Carter v. Sutherland, 52 Mich. 597.

[21] Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Parish v. Morey, 40 Mich. 417; McLeod v. Jones, 105 Mass. 403, 405, 7 Am. Rep. 539.

[22] Wood v. Manley, 11 Ad. & El. 34; Giles v. Simonds, 15 Gray, 441; Nettleton v. Sikes, 8 Met. 34; Miller v. State, 39 Ind. 267. The sale of growing trees gives a license to enter and cut within a reasonable time. Heflin v. Bingham, 56 Ala. 566. See McLeod v. Jones, 105 Mass. 403, 7 Am. Rep. 539.

and been acquired by another, the latter may lawfully enter to take it away; as in the case of a government officer, who may justify entering upon the premises of his predecessor to remove the public property there remaining.[23] One who obtains property by a fraudulent purchase becomes a wrong-doer in respect to the possession so soon as the sale is rescinded for the fraud, and the vendor may reclaim it by peaceable entry.[24] The right to retake is not lost by the wrong-doer having put the chattel to such a use that removing it inflicts a damage upon him, but he must take all such risks as are incident to an exercise of the owner's right.[25] And in any case, if one's property is on the land of another, with either the express or the implied assent of the latter, the former may enter to remove it,[26] subject, we should say, to this restriction: That notice should be given of the intent to do so, whenever, under the circumstances, it can reasonably be supposed that notice to the land-owner can be important to the protection of his own rights. The time and the circumstances, also, ought to be suitable; one should not enter his neighbor's house unannounced, or in the night time, to take away an article left there by permission, nor, if the chattel is under lock, break open doors or fastenings, without first making demand for its restoration.[27] And if a third party shall take the property of one, and place it upon the land of another, without the consent or co-opera-

[23] Sterling v. Warden, 52 N. H. 197. See, also, the case of Burridge v. Nicholetts, 6 H. & N. 383. A tenant, after the relation is dissolved, may enter to reclaim his goods. Daniels v. Brown, 34 N. H. 456, 69 Am. Dec. 505.

[24] Wheeldon v. Lowell, 50 Me. 499. See Rea v. Shepard, 2 M. & W. 426. If one's cattle are found on the land of another, and there is no evidence how they came there, he may lawfully enter and reclaim them. Richardson v. Anthony, 12 Vt. 273.

[25] White v. Twitchell, 25 Vt. 620, 60 Am. Dec. 294. So where stone was tortiously taken from defendant's land by plaintiff to build a pier which defendant rightfully abated. Larson v. Furlong, 63 Wis. 323.

[26] Nettleton v. Sikes, 8 Met. 34; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; White v. Elwell, 48 Me. 360, 77 Am. Dec. 271; Schoonover v. Irwin, 58 Ind. 287.

[27] See Blades v. Higgs, 10 C. B. (N. S.) 713; Sterling v. Warden, 51 N. H. 217, 17 Am. Rep. 80, and cases cited. Drury v. Hervey, 126 Mass. 519, a case of an entry in an unreasonable manner to retake an article on breach of condition precedent to complete sale.

tion of either, while the latter, perhaps, might forbid the entry of the owner to remove it, and hold him a trespasser if he should persist in doing so, yet in that case he would be under obligation to restore it on demand, and the owner might proceed, by replevin, to take it, on his refusal.[28]

But if the owner is himself a wrong-doer in leaving his property upon another's land, he must take the consequences of his wrongful act, and cannot, by an unlawful entry, acquire a right to make one that shall be lawful.[29]

§ 48. Recaption in case of confusion of goods. The right of recaption may sometimes be exercised under circumstances which give to the party exercising it not his own merely, but also property of the wrong-doer. For example, if one purposely or by negligence take a hundred bushels of his neighbor's wheat and commingle it with a hundred bushels of his own barley, so that a separation of the two becomes practically impossible, the law permits the owner of the wheat, in retaking it, to take that which is inseparably commingled with it, since in no other way can he reclaim his own property.[30]

[28] In Anthony v. Haney, 8 Bing. 187, it is intimated by Tindal, Ch. J., that if the occupant of the freehold refused to deliver up the property, the owner might enter and take it, subject to the payment of any damages he might commit. But if he were liable in damages for the entry, it must be because the entry is unlawful; and in that case it might be resisted. There can be no such absurdity as a right of entry and a co-existent right to resist the entry. The case of Chambers v. Bedell, 2 W. & S. 225, 37 Am. Dec. 508, seems to recognize the right of the owner, after the demand and refusal, to enter and take away his property, if he can do so peaceably. Compare Roach v. Dumron, 2 Humph. 425. If one removes chattels wrongfully placed on his land he must act so as not unreasonably to injure the wrong-doer. Burnham v. Jenness, 54 Vt. 272.

[29] Anthony v. Haney, 8 Bing. 187; Roach v. Dumron, 2 Humph. 425; Crocker v. Carson, 33 Me. 436; Blake v. Johnson, 14 Johns. 406; Heermance v. Fernoy, 6 Johns. 5; Chess v. Keley, 3 Blackf. 438. One of two tenants in common of a chattel has no right to break into the premises of the other to obtain it. Herndon v. Bartlett, 4 Porter, 481; Crocker v. Carson, 33 Me. 436. See, further, Hupport v. Morrison, 27 Miss. 365; Allen v. Feland, 10 B. Mon. 306; Newbold v. Sabler, 9 Barb. 57; Chase v. Jefferson, 1 Houst. 257.

[30] 2 Kent. 364, 365; Loomis v. Green, 7 Me. 386; Wingate v

The inextricable confusion of his goods with the goods of another gives him this right, provided the intermixture was wrongful. But if the goods are of the same kind and quality the injured party is only entitled to take his proportion from the common mass. The law in such cases does justice between the parties as nearly as, under the circumstances, is practicable by dividing between them the commingled mass according to their respective proportions.[31] Nor is this method of arranging their interests limited to the cases in which the commingled mass is exactly the same with the separate parcels: it is sufficient that it is practically the same, so that the separation of that which is equivalent in quantity or measure will give to the party whose property has been wrongfully taken that which is substantially equivalent in kind and value. This rule has been applied to the case of quantities of sawlogs, belonging to different parties but commingled together; and it is held that to give the party whose logs are lost the option of taking from the mass an equivalent in quantity and quality, or of demanding the value, is all that in justice he

Smith, 20 Me. 287; Moore v. Bowman, 47 N. H. 494; Weil v. Silverstone, 6 Bush, 698; Alley v. Adams, 44 Ala. 609; Hart v. Ten Eyck, 2 Johns. Ch. 62; Willard v. Rice, 11 Met. 490, 45 Am. Dec. 226; Jenkins v. Steanka, 19 Wis. 139, 88 Am. Dec. 675; Beach v. Schmultz, 20 Ill. 185; Claflin v. Continental Jersey Works, 85 Ga. 27, 11 S. E. 721; First Nat. Bank v. Schween, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174; Reiss v. Hanchett, 141 Ill. 419, 31 N. E. 165; Lance v. Butter, 135 N. C. 419, 47 S. E. 488; Brooks v. Lowenstein, 95 Tenn. 262, 35 S. W. 89; Jewett v. Dringer, 30 N. J. Eq. 291.

[31] Lufton v. White, 15 Ves. 442; Spence v. Union Marine Ins. Co., L. R. 3 C. P. 427; Ryder v. Hathaway, 21 Pick. 298; Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233; Willard v. Rice, 11 Met. 493, 45 Am. Dec. 226; Bryant v. Ware, 30 Me. 295; Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; Holbrook v. Hyde, 1 Vt. 286; Wilkinson v. Stewart, 85 Pa. St. 255; Chandler v. De Graff, 25 Minn. 88; Claflin v. Continental Jersey Works, 85 Ga. 27, 11 S. E. 721; Reid v. King, 89 Ky. 388, 12 S. W. 772; Keweenaw Ass'n v. O'Neil, 120 Mich. 270, 79 N. W. 183; Osborne v. Cargill El. Co., 62 Minn. 400, 64 N. W. 1135; Peterson v. Polk, 67 Miss. 163, 6 So. 615; First Nat. Bank v. Scott, 36 Neb. 607, 54 N. W. 987; Pickering v. Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698; The Idaho, 93 U. S. 575

can require.[32] In all cases of wrongful intermixture of goods, doubts as to the amount each is entitled to will be resolved against the party at fault.[33]

§ 49. Recaption in case of transformation of the property. In another class of cases the owner of property may either lose it by wrongful act of another, or he may be entitled to reclaim it in a modified or perhaps wholly different form. The reason why the owner is permitted to reclaim his own property from a wrong-doer is, that the protection of property and the peace of society are inconsistent with a state of the law in which a wrong-doer may compel another to sell to him, by seizing the property he desires and leaving the owner to bring suit for its value. Therefore, in general, the owner of property, so long as he can trace and identify his own may reclaim it. If one has willfully as a trespasser, taken the property of another and altered it in form or substance by an expenditure of his own labor or money, he will not be suffered to acquire a title by his wrongful action as against the original owner reclaiming his

[32] Stephenson v. Little, 10 Mich. 433; Jenkins v. Steanka, 19 Wis. 126, 88 Am. Dec. 675; Ryder v. Hathaway, 21 Pick. 298; Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; Smith v. Morrill, 56 Me. 566; McDonald v. Lane, 7 Can. S. C. R. 462; Bonaparte v. Clagett, 78 Md. 87, 27 Atl. 619. If the goods can be distinguished or separated, no change, of course, takes place in the property. Alley v. Adams, 44 Ala. 60; Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233; Goff v. Brainerd, 58 Vt. 468. If they are intermingled by consent, the parties become tenants in common of the mass. Adams v. Myers, 1 Sawyer, 306; Ryder v. Hathaway, 21 Pick. 299; Low v. Martin, 18 Ill. 286. See, Hance v. Tittabawassee Boom Co., 70 Mich. 227, 38 N. W. 228. The same is true where they are intermixed by accident. Moore v. Erie R. R. Co., 7 Lans. 39. If one allows his goods to be intermingled with those of another, knowing that sales are to be made from the mass, he cannot retake his own from a purchaser in good faith (Foster v. Warner, 49 Mich. 641), or hold such purchaser for a conversion. Preston v. Witherspoon, 109 Ind. 457, 58 Am. Rep. 417. As to an intermixture where the party chargeable with it is innocent of intended wrong, see Bryant v. Ransom, 20 Vt. 383; Hesseltine v. Stockwell, 30 Me. 257, 50 Am. Dec. 627; Thorne v. Colton, 27 Ia. 425; Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653; Hart v. Morton, 44 Ark. 447; Davis v. Krum, 12 Mo. App. 279.

[33] Osborne v. Cargill El. Co., 62 Minn. 400, 64 N. W. 1135.

property. Therefore, one whose trees have been converted into shingles by a trespasser may reclaim his property in the shingles,[34] or if they have been made into the frame of a boat, he may have them in that form.[35] Indeed, the doctrine has been carried so far that in New York it has been held that one whose grain has been taken by a willful trespasser and converted into alcoholic liquors is entitled to demand and recover the new product.[36] The cases arise mostly when trees or minerals are severed from the land by a trespasser. In such case the property severed still belongs to the owner of the land and he may reclaim it wherever found and in whatever condition it may be at the time, subject to the exception hereafter noted.[37] This being true it would seem to follow that if the owner brings trover he should be entitled to recover the value of the property at the time of demand, without any deduction for the labor and expense of the defendant in severing, transporting and preparing the property for market; and some of the cases so hold.[38] Other cases hold that this rule only applies where the trespass is wilful and that, when the trespass is by mistake and innocent, the owner is only entitled to recover the

[34] Church v. Lee, 5 Johns. 348. See, also, Curtis v. Groat, 6 Johns. 108; Worth v. Northam, 4 Ired. 102.

[35] Burris v. Johnson, 1 J. J. Marsh. 196. Trees into railroad ties. Strubbee v. Trustees, 78 Ky. 481. The following cases also support the text: Street v. Nelson, 80 Ala. 230; Eaton v. Langley, 65 Ark. 448, 47 S. W. 123, 47 L. R. A. 474; Central Coal & Coke Co. v. John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49; Powers v. Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; Wing v. Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; Keweenaw Ass'n v. O'Neil, 120 Mich. 270, 79 N. W. 183; Peterson v. Polk, 67 Miss. 163, 6 So. 615; Hughes v. United Pipe Lines, 119 N. Y. 423, 23 N. E. 1042; Holt v. Hayes, 110 Tenn. 42, 73 S. W. 111; United States v. Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303.

[36] Silsbury v. McCoon, 3 N. Y. 379. See Riddle v. Driver, 12 Ala. 590.

[37] See cases cited in last three and in following notes.

[38] White v. Yawkey, 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199; Powers v. Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; Wing v. Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; Gates v. Rifle Boom Co., 70 Mich. 309, 38 N. W. 245; Moret v. Mason, 106 Mich. 340, 64 N. W. 193; Gaskins v. Davis, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813.

value of the property as part of the realty, or immediately after severance.[39]

§ 50. **Entry upon lands to repossess them.** Of the same nature as the right of recaption is the right which the owner of lands has, when another is wrongfully in possession thereof, to re-enter when he may do so peacefully, and thereafter to exclude the wrong-doer therefrom. This right may exist either where one has gone into possession without right, or where one, having had an estate in, or at least lawful possession of the lands, has had his right terminated by operation of law or by the act of the owner.[40] The chief restraint upon this remedy is sufficiently indicated by what has already been said; it must be had in a peaceful manner, and an actual possession, though wrongful, must not be subverted by the employment of force.[41]

§ 51. **Distress of cattle damage feasant.** If the cattle of one man stray upon the lands of another, thereby causing him damage, he may distrain and hold them until the damage is estimated and satisfied.[42] This is a common-law right, and is reg-

[39] Ivy Coal & Coke Co. v. Ala. Coal & Coke Co., 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46; Eaton v. Langley, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474; Wright v. Skinner, 34 Fla. 453, 16 So. 335; Donovan v. Consolidated Coal Co., 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206; Guarantee, etc., Co. v. Drew Investment Co., 107 La. 251, 31 So. 736; Anderson v. Besser, 131 Mich. 481, 91 N. W. 737; Whitney v. Huntington, 37 Minn. 197, 33 N. W. 561; King v. Merriman, 38 Minn. 47, 35 N. W. 570; Peterson v. Polk, 67 Miss. 163, 6 So. 615; Bond v. Griffin, 74 Miss. 599, 22 So. 187; Illinois Cent. R. R. Co. v. Le Blanc, 74 Miss. 626, 21 So. 748; Holt v. Hayes, 110 Tenn. 42, 73 S. W. 111; United States v. Homestake Min. Co., 117 Fed. 481, 34 C. C. A. 303.

[40] Taunton v. Costar, 7 T. R. 431; Turner v. Meymott, 1 Bing. 158; Argent v. Durrant, 8 T. R. 403; Barnes v. Dean, 5 Watts. 543, 30 Am. Dec. 346; Thompson v. Craigmyle, 4 B. Mon. 391, 41 Am. Rep. 240; Sharon v. Wooldrick, 13 Minn. 355; Clower v. Maynard, 112 Ga. 340, 37 S. E. 370; Brebach v. Johnson, 62 Ill. App. 131; Mead v. Pollock, 99 Ill. App. 151; Stillwell v. Duncan, 103 Ky. 59, 44 S. W. 357, 39 L. R. A. 863; Lyon v. Fairbank, 79 Wis. 455, 48 N. W. 492, 24 Am. St. Rep. 732. See Bristor v. Burr, 120 N. Y. 427, 24 N. E. 937.

[41] See *post*, ch. X, where the subject is further treated.

[42] McKeen v. Converse, 68 N. H. 173, 39 Atl. 435; McPherson v. James, 69 Ill. App. 337.

ulated by statute. The distress consists in taking the cattle into custody while they are still upon the lands, and impounding them until satisfaction is made. For the protection of the owner, notice to him of the distress is required, and if the compensation is not agreed upon, disinterested appraisers are chosen to assess it. The detention of the cattle is only for the purpose of indemnity, and they must be surrendered when satisfaction is made. In the meantime the distrainer must feed and care for them properly; but if they die or are injured or lost, without his fault, the loss must fall upon the owner.[43] The right is now generally regulated by statute.[44]

§ 52. **Distress of goods to compel performance of duty.** In several cases where an obligation, owing to a party, remained unperformed, the common law permitted him to enforce performance by seizing the goods and chattels of the party in default, and holding them until performance. If the performance was not made in reasonable time after seizure, it also permitted him, under proper regulations, to sell the distress. The most common of these cases was that of the non-payment by a tenant of his rent; and this is the only one which has any place in the law of this country.[45] All movable articles which are the subject of property are liable to be seized for rent, including even the chattels of other persons which chance to be in the tenant's possession with the owner's permission; but with this important exception, that articles held by him in the way of trade such as goods of a guest in possession of an inn-keeper, and goods in the hands of a mechanic to be made up or repaired, are privileged for the encouragement of business. And whatever is for the moment in the personal use of the tenant is also, while so used, privileged.[46] Now, by statute,

[43] Pettit v. May, 34 Wis. 666; Mosher v. Jewett, 59 Me. 453; S. C. 63 Me. 84; Rust v. Low, 6 Mass. 90; Melody v. Reab, 4 Mass. 471; Eames v. Salem & Lowell R. R. Co., 98 Mass. 560, 96 Am. Dec. 676; Ladue v. Branch, 42 Vt. 575.

[44] See Little v. Swafford, 14 Ind. App. 7, 42 N. E. 245; Northcott v. Smith, 4 Ohio C. C. 565; Jones v. Clouser, 114 Ind. 387, 16 N. E. 797.

[45] Taylor, L. & T. § 556 *et seq.*

[46] See 1 Bl. Com. 8 and notes. Home Sewing Machine Co. v. Sloan, 87 Pa. St. 438; Kleber v. Ward, 88 Pa. St. 93; Kennedy v. Lange, 50 Md. 91; Bird v. Anderson, 41 N. J. L. 392.

in this country, this right of distress is in the main taken away; and where not taken away, it is regulated by statute.

§ 53. **Redress by action.** From the foregoing statement of the law it will appear that the privilege of redressing one's own wrongs is not to any great extent permitted to individuals; indeed, the state cannot afford to clothe individuals with its own powers for the purpose of enforcing its laws according to their own judgments, especially when in enforcing the laws they would only be judging of and redressing their own grievances. Order is no less the law of human governments than of the divine government, and individual convenience must be subordinated to it. The cases which are above mentioned are in the main to be regarded as cases in which the individual is permitted to act on his own behalf, in order that he may prevent a mischief already begun from becoming more serious. He interposes obstructions to the lawless conduct of others, he protects his person, he reclaims his property; but only on the condition that he can do so without a breach of the public peace; and he abates a nuisance on the same terms. But to obtain redress for any wrong done him he must invoke the assistance of the law.

The redress the law will give will be suited to the injury suffered. If one's land is taken from him, he shall have the proper writ for its recovery.[47] If personal property is taken which he prefers to recover rather than have judgment for its money value, he may demand back the thing itself.[48] Under some circumstances the injured party may have a remedy in equity or in admiralty. But the principal remedy, and for the most part the only available remedy which the law can give for a wrong, is an award of money estimated as an equivalent for the damage suffered.

§ 54. **Remedy in equity.** Equity has jurisdiction in cases of tort when the remedy at law is inadequate. The remedy at law is inadequate when the object is to prevent the commission of a tort, or to prevent its continuance or repetition; also where a difficult and complicated accounting is necessary, as might be in cases of infringement of patents and copyrights.

[47] The action of ejectment.

[48] The action of replevin or detinue.

In speaking of the cases wherein equity will take jurisdiction, Mr. Pomeroy says: "They are waste, nuisance, including interference with easements, servitudes, and similar rights, infringement of patent rights, of copyrights, of trade marks, and of other intangible property rights, the pecunary value of which cannot be certainly estimated, such as literary property in manuscript writings and good will. In ordinary trespasses the injured party is left to his remedy of damages, but the circumstances of a trespass to property—especially to real property—may be such that the compensatory remedy is inadequate, and a court of equity will prevent the wrong by injunction."[49] To this enumeration may be added the wrong of fraud and deceit, the remedy for which is to some extent concurrent in law and equity.[50] As a general rule there is no jurisdiction in equity merely to recover damages for a past wrong. But when equity acquires jurisdiction by reason of the right to other relief, compensation for past damages may be given as an incident to the equitable relief;[51] for equity having obtained jurisdiction for one purpose will give complete relief.

§ 55. Remedy in admiralty. When a tort is committed on waters over which the admiralty courts have jurisdiction, the injured party may have his remedy either in the courts of common law or of admiralty.[52] If he elects to proceed in the latter courts the remedy will be subject to all the incidents of admiralty jurisdiction and practice,[53] among which are that

[49] Pomeroy's Eq. § 1347. And see generally, §§ 1346–1358, where the subject is fully treated. See also High on Injunctions, chapters 11–18.

[50] See Pomeroy's Eq. § 872 *et seq.*

[51] Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; Waterson v. Saldunbehre, 101 Cal. 107, 35 Pac. 432; Chapman v. Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366; Shepard v. Manhattan Ry. Co., 117 N. Y. 442, 23 N. E. 30; Lamming v. Galusha, 135 N. Y. 239, 31 N. E. 1024.

[52] Percival v. Hickey, 18 Johns. 257, 9 Am. Dec. 210; McDonald v. Mallory, 77 N. Y. 546, 33 Am. Rep. 664; Chase v. American S. S. Co., 9 R. I. 419, 11 Am Rep. 274; Schoonmaker v. Gilmore, 102 U. S. 118; Chappell v. Bradshaw, 128 U. S. 132, 9 S. C. Rep. 40. See 1 Am. & Eng. Encly. 656; 1 Cyc. 841–845.

[53] Atlee v. Packet Co., 21 Wall. 389, 395; The Albert Dumois, 177 U. S. 240, 20 S. C. Rep. 595.

contributory negligence does not necessarily defeat a recovery,[54] and that there is no jury trial.[55] Even the substantive law of the case may be different.[56]

§ 56. **The action for damages—General and special damages.** It is not the purpose of this work to treat to any considerable extent of the subject of damages. A few general observations are all that space permits. Damages are of three sorts, according to the object they are intended to subserve, namely, nominal, compensatory and punitive. These will be briefly described in the following sections.[57] Damages are also *general* and *special*, according to the manner in which they arise and the mode of pleading them. General damages are such as naturally and necessarily result from the wrong complained of, and such as the law implies or presumes therefrom. Special damages are such as are the natural but not the necessary result of the wrongful act, and arise out of the peculiar circumstances of the case.[58] The important distinction is that special damages must be specifically set forth in the pleadings or they cannot be recovered.[59] As said in one case, "when

[54] Atlee v. Packet Co., 21 Wall. 389; The Max Morris, 137 U. S. 1.

[55] 1 Cyc. 841-845.

[56] Workman v. New York, 179 U. S. 552, 21 S. C. Rep. 212.

[57] Reid v. Terwilliger, 116 N. Y. 530, 534, 22 N. E. 1091.

[58] See generally Hunter v. Stewart, 47 Me. 419; Taylor v. Monroe, 43 Conn. 36; Tomlinson v. Derby, 43 Conn. 562; Atchison, etc., Ry. Co. v. Rice, 36 Kan. 593; Chamberlain v. Porter, 9 Minn. 260, 266; Shaw v. Hoffman, 21 Mich. 151; Baldwin v. Western R. R. Co., 4 Gray, 333; Squier v. Gould, 14 Wend. 159; 13 Cyc. 13; 1 Suth. Dams. 418. In Tomlinson v. Derby, 43 Conn. 562, the court says: "Special damage is that which the law does not necessarily imply that the plaintiff has sustained from the act complained of. It is often very difficult to distinguish general from special damage. The necessary result of an injury is often and easily confounded with the natural and proximate result, and all legal damage, whether general or special, must naturally and proximately result from the act or default complained of. It is difficult to lay down any general rule by which to determine when the law implies the damage and when it does not. It would seem, however, that when the consequences of an injury are peculiar to the circumstances and condition of the injured party, the law could not imply the damage simply from the act causing the injury."

[59] Stevenson v. Smith, 28 Cal 103; Tucker v. Parks, 7 Colo. 62;

it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, the rule is that they must be specifically set forth, that the defendant may have notice of the facts out of which they are claimed to have arisen, and that he may not be taken by surprise on the trial."[60] The loss of the profits of a lecture which the plaintiff was prevented from giving by reason of a personal injury, is special damage.[61] So of the loss of earnings in an employment requiring skill and training.[62] So of the loss of the profits of a mill which the plaintiff was prevented from carrying on for the same reason.[63] So of the loss of rents or profits where property is wrongfully interfered with or withheld.[64] So of money expended to repair the damage or effect a cure,[65] and sickness caused by false imprisonment.[66]

§ 57. Nominal damages. Nominal damages are such as are given for the vindication of a right, where no actual damages are shown.[67] Whenever a right is violated or invaded damage is presumed and an action lies.[68] "Surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when

Taylor v. Monroe, 43 Conn. 36; Tomlinson v. Derby, 43 Conn. 562; Chicago v. O'Brennan, 65 Ill. 160; Atchison, etc., Ry. Co. v. Rice, 36 Kan. 593; South Covington, etc., St. Ry. Co. v. Ware, 84 Ky. 267; Furlong v. Polley, 30 Me. 491; Plimpton v. Gardiner, 64 Me. 360; Dickinson v. Boyle, 17 Pick. 78; Brown v. Cummings, 7 Allen, 507; Adams v. Barry, 10 Gray, 361; Shaw v. Hoffman, 21 Mich. 151; Spencer v. St. Paul, etc., R. R. Co., 21 Minn. 362; O'Leary v. Rowan, 65 Mo. 117; Squier v. Gould, 14 Wend. 159; Agnew v. Johnson, 22 Pa. St. 471; Comminge v. Stevenson, 76 Tex. 642; Roberts v. Graham, 6 Wall. 578.

[60] Tucker v. Parks, 7 Colo. 62, 69.

[61] Chicago v. O'Brennan, 65 Ill. 160.

[62] Taylor v. Monroe, 43 Conn. 36.

[63] Tomlinson v. Derby, 43 Conn. 562.

[64] Agnew v. Johnson, 22 Pa. St. 471; Adams v. Barry, 10 Gray, 361; Plimpton v. Gardiner, 64 Me. 360.

[65] South Covington, etc., St. Ry Co. v. Ware, 84 Ky. 267; Shaw v Hoffman, 21 Mich. 151; Agnew v. Johnson, 22 Pa. St. 471.

[66] Atchison, etc., Ry. Co., v. Rice, 36 Kan. 593.

[67] 1 Sedg. Dams. §§ 96–109; 1 Suth. Dams. §§ 9–11; 13 Cyc. 14.

[68] 1 Sedg. Dams. §§ 97, 98; *Ante*, § 12; Parker v. Griswold, 17 Conn. 287, 302, 42 Am. Dec. 739; Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732.

a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking of them, yet he shall have an action. So, if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So, a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there." [69]

To state when rights are infringed, and consequently when nominal damages are recoverable, says Mr. Sedgwick, would be to recapitulate the whole *corpus juris*.[70] Some typical examples are the following: When the waters of a stream are diverted [71] or the flow of the stream otherwise interfered with.[72] When surface water is wrongfully caused to flow or accumulate on the plaintiff's land,[73] or a right of way obstructed.[74] So in case of trespass to property, real or personal.[75] So if a passenger is carried past his station,[76] or if one is hindered in his right to vote,[77] or the right to personal security is invaded. And if a positive right is violated, the injured party may recover nominal damages, though the result is beneficial to him, for, as elsewhere remarked, it is as illegal to force one to receive a benefit as to submit to an injury.[78]

[69] Holt, C. J., in Ashby v. White, 2 Ld. Raym. 955.

[70] 1 Sedg. Dams. § 98.

[71] Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453; Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575; Webb v. Portland Mfg. Co., 3 Sum. 189; Brown v. Best, 1 Wils. 174.

[72] Tillotson v. Smith, 32 N. H. 90, 64 Am. Dec. 355.

[73] Jones v. Hannovan, 55 Mo. 462; Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732.

[74] Williams v. Esling, 4 Pa. St. 486, 45 Am. Dec. 710.

[75] Jewett v. Whitney, 43 Me. 242; Brent v. Kimball, 60 Ill. 211, 14 Am. Rep. 35.

[76] Texarkana, etc., Ry. Co. v. Anderson, 67 Ark. 123, 53 S. W. 673; Thompson v. New Orleans, etc., R. R. Co., 50 Miss. 315, 19 Am. Rep. 12.

[77] Ashby v. White, 2 Ld. Raym. 955.

[78] Excelsior Needle Co. v. Smith, 61 Conn. 56, 23 Atl. 693; Johnson v. Conant, 64 N. H. 109, 136, 7 Atl. 116; East Jersey Water Co., v. Bigelow, 60 N. J. L. 201, 28 Atl. 631; Murphy v. Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181.

§ 58. Compensatory damages. Compensatory damages, as the term implies, are such as make good the loss caused by the wrong or injury complained of.[79] "An amount sufficient to indemnify the party injured for the loss, which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted, is the measure of damages which juries are usually instructed to award, except in cases where punitive damages are allowable."[80] This is the rule of damages in the great majority of tort actions and the amount of damages that will satisfy the rule is peculiarly within the province of the jury.

§ 59. Punitive damages. Punitive damages, sometimes called exemplary or vindictive, are something given in addition to compensation for the loss sustained, for the purpose of punishment or example.[81] "Exemplary, vindictive or punitory damages are such as blend together the interests of society and of the aggrieved individual, and are not only a recompense to the sufferer but a punishment to the offender and an example to the community."[82] As a general rule punitive damages may be awarded when the wrong is committed with a malicious or evil intent, or is wanton, deliberate or oppressive.[83] Such damages may be awarded in cases of negligence, where the negligence is so gross as to show an indifference to consequences or a willful disregard of the rights of others.[84] The right to give punitive damages is denied alto-

[79] 1 Sedg. Dams. § 37 *et seq.*; 1 Suth. Dams. § 12 *et seq.*; Smith v. Bagwill, 19 Fla. 117, 45 Am. Rep. 12; Reid v. Tewilliger, 116 N. Y. 530, 22 N. E. 1091.

[80] Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507. And see Allison v. Chandler, 11 Mich. 542.

[81] 1 Sedg. Dams. § 347 *et seq.*; 1 Suth. Dams. § 391 *et seq.*

[82] Smith v. Bagwell, 19 Fla. 117, 121, 45 Am. Rep. 12.

[83] Merrills v. Tarriff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682; Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12; Jacobus v. Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; New Orleans, etc., R. R. Co. v. Statham, 42 Miss. 607, 97 Am. Dec. 478; Rhodes v. Rodgers, 151 Pa. St. 634, 24 Atl. 1044; Cole v. Tucker, 6 Tex. 266; Borland v Barrett, 76 Va. 128, 44 Am. Rep 152; Scott v. Donald, 165 U. S. 58 86.

[84] Welch v. Durand, 36 Conn 182, 4 Am. Rep. 55; Taylor v. Grand Trunk Ry. Co., 48 N. H. 304, 2 Am. Rep. 229; Brasington

gether in some states,[85] and in others in the case of torts which are crimes.[86] But according to the great weight of authority, the latter fact is no bar to such damages.[87] Private corporations stand upon the same footing as individuals,[88] but punitive damages are not awarded against municipal corporations.[89] A master or principal is not liable in punitive damages for the malicious tort of his agent or servant, unless he has authorized or approved the act, or has been guilty of fault in hiring or retaining the servant.[90]

§ 60. Avoidable consequences. It is well settled that one who is injured by another has no right to lie by and suffer damages to accumulate which he can prevent by the exercise of reasonable diligence and exertion or by the incurring of a reasonable expense. And there can be no recovery for damages which might have been so prevented.[91]

v. South Bound R. R. Co., 62 S. C. 325, 40 S. E. 665, 89 Am. St. Rep. 905; Milwaukee, etc., Ry. Co. v. Arms, 91 U. S. 489.

[85] See 1 Sedg. Dams. §§ 358, 359; 1 Suth. Dams. §§ 395–400.

[86] Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366; Howlett v. Tuttle, 15 Colo. 454; 24 Pac. 921; Wabash P. & P. Co. v. Crumrine, 123 Ind. 89, 21 N. E. 904; Boyer v. Barr, 8 Neb. 68, 30 Am. Rep. 814; Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270.

[87] Phillips v. Kelly, 29 Ala. 628; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12; Brannan v. Silvernail, 81 Ill. 434; Hendrickson v. Silvernail, 21 Ia. 380; Hanser v. Griffith, 102 Ia. 215, 71 N. W. 223; Chiles v. Drake, 2 Met. (Ky.) 146; Boetcher v. Staples, 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295; Barr v. Moore, 87 Pa. St. 385, 30 Am. Rep. 367; Hoadley v. Watson, 45 Vt. 289, 12 Am. Rep. 197; Edwards v. Leavitt, 46 Vt. 126; Cole v. Tucker, 6 Tex. 266; Cook v. Ellis, 6 Hill, 466; Brown v. Swineford, 44 Wis. 282. In Rhodes v. Rodgers, 151 Pa. St. 634, 24 Atl. 1044, it was held that a conviction and fine in a criminal prosecution could be shown in mitigation of damages.

[88] See 1 Sedg. Dams. § 378; 13 Cyc. 117.

[89] 1 Sedg. Dams. § 379; 1 Suth. Dams. § 412; 2 Dillon, Munic. Corp. § 1020; Chicago v. Kelly, 69 Ill. 475; Bennett v. Marion, 102 Ia. 425, 71 N. W. 360, 63 Am. St. Rep. 454; Hunt v. Boonville, 65 Mo. 620; Wilson v. Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

[90] See 1 Sedg. Dams. § 378; 13 Cyc. 114, 115, and cases cited.

[91] Indiana, etc., Ry. Co. v. Birney, 71 Ill. 391; Louisville, etc., Ry. Co., v. Falvey, 104 Ind. 409, 3 N. E. 389; Simpson v. Keokuk, 34 Ia. 568; German Theological School v. Dubuque, 64 Ia. 736, 17 N. W. 153; Alexander v. Chicago

§ 61. Allowance of interest in tort actions. The tendency of courts in modern times has been to extend the right to recover interest far beyond the limits within which that right was originally confined. "What seemed to be the demands of justice did not permit the principle to remain stationary, and hence it has been for years in a state of constant evolution."[92] The authorities are agreed that interest is not allowable, except for the wrongful destruction or damaging of property. Thus it is not allowed in suits for assault and battery, slander, libel, seduction, false imprisonment, or for personal injuries generally.[93] When property is converted or destroyed, interest may be allowed upon the value of the property from the date of the loss.[94] So generally when property is damaged, interest may be allowed on the amount of the damage, in the

etc., R. R. Co., 37 Ia. 264; Fitzpatrick v. Boston, etc., R. R. Co., 84 Me. 33, 24 Atl. 432; Talley v. Courter, 93 Mich. 473, 53 N. W. 621; Douglas v. Stephens, 18 Mo. 362; State v. Powell, 44 Mo. 436; Bader v. Southern Pac. Co., 52 La. Ann. 1060, 27 So. 584; Rexter v. Starin, 73 N. Y. 601; Lloyd v. Jones, 60 Vt. 288, 13 Atl. 638; Watkins v. Rist, 67 Vt. 284, 31 Atl. 413; 1 Sedg. Dams. §§ 201–228.

[92] Wilson v. Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 440.

[93] Ibid.; Western, etc., R. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Marshall v. Schricker, 63 Mo. 308; Thompson v. Boston, etc., R. R. Co., 58 N. H. 524; Pittsburg So. Ry. Co. v. Taylor, 104 Pa. St. 306, 317, 49 Am. Rep. 580; Railroad Co. v. Wallace, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548; Texas, etc., R. R. Co. v. Carr, 91 Tex. 332, 43 S. W. 18; Nichols v. Union Pac. Ry Co., 7 Utah, 510, 27 Pac. 693.

[94] Hamer v. Hatheway, 33 Cal. 117; Clark v. Whittaker, 19 Conn. 319, 48 Am. Dec. 160; Cook v. Loomis, 26 Conn. 483; Oviatt v. Pond, 29 Conn. 479; Regan v. New York, etc., R. R. Co., 60 Conn. 124, 142, 143, 22 Atl. 503, 25 Am. St. Rep. 306; Jacksonville, etc., Ry. Co. v. P. L. T. & M. Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33; Chicago v. Allcock, 86 Ill. 384; Shepard v. Pratt, 16 Kan. 209; Old Colony R. R. Co. v. Miller, 125 Mass. 1, 28 Am. Rep. 194; Kendrick v. Towle, 60 Mich. 363, 27 N. W. 567, 1 Am. St. Rep. 526; Fremont, etc., R. R. Co. v. Marley, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; Union Pac. Ry. Co. v. Ray, 46 Neb. 750, 65 N. W. 773; Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec. 348; Wilson v. Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 440; Patapsco Guano Co. v. Magee, 86 N. C. 350; Richards v. Citizens' Nat. Gas Co., 130 Pa. St. 37, 19 Atl 1025; Chapman v. Chicago, etc., Ry Co., 26 Wis 295, 7 Am. Rep. 81. So when

discretion of the jury.[95] In Massachusetts the rule is said to be "that in assessing damages of this kind a plaintiff is not to be awarded interest as interest, but that in ascertaining the damage at the date of the verdict, the jury should take into account the lapse of time and put the plaintiff in as good a position in reference to the injury as if the damages directly resulting from it had been paid immediately."[96] And some of the cases already referred to are to the same effect.

§ 62. **Waiving a tort and suing in contract.** There are a few cases in which a party is permitted to treat that which is purely a tort as having created a contract between himself and the wrong-doer, and waiving his right of action for the tort, to pursue his remedy for the breach of the supposed contract. The right to waive a tort and sue in assumpsit seems to have been first distinctly recognized in an action where assumpsit was brought by an administrator to recover the

crops are destroyed. Railway Co. v. Lyman, 57 Ark. 512, 22 S. W. 170; Gulf, etc., Ry. Co. v. Holliday, 65 Tex. 512; Ingram v. Rankin, 47 Wis. 406, 32 Am. Rep. 762.

[95] New York, etc., R. R. Co. v. Ansonia, etc. Co., 72 Conn. 703, 46 Atl. 157; Gress Lumber Co. v. Coody, 104 Ga. 611, 30 S. E. 810; Frazer v. Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620; Sanborn v. Webster, 2 Minn. 323; Fremont, etc., R. R. Co. v. Marley, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; Parrott v. Knickerbocker Ice Co., 46 N. Y. 361; Duryea v. New York, 96 N. Y. 477; Lawrence R. R. Co. v. Cobb, 35 Ohio St. 94; Barr v. Hoffman, 79 Pa. St. 71, 21 Am. Rep. 42; Emerson v. Schoonmaker, 135 Pa. St. 437, 19 Atl. 1025; Chapman v. Chicago, etc., Ry. Co., 26 Wis. 295; Lincoln v. Claflin, 7 Wall. 132; District of Columbia v. Robinson, 180 U. S. 92, 21 S. C. Rep. 283. "We think the rule is now settled in this state that where the value of property is diminished by an injury wrongfully inflicted the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury." Wilson v. Troy, 135 N. Y. 96, 105, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 440. *Contra*, Kenney v. Hannibal, etc., R. R. Co., 63 Mo. 99; Atkinson v. Atlantic, etc., R. R. Co., 63 Mo. 367.

[96] Ainsworth v. Lakin, 180 Mass. 397, 402, 62 N. E. 746. To same effect: Gress Lumber Co. v. Coody, 104 Ga. 611, 30 S. E. 810; Richards v. Citizens' Nat. Gas Co., 130 Pa. St. 37, 19 Atl. 1025; Emerson v. Schoonmaker, 135 Pa. St. 437, 19 Atl. 1025; Clement v. Spear, 56 Vt. 401. See generally on the subject of interest in tort action, 1 Sedg. Dams. §§ 320–324; 1 Suth. Dams. § 355.

moneys received by the defendant on a sale made by him, without authority, of debentures belonging to the estate.[97] And the doctrine is now well settled that where, as a result of a tortious act, the defendant has come into the possession of money belonging to the plaintiff, the law will not permit him to deny an implied promise to pay this money to the party entitled, and an action of contract may be maintained on this implied promise.[98] Whether the plaintiff can maintain assumpsit for the value of property which the defendant has appropriated to his own use without selling or converting it into money, is a question upon which the authorities differ. There are numerous decisions to the effect that assumpsit cannot be maintained unless the property has been converted into money.[99] But perhaps a greater number of cases decide that

[97] Lamine v. Bonell, Ld. Raym. 1216.

[98] Hitchin v. Campbell, 2 W. Bl. 827; Abbotts v. Barry, 2 B. & B. 369; Powell v. Rees, 7 A. & E. 426; Berley v. Taylor, 5 Hill, 577; Gilmore v. Wilbur, 12 Pick. 120, 22 Am. Dec. 410; Morrison v. Rodgers, 2 Scam. 317; Staat v. Evans, 35 Ill. 455; Leighton v. Preston, 9 Gill, 201; Gray v. Griffith, 10 Watts, 431; Goodenow v. Luyder, 3 Greene (Iowa), 599; White v. Brooks, 43 N. H. 402; Lord v. French, 61 Me. 420; Steiner Brothers v. Clisby, 103 Ala. 181, 15 So. 612; Smith v. McCarthy, 39 Kan. 308, 18 Pac. 204; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; Hirsch v. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645; Brittain v. Payne, 118 N. C. 989, 24 S. E. 711; St. John v. Antrim Iron Co., 122 Mich. 68, 80 N. W. 998; Nelson v. Kilbridge, 113 Mich. 637, 71 N. W. 1089; Wescott v. Sharp, 50 N. J. L. 392, 13 Atl. 243; Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216; Olive v. Olive, 95 N. C. 485; Crown Cycle Co. v. Brown, 39 Ore. 285, 64 Pac. 451; Pryor v. Morgan, 170 Pa. St. 568, 33 Atl. 98; Saville v. Welch, 58 Vt. 683, 5 Atl. 491; Robinson v. Welty, 40 W. Va. 385, 22 S. E. 73. The principle applies to one who sells chattels in violation of a trust. Rand v. Nesmith, 61 Me. 111. And to one who steals and sells them. Boston, etc., R. R. Co. v. Dana, 1 Gray, 83; Shaw v. Coffin, 58 Me. 254, 4 Am. Rep 290; Howe v. Clancy, 53 Me. 130.

[99] Jones v. Hoar, 5 Pick. 285; Glass Co. v. Wolcott, 2 Allen, 227; Mann v. Locke, 11 N. H. 246, 248; Smith v. Smith, 43 N. H. 536; Morrison v. Rogers, 3 Ill. 317; O'Reer v. Strong, 13 Ill. 688; Kelty v. Owens, 4 Chand. 166; Elliott v. Jackson, 3 Wis. 649; Stearns v. Dillingham, 22 Vt. 624, 54 Am. Dec. 88; Willett v. Willett, 3 Watts, 277; Pearsoll v. Chapin, 44 Pa. St. 9; Guthrie v. Wickliffe, 1 A. K. Marsh. 83; Fuller v. Duren, 36 Ala. 73, 76 Am. Dec. 318; Tucker v. Jewett,

if the defendant has converted the property in any manner to his own use, it is sufficient.[1] The contract implied is one to pay the value of the property, as if it had been sold to the wrong-doer by the owner.[2] But by all the authorities it is conceded that where the act is a naked trespass an action of assumpsit cannot be maintained, because the elements of an assumpsit are wanting. In most cases this is clear enough. Suppose one commits an assault and battery upon another, there is absurdity in the suggestion of a contract that the one party should permit this and the other should pay for it a reasonable compensation.[3] Suppose his cattle have invaded his

32 Conn. 563; Sanders v. Hamilton, 3 Dana, 550; Barlow v. Stalworth, 57 Ga. 117; Pike v. Bright, 29 Ala. 332; Emerson v. McNamara, 41 Me. 565; Quimby v. Lowell, 89 Me. 132, 36 Atl. 102; Androscoggin Water Power Co. v. Metcalf, 65 Me. 40; Grinnelle v. Anderson, 122 Mich. 533, 81 N. W. 329; Miller v. King, 67 Ala. 575; Smith v. Jernigan, 83 Ala. 256, 3 So. 515; Saville v. Welch, 58 Vt. 683.

[1] Miller v. Miller, 7 Pick. 133; Budd v. Hiler, 27 N. J. L. 43; Stockett v. Watkins' Admr. 2 G. & J. 326; Welch v. Bagg, 12 Mich. 42; Hill v. Davis, 3 N. H. 384; Floyd v. Wiley, 1 Mo. 430; Ford v. Caldwell, 3 Hill (S. C.), 248; Baker v. Cory, 15 Ohio 9; Fiquet v. Allison, 12 Mich. 328, 86 Am. Dec. 54; Bowen v. School Dist., 36 Mich. 149; Webster v. Drinkwater, 5 Me. 319, 17 Am. Dec. 238; Jones v. Buzzard, 1 Hemp. 240; Johnson v. Reed, 8 Ark. 202; Labeume v. Hill, 1 Mo. 643; Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Galvin v. Mac-Min, etc., Co., 14 Mont. 508, 37 Pac. 366; Challis v. Wylie, 35 Kan. 506, 11 Pac. 438; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; Crown Cycle Co. v. Brown, 39 Ore. 285, 64 Pac. 451; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161.

[2] Terry v. Munger, 121 N. Y. 161, 165, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216. In Hirsch v. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645, the court says: "If one who has *rightfully* converted the personal property of another to his own use is held bound by an implied promise to pay to the owner its reasonable value, certainly he who has *wrongfully* converted such property must be held to the same implied undertaking. To permit him to deny the promise would enable him to take advantage of his own wrong. The tort-feasor, in such circumstances, may, at the option of the party injured, be treated as having purchased the goods in question without stipulation as to their price, and be held liable in assumpsit for their market value." Pages 513, 514.

[3] See Raymond v. Lowe, 87 Me 329, 32 Atl 964.

neighbor's premises and trampled down and destroyed his crops, the ground for an implication of contract is equally wanting. There is a wrong, nothing more and nothing less.[4] We cannot imply a contract that one party should proceed to destroy the other's crop and then pay him for it. That is an unnatural transaction, and we cannot suppose it would take place except as a wrongful act.[4a] But where a trespass is committed and trees or mineral is severed from the land and taken by the trespasser and converted to his own use, assumpsit will lie for the value of the material so converted.[5]

[4] See Noyes v. Loring, 55 Me. 408, where the authorities on this point are collected. In that case a party fraudulently procured an advertisement to be published at the expense of the town, and he was held not to be liable in assumpsit. A mere detention of a chattel is not enough. Weiler v. Kershner, 109 Pa. St. 219; Tolan v. Hodgeboom, 38 Mich. 624. To try the title to use of water assumpsit on an implied promise to pay for the use of it, will not lie. North Haverhill, etc., Co. v. Metcalf, 63 N. H. 427. See, also, Watson v. Stever, 25 Mich. 386; Moses v. Arnold, 43 Ia. 187, 22 Am. Rep. 239; Finlay v. Bryson, 84 Mo. 664; Sandeen v. R. R. Co., 79 Mo. 278.

[4a] In Krause v. Pa. R. R. Co. 4 Pa. Co. Ct. 60, the court says: "But I know of no case in which a plaintiff was allowed to allege and recover upon an implied promise to pay the damages caused by the negligence of the defendant." Page 65.

[5] Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488. In this case the court, referring to the rule that when property has been converted, the tort may be waived and assumpsit maintained, says: "But certain it is that the rule has been extended to cases where there has been a wrongful conversion of property of one person to the use of another, whether sold or not by the latter, and also to cases where a trespasser has severed trees from land in possession of the owner, or has quarried stone thereon, and has afterwards taken the trees or the stone away, converting the same to his own use, so that trover or replevin might be maintained. That the doctrine has been greatly developed and extended in application is apparent, and that in cases where property has been severed from real estate by a wrong-doer, carried from the freehold, and converted to his own use, the rightful owner may sue and recover its value as on implied contract, is thoroughly established, although it may not be in harmony with the principles of the reformed system of pleading. No reason exists why, if permissible at all, it should not include cases arising out of trespass, to the extent that the property severed and carried away is beneficial to the trespasser, ex-

§ 63. **Locality of wrongs—Conflict of laws.** It is a general rule that for the purpose of redress it is immaterial where a wrong was committed; in other words, a wrong being personal, redress may be sought for it wherever the wrong-doer may be found.[6] To this there are a few exceptions, in which actions are said to be local, and must, therefore, be brought not only within the country, but also within the very county where they arose. The distinction between transitory and local actions is this: If the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local. Therefore, while an action of trespass to the person or for the conversion of goods is transitory, an action for flowing lands is local, because they can be flooded only where they are. For the most part the actions which are local are those brought for the recovery of real estate, or for injuries thereto or to easements.

In the leading case of *Mostyn v. Fabrigas*, the governor of a British colony was prosecuted in England, and a heavy judgment recovered against him for an assault and imprisonment of the plaintiff without authority of law in the colony.[7] In a later case it is held to be unimportant whether the foreign tort was or was not committed within territory subject to the British crown;[8] but it is agreed that to support an action the

cept when it would involve a trial of title to real estate." Pages 118, 119.

[6] Such are actions for injuries to the person: Helton v. Ala. Midland R. R. Co., 97 Ala. 275, 12 So. 276; St. Louis, etc., Ry. Co. v. Brown, 67 Ark. 295, 54 S. W. 865; Burdict v. Missouri Pac. Ry. Co., 123 Mo. 221, 27 S. W. 453, 45 Am. St. Rep. 528, 26 L. R. A. 384; Burdick v. Freeman, 120 N. Y. 420, 24 N. E. 949; Morrisetti v. Canadian Pac. Ry. Co., 76 Vt. 267, 56 Atl. 1102; McCarthy v. Whitcomb, 110 Wis. 113, 85 N. W. 707; Bain v. Northern Pac. R. R. Co., 120 Wis. 412, 98 N. W. 241; Mexican Central Ry. Co. v. Jones, 107 Fed. 64, 48 C. C. A. 227. For injuries to personal property: Lipscomb v. Tanner, 31 S. C. 49, 9 S. E. 933. For fraud: McQueen v. New, 87 Hun, 206, 33 N. Y. S. 802. Where a building is put on the land of another with right of removal, it is personal property and an action for injury thereto is transitory. Laird v. Railroad Co., 62 N. H. 254, 13 Am. St. Rep. 564.

[7] Mostyn v. Fabrigas, Cowp. 161. See Buron v. Denman, 2 Exch. 167.

[8] Scott v. Lord Seymour, 1 H. & C. 219. In Wilson v. McKenzie, 7 Hill, 95, it was decided that an action would lie against an of-

act must have been wrongful or punishable where it took place, and that whatever would be a good defense to the action, if brought there, must be a good defense everywhere.[9] That actions for trespasses on lands in a foreign country cannot be sustained, is the settled law in England and in this country.[10]

ficer of the navy for illegally assaulting and imprisoning one of his subordinates on the high seas, though the act was done under color of naval discipline. Nelson, Ch. J., cites in his opinion, among other cases, Warden v. Bailey, 4 Taunt. 67; S. C. 4 Maule & S. 400; Hanneford v. Hun, 2 C. & P. 148.

[9] Phillips v. Eyre, L. R. 4 Q. B. 225; S. C. in Exch. Ch. L. R. 6 Q. B. 1; The China, 7 Wall. 53, 64; Smith v. Condry, 1 How. 28; Stout v. Wood, 1 Blackf. 71; Wall v. Hoskins, 5 Ired. 177; Mahler v. New York, etc., Trans. Co., 35 N. Y. 352; Kohl v. Memphis, etc., R. R. Co., 95 Ala. 337, 10 So. 661; Hilton v. Ala. Midland R. R. Co., 97 Ala. 275, 12 So. 276; St. Louis, etc., Ry. Co. v. Brown, 67 Ark. 295, 54 S. W. 865; Holderman v. Pond, 45 Kan. 410, 25 Pac. 872, 23 Am. St. Rep. 734, 11 L. R. A. 542; Fogarty v. St. Louis Transfer Co., 180 Mo. 490, 79 S. W. 664; Alexander v. Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69; Railway Co. v. Lewis, 89 Tenn. 235, 14 S. W. 603; Morris v. Missouri Pac. Ry. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349; Sartin v. Oregon Short Line R. R. Co., 27 Utah, 447, 76 Pac. 219; Morrisetti v. Canadian Pac. Ry. Co., 76 Vt. 267, 56 Atl. 1102; Bain v. Northern Pac. R. R. Co., 120 Wis. 412, 98 N. W. 241. A common-law action for a tort in another state can be maintained without proof of the law of the latter state, the common law being presumed to be in force in such state in the absence of proof. Burdict v. Missouri Pac. Ry. Co., 123 Mo.. 221, 27 S. W. 453, 45 Am. St. Rep. 528, 26 L. R. A. 384. An action was held to lie in Illinois under a statute of Indiana making the master liable to his servant for injuries by reason of the negligence of a fellow servant. Chicago, etc., R. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410.

[10] Doulson v. Mathews, 4 T. R. 503; Livingston v. Jefferson, 1 Brock. 203; Watts' Admr. v. Kinney, 23 Wend. 484; S. C. 6 Hill, 82; Champion v. Doughty, 18 N. J. L. 3, 35 Am. Dec. 523; Ham v. Rogers, 6 Blackf. 559; Prichard v. Campbell, 5 Ind. 494; Chapman v. Morgan, 2 Greene (Iowa), 374; Brown v. Irwin, 47 Kan. 50, 27 Pac. 184; Allin v. Conn. Riv. Lumber Co., 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416; Jacobson v. Lynn, 54 Neb. 794, 75 N. W. 243; Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703; Niles v. Howe, 57 Vt. 388; Am. Un. Tel. Co. v. Middleton, 80 N. Y. 408; Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703. But a bill to set aside a conveyance as fraudulent is not local. Johnson v. Gibson, 116 Ill. 294. Nor an action for negligently burning fences. Railroad Co. v. Weaks, 13 Lea, 148.

But if by means of the trespass anything is severed from the realty so as to become personal property, and this is afterward converted by the trespasser to his own use, it seems that for the conversion he may be sued anywhere.[11] In New York it is held that the courts of that state have jurisdiction of a suit for injury to land in another state and that, if no objection is made and the case proceeds to judgment, the judgment will be valid and that a default is a waiver of the objection.[12] But the court may decline jurisdiction of its own motion.[13]

It has been made a question whether, if by a wrongful act committed in one state, real property is injured in another, action may not be brought in the former for that injury; and in one case Mr. Justice Grier, at the circuit, held that it might.[14] In New Hampshire, however, it is held that suit can be brought only in the jurisdiction where the land lies.[15]

Where a new right of action is given by statute for that for which an action at common law would not lie, the courts are not agreed as to where such action must be brought.[16] The

[11] Tyson v. McGuineas, 25 Wis. 656. Sand was severed in Missouri, and carried to Kansas. Trespass *de bon asp.* or trover will lie in Kansas. McGonigle v. Atchison, 33 Kan. 726. In Louisiana, actions for injuries to real estate are transitory, and on that ground an action for an injury to real estate in Illinois was sustained. Holmes v. Barclay, 4 La. Ann. 63.

[12] Sentenis v. Ladew, 140 N. Y 463, 35 N. E. 650, 37 Am. St. Rep. 569.

[13] Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 S. C. Rep. 771, 39 L. Ed. 913. See Morris v. Missouri Pac. R. R. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349.

[14] Rundle v. Del. & Rar. Canal, 1 Wall. Jr. 275. The conclusion of the learned judge was that the plaintiff might elect to sue in either jurisdiction, the act done being in one and the injury accomplished in the other. In Ohio an action was sustained for the diversion of water in Pennsylvania to the injury of lands in the former state. Thayer v. Brooks 17 Ohio, 489, 49 Am. Dec. 474 And see Little v. Chicago, etc., R. R. Co., 65 Minn. 48, 67 N. W. 846.

[15] Worster v. Winnipiseogee Lake Co., 25 N. H. 525. Compare Sutton v. Clarke, 6 Taunt. 29; Thompson v. Crocker, 9 Pick. 59 Where the plaintiff was hit in Arkansas by a fragment thrown by a blast fired in the Indian Territory, the cause of action was held to have arisen in the former state. Cameron v. Vandergriff, 53 53 Ark. 381, 13 S. W. 1092.

[16] An action will lie in Vermont, for injury suffered in the Province of Quebec, from failure of

question has often arisen under statutes giving an action for causing death by wrongful act, neglect or default and as has been stated in a former chapter, some cases hold that the action can only be brought within the state or country whose statute gives the right and for wrongs there suffered, while others allow the action to be brought in any state which has substantially similar statutes.[17] And where a further remedy is given for that which is an actionable wrong at the common law, it can be enforced only by the courts of the jurisdiction giving it, and for wrongs there suffered.[18]

When an action is brought in one state for a tort committed in another, what pertains to the right of action, the measure of damages and the validity of the defense is governed by the law of the place where the wrong was committed, and what pertains to the form of the remedy and to the procedure and practice is governed by the law of the place where the action is prosecuted.[19]

§ 64. Defenses. The principal defenses in an action of tort, apart from a denial and disproof of the wrong alleged, are (1) that the plaintiff's injury was due to his own fault or illegal conduct; (2) that the plaintiff consented to the act complained of or voluntarily took the risk of injury therefrom and consequently cannot found an action upon its commission;

defendant to comply with a statute of the Province. McLeod v. Railroad Co., 58 Vt. 727. An action which lies in Iowa under a statute changing the common-law rule as to the non-liability of the master to the servant for a fellow servant's negligence, may, if the injury is suffered in Iowa, be brought against the master in Minnesota, though there the common-law rule is followed. Herrick v. Minn., etc., R. R. Co., 31 Minn. 11, 47 Am. Rep. 771.

[17] See *post*, § 145, where this question is considered.

[18] One cannot sue in Massachusetts under its statutes for an injury done by a dog in New Hampshire, though the dog is owned and kept in the former state, and strayed away to commit the injury. Le Forest v. Tolman, 117 Mass. 109.

[19] Johnson v. Chicago, etc., Ry. Co., 91 Ia. 248, 59 N. W. 66; Higgins v. Central New England, etc, R. R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544; Herrick v. Railway Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Knight v. Railroad Co., 108 Pa. St. 250, 56 Am. Rep. 200; Northern Pac. R. R. Co. v. Babcock, 154 U. S. 190; Stewart v. Baltimore, etc., R. R. Co., 168 U. S. 445, 18 S. C. Rep. 105, 42 L. Ed. 537.

(3) that the plaintiff by his contract previously entered into, absolved the defendant from liability for the wrong alleged or assumed the risk of injury therefrom; (4) that the plaintiff, since the happening of the injury, has released the damages sued for or has otherwise satisfied and discharged the cause of action; (5) that the action is barred by the statute of limitations.

The first of these defenses includes contributory negligence and the effect of plaintiff being a wrong-doer at the time of the injury, both of which are elsewhere considered.[20] The third class of defenses mentioned is also considered in subsequent chapters. This class is practically made up of contracts against liability for negligence,[21] and implied agreements for assumption of risk in contracts between master and servant.[22] The other defenses will be breifly considered in the following sections.

§ 65. Assent of plaintiff. Ordinarily the consent of the plaintiff to a given act or course of conduct on the part of the defendant, is a bar to any claim of damages arising therefrom.[23] This is commonly known as "leave and license."[24] It is seldom met with except in the form of a license to enter upon the licensor's real estate or a permission to do something upon the licensee's estate which would otherwise be a nuisance to the licensor.[25] A consent obtained by fraud or imposition is of no avail as a defense.[26] Nor is a consent to do that which is unlawful.[27] In the case just referred to the court, after reviewing the authorities, sums up the matter as follows: "An agreement, leave, or license, to do an act which is itself unlawful, forbidden by positive law, and for the doing of which a penalty is attached and denounced, whether a felony or misdemeanor, is no defense to an action for damages to a party

[20] Plaintiff a Wrong-doer, *ante*, § 18; Contributory Negligence, *post*, § 344 *et seq.*

[21] *Post*, §§ 356–358.

[22] *Post*, § 275.

[23] Churchill v. Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; Howland v. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656; O'Brien v. Cunard S. S. Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329.

[24] Pollock, Torts, p. 156.

[25] See *post*, ch. X.

[26] Johnson v. Girdwood, 7 Misc. 651, 654, 28 N. Y. S. 151; McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260.

[27] Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230.

who has been injured by the doing of such act, though he made the agreement, gave the license, leave and consent; but when the wrong complained of is not forbidden by law, though it may be by morals, such as the seduction or debauching of a man's wife or daughter, slander, libel, or trespass on his real estate or to his personal property, agreement, consent, or license is a good defense." The question of the illegality of consent arises mostly in cases of assault and it has been repeatedly held that an agreement to fight or leave to strike is no defense to an action for injuries received in the encounter, because an assault or breach of the peace is against the law.[28] According to some authorities the consent may be shown in mitigation of damages.[29] A person who participates in a game must submit without recourse to such treatment as is unintentionally inflicted and may reasonably be expected to happen in course of the play.[30] And where parties engage in any sort of innocent play or sport it is probable that one would not be held liable for an injury accidentally resulting from an act that was reasonable and proper under the circumstances and was not calculated to do serious harm. But this would not apply to dangerous play or to acts calculated to produce serious injury.[31]

Another form of consent is that expressed by the maxim, "*Volenti non fit injuria.*" If a man knows of a danger and

[28] Logan v. Austin, 1 Stew. 476; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Commonwealth v. Collberg, 119 Mass. 150, 20 Am. Rep. 328; Jones v. Gale, 22 Mo. App. 637, 640; Stout v. Wren, 1 Hawks, 420, 9 Am. Dec. 653; Bell v. Hansley, 3 Jones, N. C. 131; Barholt v. Wright, 45 Ohio St. 177, 4 Am. St. Rep. 535; McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260; Willey v. Carpenter, 64 Vt. 212, 15 L. R. A. 852; Shay v. Thompson, 59 Wis. 540, 48 Am. Rep. 538; Matthew v. Ollerton, Comb. 218; Boulter v. Clark, Bull. N. P. 16. But in Goldnamer v. O'Brien, 98 Ky. 569, 33 S. W. 831, 56 Am. St. Rep. 378, 36 L. R. A. 715, the defendants were held not liable for having procured an abortion upon the plaintiff with her consent.

[29] Logan v. Austin, 1 Stew. 476; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Barholt v. Wright, 45 Ohio St. 177, 4 Am. St. Rep. 535.

[30] Fitzgerald v. Cavin, 110 Mass. 153.

[31] Where boys were at play and one threw mortar at another and hit a third boy in the eye, causing serious injury, he was held liable. Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81.

voluntarily puts himself in the way of it and is thereby injured, he is without remedy.[32] Thus where the plaintiff knew that spring guns were set in a certain wood and he nevertheless went there and was injured by the discharge of one of the guns caused by himself, it was held that he could not recover.[33] But the rule does not apply unless the plaintiff had notice or knowledge of the danger and the burden is on the defendant to show such notice or knowledge.[34] The subject will be further considered in the chapter on master and servant.[35]

§ 66. **Release or agreement after injury.** A claim for damages arising from a tort may be settled and released by agreement between the parties in interest. The binding force of such an agreement depends upon the same consideration as in case of other agreements. It must have a consideration, the parties must be competent at the time to enter into contracts and it must be free from fraud or imposition. When it will bear these tests it will be binding, however inadequate the consideration may be.[36] But if the release or settlement is obtained by fraud or artifice or by means of oppression or imposition, it will not be binding.[37] In such case the plaintiff may sue without returning or offering to return what has been

[32] Miner v. Conn. Riv. R. R. Co., 153 Mass. 398, 26 N. E. 994; Magar v. Hammond, 171 N. Y. 377, 64 N. E. 150, 59 L. R. A. 315; Thomas v. Quartermaine, 18 Q. B. D. 685.

[33] Pott v. Wilkes, 3 Barn. & Ald. 304.

[34] Muller v. McKesson, 170 N. Y. 195, 63 N. E. 541; Bird v. Holbrook, 4 Bing. 628; Smith v. Baker, (1891) A. C. 325.

[35] See *post*, § 275.

[36] Guldager v. Rockwell, 14 Colo. 459, 24 Pac. 556; Shaw v. Chicago, etc., Ry. Co., 82 Ia. 199, 47 N. W. 1054; Mateer v Mo. Pac. Ry. Co., 105 Mo. 320; Pederson v. Seattle Con. St. Ry. Co., 6 Wash. 202, 33 Pac. 351; Hayes v. East Tenn., etc., R. R. Co., 80 Ga 264, 15 S. E. 361.

[37] Smith v. Occidental, etc., S S. Co., 99 Cal. 462; Guldager v. Rockwell, 14 Colo. 459, 24 Pac. 556; Butler v. Railroad Co., 88 Ga. 594; Illinois Cent. R. R. Co. v. Welch, 52 Ill. 183; Chicago, etc., Ry. Co. v. Lewis, 109 Ill. 120; Shaw v. Chicago, etc., Ry. Co,. 82 Ia. 199, 47 N. W. 1004. Chicago, etc., R. R. Co. v. Doyle 18 Kan. 58; Bliss v. New York. etc., R. R. Co., 160 Mass. 447, 36 N. E. 65; Stone v Chicago, etc., Ry. Co., 66 Mich. 76, 33 N. W. 24; Girard v. St. Louis Car Wheel Co., 123 Mo. 358, 27 S. W. 648; Dixon v. Brooklyn City, etc., R. R. Co., 100 N. Y. 555; Kley v. Healey

received under the fraudulent agreement, but the same should be taken into account in fixing the amount of the recovery.[38] If the defendant sets up the release as a bar, the plaintiff may reply by setting up the fraud or duress and the validity of the release will be one of the issues to be tried in the case.[39] A release, invalid when made, may be ratified by subsequent acts and conduct so as to bar a recovery.[40]

§ 67. Statute of limitations. The statutes of limitations applicable to tort actions vary in the different states and in the same state as to different torts. Only a few general principles can here be noticed. The statute begins to run when the right of action accrues and is complete.[41] It has already been shown that in some cases the right of action is not complete unless damage results from the wrongful act, while in other cases it is complete upon the commission of the wrongful act, without

127 N. Y. 555; Kirchner v. Sewing Machine Co., 135 N. Y. 182; Duvall v. Mowry, 6 R. I. 479; Railroad Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348; Bussian v. Milwaukee, etc., Ry. Co., 56 Wis. 325; Sheanon v. Insurance Co., 83 Wis. 507; Albrecht v. Milwaukee, etc., R. R. Co., 94 Wis. 397, 69 N. W. 63; Union Pac. Ry. Co. v. Harris, 158 U. S. 333.

[38] O'Brien v. Chicago, etc., Ry. Co., 89 Ia. 644, 57 N. W. 425; Girard v. St. Louis Car Wheel Co., 123 Mo. 358, 27 S. W. 648; Union Pac. Ry. Co. v. Harris, 158 U. S. 333, and cases cited in last note. Compare Mullen v. Old Colony R. R. Co., 127 Mass. 86; Bliss v. New York, etc., R. R. Co., 160 Mass. 447, 36 N. E. 65; Drohan v. Lake Shore, etc., Ry. Co., 162 Mass. 435, 38 N. E. 1116.

[39] Bussian v. Milwaukee, etc., Ry. Co., 56 Wis. 325, and cases cited in last two notes.

[40] Drohan v. Lake Shore, etc., Ry. Co., 162 Mass. 435, 38 N. E. 1116; Gibson v. Western N. Y., etc., R. R. Co., 164 Pa. St. 142, 30 Atl. 308, 33 Am. St. Rep. 586; Missouri Pac. R. R. Co. v. Brazzil, 72 Tex. 233, 10 S. W. 403. As to effect of accepting benefits from railroad relief association to bar recovery, see Lease v. Pa. R. R. Co., 10 Ind. App. 47, 37 N. E. 423; Donald v. Chicago, etc., R. R. Co., 93 Ia. 284, 61 N. W. 971; Fuller v. Baltimore, etc., R. R. Co., 67 Md. 433, 10 Atl. 237; Spitze v. Baltimore, etc., R. R. Co., 75 Md. 162, 23 Atl. 307; Chicago, etc., R. R. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120; Chicago, etc., R. R. Co. v. Bell, 44 Neb. 44, 62 N. W. 314; Johnson v. Phila., etc., R. R. Co., 163 Pa. St. 127, 29 Atl. 854; Ringle v. Penn. R. R. Co., 164 Pa. St. 529, 30 Atl. 492; Miller v. Chicago, etc., R. R. Co., 65 Fed. 305.

[41] Wood on Limitations, § 117; 19 Am. & Eng. Encyc. p. 193. This is the express provision of the statute in most cases.

regard to consequences.[42] In the latter case the action accrues and the statute begins to run when the wrongful act is committed.[43] In the former, when the damage is sustained.[44] No exception can be made to the running of the statute, on account of hardship or otherwise, unless contained in the statute itself,[45] and express exceptions will not be extended by construction beyond the plain import of the language.[46] But it has been held that the operation of the limitation laws of the southern states was suspended during the civil war, as to claimants residing in the northern states.[47] And also that "whenever a person is prevented from exercising his legal remedy by some paramount authority, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitation has barred his right, even though the statute makes no specific exception in his favor in such cases."[48] When an action accrues to the personal representative after the death of a person, the statute does not begin to run until an administrator or executor is ap-

[42] *Ante*, § 12.

[43] Bank of Hartford v. Waterman, 26 Conn. 324.

[44] Wood on Lim. § 178; Board of Comrs. v. Pearson, 120 Ind. 426, 22 N. E. 134; Mitchell v. Darley Main Colliery Co., 14 Q. B. D. 125.

[45] Carden v. Louisville, etc., R. R. Co., 101 Ky. 113, 39 S. W. 1027; Swaney v. Gage County, 64 Neb. 627, 90 N. W. 542; Demarest v. Wynkoop, 3 Johns. Ch. 142; Troy v. Smith, 20 Johns. 33; McIver v. Reagan, 2 Wheat. 29; Bicker v. Chrisman, 76 Va. 678; Jones v. Lemon, 26 W. Va. 629; Vance v. Vance, 108 U. S. 514; Amy v. Watertown, 130 U. S. 320, 9 S. C. Rep. 537; Madden v. Lancaster County, 65 Fed. 188, 12 C. C. A. 566; Murray v. Chicago, etc., Ry. Co., 92 Fed. 868, 35 C. C. A. 62; Powell v. Koehler, 52 Ohio St. 103, 39 N. E. 195, 49 Am. St. Rep. 705, 26 L. R. A. 480. In the following cases it was held that where the cause of action was fraudulently concealed, the statute did not begin to run until its existence was discovered, or, by the exercise of reasonable diligence, might have been discovered. Boomer v. French, 40 Ia. 601; Carrier v. Chicago, etc., Ry. Co., 79 Ia. 80, 44 N. W. 203; Cook v. Chicago, etc., Ry. Co., 81 Ia. 551, 46 N. W. 1080.

[46] Powell v. Koehler, 52 Ohio St. 103, 39 N. E. 195, 49 Am. St. Rep. 705, 26 L. R. A. 480.

[47] Hanger v. Abbott, 6 Wall. 532.

[48] St. Paul, etc., Ry. Co. v. Olson, 87 Minn. 117, 91 N. W. 294, 94 Am. St. Rep. 693; Braun v. Sauerwein, 10 Wall. 218.

pointed.[49] But this does not apply in case of actions for wrongful death, where the action accrues because of the death. Such actions accrue at the date of the death.[50] When the statute has once begun to run its running is not arrested by the happening of subsequent disability or other event, unless express provision is made therefor in the statute.[51] When an action is brought for a tort committed in a foreign state or country the *lex fori* governs, whether the right of action depends upon the common law or a statute, unless the statute creating the right also limits the time within which the right shall be enforced, in which case the foreign statute governs.[52]

§ 68. Parties. Mr. Chitty says: "The general rule is that the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative; and therefore a correct knowledge of *legal* rights, and of *wrongs* remediable at law, will, in general, direct by and against whom an action should be brought."[53] The parties liable for torts and the rules of joint liability have been considered in the two preceding chapters and nothing further need be said in regard to the party or parties against whom the action should be brought. The proper plaintiff is necessarily the one whose right has been violated by the wrong complained of[54] and the only question that can arise is as to when two or more may join in bringing an action. This can only be done

[49] Hobart v. Conn. Turnpike Co., 15 Conn. 145; 1 Wood, Lim. § 117.

[50] Louisville, etc., R. R. Co. v. Clarke, 152 U. S. 230. And see *post*, § 150.

[51] Rogers v. Hillhouse, 3 Conn. 398; Doyle v. Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 342; Kestler v. Hereth, 75 Ind. 177, 39 Am. St. Rep. 131; McCutchen v. Currier, 94 Me. 362, 47 Atl. 923; Dempsey v. McNabb, 73 Md. 433, 21 Atl. 378; Bradstreet v. Clarke, 12 Wend. 602; Amole's Appeal, 115 Pa. St. 356, 8 Atl. 614; Tyson v. Britton, 6 Tex. 222; Hogan v. Kurtz, 94 U. S. 773, 779; McDonald v. Hovey, 110 U. S. 619, 621, 630; Jenkins v. Jensen, 24 Utah, 108, 66 Pac. 773, 91 Am. St. Rep. 783.

[52] O'Shields v. Ga. Pac. Ry. Co., 83 Ga. 621; Pittsburgh, etc., Ry. Co. v. Hive, 25 Ohio St. 629; The Harrisburg, 119 U. S. 199; Munos v. Southern Pac. Co., 51 Fed. 188, 2 C. C. A. 163; Theroux v. Northern Pac. R. R. Co., 64 Fed. 84, 12 C. C. A. 52.

[53] 1 Chit. Pl. 1.

[54] Dicey on Parties, p. 330.

when they have a joint right or interest which has been affected by the wrong.[55] Such joint right or interest can only exist with respect to property or business. Personal rights are necessarily separate and distinct in each individual and each must sue separately for any injury thereto, though others were injured in the same manner by the same wrongful act. Thus there can be no joint action for assault and battery, false imprisonment, malicious prosecution, slander, libel and the like.[56] So the owners of separate estates or interests in property must sue separately for an injury to the property.[57] But where two or more are joint owners of property or have a joint interest therein, they must all join in an action for redress of injuries thereto.[58] So for an injury to partnership property or business.[59] When the parties are very numerous, as in the case of some unincorporated associations, there is authority for the position that some may sue on behalf of all;[60] but the weight of authority is that all must join, however numerous.[61] If any person, being a necessary party, refuses to join, his name may be used, by indemnifying him against costs in such manner as the court may direct.[62]

[55] Dicey on Parties, p. 380; Rhoades v. Booth, 14 Ia. 575.

[56] Robinett v. McDonald, 65 Cal. 611; Leavet v. Sherman, 1 Root, 159; Nichols v. Hayes, 13 Conn. 155; Rhoades v. Booth, 14 Ia. 575; Stepanck v. Kula, 36 Ia. 563; Hinkle v. Davenport, 38 Ia. 355; Bunker v. Tufts, 55 Me. 180.

[57] Columbia Del. Bridge Co. v. Geisse, 38 N. J. L. 39; S. C. affirmed, 38 N. J. L. 580.

[58] Harris v. Swanson, 62 Ala. 299; Whitney v. Stark, 8 Cal. 514, 68 Am. Dec 360; Darling v. Simpson, 15 Me. 175; Hays v. Farwell, 53 Kan. 78; Austin v. Hall, 13 Johns. 286; Phillips v Sherman, 61 Me. 548; Merrill v. Berkshire, 11 Pick. 269. In Vermont, it seems one tenant in common may recover in trespass for all. Hibbard v. Foster, 24 Vt. 542; Bigelow v. Rising, 42 Vt. 678. See Allen v. Gibson, 4 Rand. 468; Wooley v. Campbell, 37 N. J. L. 163. In Lowery v. Rowland, 104 Ala. 420, 16 So. 88, it is held that part may sue and recover their proportionate part of the damage.

[59] Leavet v. Sherman, 1 Root. 159; Rhoades v. Booth, 14 Ia. 575.

[60] Liederkranz Singing Society v. Germania Turn-Verein, 163 Pa St. 265, 29 Atl. 918, 43 Atl. 798.

[61] O'Connell v. Lamb, 63 Ill App. 652; St. Paul Typothetae v St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725; 22 Enc Pl. & Pr. 230, 231.

[62] Harris v. Swanson, 62 Ala 299; Darling v. Simpson, 15 Me 175; Southwick v. Hopkins, 47 Me 362.

§ 69. Remedy for violation of statutory duties. Where duties are imposed by statute upon individuals or corporations, questions of liability for neglect corresponding to the questions which arise when official duty fails in performance, are of frequent occurrence and often of difficulty. The regulations which include the requirement of such duties are usually in the nature of regulations of police, and the duties may be imposed for the purpose of giving to the general public some new protection which the common law did not provide, or in order to give to individuals liable to injury a remedy where none existed before, or more complete remedy than before existed. Often all these purposes are had in view, though none of them may be expressly declared. When the latter is the case the question of civil liability to parties who may be damnified by the neglect can only be determined on a careful consideration of the statute and of the end it was manifestly intended to accomplish.

There are certain rules for the construction of such statutes which will afford some aid in the endeavor to arrive at the real intent. It must be admitted, however, that they are not very certain or very conclusive guides, and that the exceptions to them are numerous. The rules, as we shall give them below, relate not only to the cases where new duties are imposed, but also to those where a new remedy is given for the breach of a pre-existing duty, and they are brought together because the cases that illustrate one rule will often throw light upon the others also.

I. Where a remedy existed at the common law, and a new remedy is given by statute, and there are no negative words in the statute indicating that the new remedy is to be exclusive, the presumption is it was meant to be cumulative, and the party injured may pursue at his option either the common-law remedy, or the remedy given by the statute.[63] For example,

[63] Farmers' Turnpike Road v. Coventry, 10 Johns. 389; Crittenden v. Wilson, 5 Cow. 165, 15 Am. Dec. 462; Livingston v. Van Ingen, 9 Johns. 507; Renwick v. Morris, 7 Hill, 575; Tremain v. Richardson, 68 N. Y. 617; Ward v. Severance, 7 Cal. 126; Gooch v. Stevenson, 13 Me. 371; Hayes v. Porter, 22 Me. 371; Cumberland, etc., Corp. v. Hitchings, 59 Me. 206; Washington, etc., Road v. State, 19 Md. 239; Candee v. Hayward, 37 N. Y. 653; Lane v. Sal-

the common law gives to one whose property is seized on an attachment sued out maliciously and without probable cause an action on the case for the injury, and it has often been held that a statute requiring the attachment creditor to give bond to pay all damages suffered by the suing out of his writ, provided for a cumulative remedy only, and the remedy at the common law might still be resorted to.[64] So a statute giving a summary remedy for the assessment of damages done by trespassing cattle is cumulative.[65] So the statute authorizing highway commissioners to order the removal of fences encroaching upon highways does not take away the common-law remedy by abatement.[66] So the statutory authority to forfeit stock in corporations for non-payment of calls lawfully made upon the subscriptions thereto does not take away the remedy by suit upon the promise to pay contained in the subscription.[67] So if a highway surveyor obstructs the passage from one's dwelling to the road by cutting a ditch along the side

ter, 51 N. Y. 1; Mayor, etc., of Litchfield v. Simpson, 8 Q. B. 65; Williams v. Golding, L. R. 1 C. P. 69; Gibbes v. Town Council, 20 S. C. 213; Jarrett v. Apple, 31 Kan. 693; Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; Mackin v. Haven, 187 Ill. 480, 58 N. E. 448; Mackin v. Haven, 88 Ill. App. 434; Harper v. Mangel, 98 Ill. App. 526; Barry v. Lancy, 179 Mass. 112, 60 N. E. 395; Clark v. Lancy, 178 Mass. 460, 59 N. E. 1034; State v. Edwards, 162 Mo. 660, 63 S. W. 388; Walsh v. Ass'n of Master Plumbers, 97 Mo. App. 280; May v. Anaconda, 26 Mont. 140, 66 Pac. 759; Van Tassell v. Derrensbacher, 56 Hun, 477, 10 N. Y. S. 145; Danville State Hospital v. Belleforte, 163 Pa. St. 175, 29 Atl. 901.

[64] Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Sanders v. Hughes, 2 Brevard, 495; Smith v. Eakin, 2 Sneed, 456; Smith v. Story, 4 Humph. 169; Pettit v. Mercer, 8 B. Mon. 51; Sledge v. McLaren, 29 Ga. 64. See Booker's Ex'rs v. McRoberts, 1 Call, 213; Washington, etc., Co. v. State, 19 Md. 239.

[65] Colden v. Eldred, 15 Johns. 220; Stafford v. Ingersoll, 3 Hill, 38; Moore v. White, 45 Mo. 206.

[66] Wetmore v. Tracy, 14 Wend. 250, 28 Am. Dec. 525. See, for the same principle, Renwick v. Morris, 7 Hill, 575.

[67] Goshen Turnpike Co. v. Hurtin, 9 Johns. 217, 6 Am. Dec. 273; Small v. Herkimer Manuf. Co., 2 N. Y. 330; Nor. R. R. Co. v. Miller, 10 Barb. 260; Troy, etc., R. R. Co. v. Tibbits, 18 Barb. 297; Carson v. Mining Co., 5 Mich. 288; Inglis v. Great Nor. R. Co., 1 Macq. H. L. Cas. 112; Great Nor. R. Co. v. Kennedy, 4 Exch. 417; Giles v. Hutt, 3 Exch. 18.

of the road, it is no answer to a common-law action against him that a statute in such case gives a remedy against the town.[68] Neither is it an answer to an action against a ferry keeper for an injury occasioned by his negligence that under the statute he has been compelled to give bond, on which an action will lie for the same injury.[69]

II. But the common-law remedy may be excluded by implication as well as by express negative words; and where that which constitutes the actionable wrong is permitted on public grounds, but on condition that compensation be made, and the statute provides an adequate remedy, whereby the party injured may obtain redress, the inference that this was intended to be the sole remedy must generally be conclusive. It has been so held in many cases where land or other property has been taken for public use under the eminent domain.[70]

[68] Adams v. Richardson, 43 N. H. 212.

[69] Wells v. Steele, 31 Ark. 219. Making the supervisor of roads liable for defects in the highways does not relieve the county commissioners who were liable before. County Commissioners v. Gibson, 36 Md. 229.

[70] Fuller v. Edings, 11 Rich. 239; Conwell v. Hagerstown Canal Co., 2 Ind. 588; Crawfordsville, etc., R. R. Co. v. Wright, 5 Ind. 252; People v. Mich. Sou. R. R. Co., 3 Mich. 496; Smith v McAdam, 3 Mich 506; McCormick v. Terre Haute, etc., R. R. Co., 9 Ind. 283; Sudbury Meadows v. Middlesex Canal Co., 23 Pick. 36; Stevens v. Middlesex, 12 Mass. 466; Soulard v. St. Louis, 36 Mo. 546; Baker v. Hannibal, etc., R. R. Co., 36 Mo. 543; Calking v. Baldwin, 4 Wend. 667, 21 Am. Dec. 168; McKinney v. Monon. Nav. Co., 14 Penn. St. 65; Cole v. Muscatine, 14 Ia. 296; Stowell v. Flagg, 11 Mass. 364; Dodge v. Commissioners, etc., 3 Met. 380; Null v. Whitewater, etc., Co., 4 Ind. 431; Kimble v. Whitewater, etc., Co., 1 Ind. 285; Lebanon v. Olcott, 1 N. H. 339; Troy v. Cheshire R. R. Co., 23 N. H. 83, 55 Am. Dec. 177; Henniker v. Contoocook Valley R R. Co., 29 N. H. 146; Renwick v. Morris, 7 Hill, 575; Babb v. Mackey, 10 Wis. 371. In some cases it has been held that the common-law remedy still remained and might be resorted to; as where a water course was diverted by statutory authority. Proprietors, etc. v. Frye, 5 Me. 38. *Contra*, Calking v. Baldwin, 4 Wend. 667; McKinney v. Monon. Nav. Co., 14 Pa. St. 65. And where land and building were injured by flooding, or by the percolation of water, caused by the enlargement of a canal under statutory authority. Selden v. Canal Co., 24 Barb. 362. *Contra*, Stowell v. Flagg, 11 Mass. 364; Hazen v. Essex Co., 12 Cush. 475. If a privilege is given by statute which is exceeded, the

III. Where the statute imposes a new duty, where none existed before, and gives a specific remedy for its violation, the presumption is that this remedy was meant to be exclusive, and the party complaining of a breach is confined to it.[71] It is upon this ground that it has been many times held that when the right to exact tolls has been conferred upon a corporation, and a summary remedy given for their collection, the corporation must find in this summary remedy its sole redress when an attempt is made to evade payment.[72] So if

statutory remedy will not exclude a suit for the excess. Renwick v. Morris, 7 Hill, 575.

[71] Almy v. Harris, 5 Johns. 175; Edwards v. Davis, 16 Johns. 281; Dudley v. Mahew, 3 N. Y. 9; Thurston v. Prentiss, 1 Mich. 193; Reddick v. Governor, 1 Mo. 147; Lang v. Scott, 1 Blackf. 405; Johnston v. Louisville, 11 Bush, 527; Smith v. Drew, 5 Mass. 514; Green v. Bailey, 3 N. H. 33; Commissioners v. Bank, 32 Ohio St. 194; Beckford v. Hood, 7 T. R. 620; Doe v. Bridges, 1 B. & Ad. 847; Vestry of St. Pancras v. Battenbury, 2 C. B. (N. S.) 477; Stevens v. Jeacocke, 11 Q. B. 731; Marshall v. Nicholls, 18 Q. B. 882. See Vallance v. Falle, L. R. 13 Q. B. D. 109; Couchman v. Prather, 162 Ind. 250, 70 N. E. 240; Abel v. Minneapolis, 68 Minn. 89, 70 N. W. 851; McGinnis v. Missouri Car., etc., Co., 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553; Rochester v. Campbell, 123 N. Y. 405, 25 N. E. 937, 20 Am. St. Rep. 760, 10 L. R. A. 393; Cole v. Muscatine, 14 Ia. 296; Hodges v. Tama County, 91 Ia. 578, 60 N. W. 185; Harrington v. Glidden, 179 Mass. 486, 61 N. E. 54; Clinton v. Henry County, 115 Mo. 557, 22 S. W. 414, 37 Am. St. Rep. 415; Armstrong v. Mayer, 60 Neb. 423, 83 N. W. 401; Multnomah County v. Kelly, 37 Ore. 1, 60 Pac. 202; Madden v. Lancaster County, 65 Fed. 188, 12 C. C. A. 566. Where under a statute as to fire escapes a public remedy is given and also a remedy by injunction, available by individuals, an action on the case after an injury based on non-compliance with the statute will not lie. Grant v. Slater, etc., Co., 14 R. I. 380. When a statute gives a new right but provides no remedy, the common law will supply a remedy. Rackliff v. Greenbush, 97 Me. 99, 44 Atl. 375; McArthur v St. Louis Piano Co., 85 Mo. App. 525; Illinois Central R. R. Co. v. Wells, 104 Tenn. 706, 59 S. W. 1041.

[72] Turnpike Co. v. Martin, 12 Pa. St. 361; Beeler v. Turnpike Co., 14 Pa. St. 162; Kidder v. Boom Co., 24 Pa. St. 193; Turnpike Co. v. Van Dusen, 10 Vt. 197; Russell v. Turnpike Co., 13 Bush, 307. This is the rule generally applied in the case of taxes; if the statute imposing them prescribes a remedy, no other can be implied. See cases collected in Cooley on Taxation, 13. But if the statute gives a corporation the right to "demand and recover" tolls for the passage of

performance of the duty is enjoined under penalty, the recovery of this penalty is in general the sole remedy, even when it is not made payable to the party injured.[73] But the rule is not without its exceptions; for if a plain duty is imposed for the benefit of individuals, and the penalty is obviously inadequate to compel performance, the implication will be strong, if not conclusive that the penalty was meant to be cumulative to such remedy as the common law gives when a duty owing to an individual is neglected.[74] And if the duty imposed is obviously meant to be a duty to the public, and also to individuals, and the penalty is made payable to the state or to an informer, the right of an individual injured to maintain an action on the case for a breach of the duty owing to him will be unquestionable.

logs, and to detain the logs until the tolls are paid, this, by implication, authorizes suits. Bear Camp River Co. v. Woodman, 2 Me. 404.

[73] Turnpike Co. v. Brown, 2 Penn. & Watts, 462; Almy v. Harris, 5 Johns. 175. Failure to remove snow as required by ordinance is a breach of duty to the public from which an individual action does not arise. Flynn v. Canton Co., 40 Md. 312, 17 Am. Rep. 603; Kirby v. Market Ass'n, 14 Gray, 249; Taylor v. Lake Shore, etc., Co., 45 Mich. 74, 40 Am. Rep. 457; Moore v. Gadsden, 93 N. Y. 12; Hartford v. Talcott, 48 Conn. 525, 40 Am. Rep. 189; Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502. Compare Collinson v. Newcastle, etc., R. Co., 1 C. & K. 545.

[74] Salem Turnpike, etc., Co. v. Hayes, 5 Cush. 458. See Aldrich v. Howard, 7 R. I. 199; Ryan v. Gallatin Co., 14 Ill. 78; Dunlap v. Gallatin Co., 15 Ill. 7; Davis Coal Co. v. Polland, 158 Ind. 607, 62 N. N. E. 492, 92 Am. St. Rep. 319; Johnston v. Louisville, 11 Bush, 527; Curry v. Chicago etc., R. R. Co., 43 Wis. 665. See, also, Shepherd v. Hills, 11 Exch. 55; Mayor of Litchfield v. Simpson, 8 Q. B. 65.

CHAPTER V.

WRONGS AFFECTING PERSONAL SECURITY.

§ 70. Scope of chapter. In this chapter will be considered those wrongs which affect the bodily organization of individuals, or which deprive them of their rightful liberty of movement. These are wrongs which have no necessary relation to an ownership of property, though in some cases the extent of the injury may be affected by such ownership, and in others rights in property may be so involved that the same acts may be innocent or injurious, when they would take the opposite character, were no such rights in question. In the course of what is said, it will appear that, as regards the person itself—the bodily existence—the purpose of the law is to establish such rules as shall constitute a complete protection against any violence whatsoever, whether perceptible injury results from it or not.

Assault and Battery.

§ 71. Assaults. An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.[1] Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently

[1] Brezinski v. Tierney, 60 Conn. 55, 22 Atl. 486; Hickey v. Welch, 91 Mo. App. 4; Liebstadter v. Federgreen, 80 Hun, 245, 29 N. Y. S. 1039; State v. Baker, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863; People v. Lilley, 43 Mich. 521; Plouty v. Murphy, 82 Minn. 268, 84 N. W. 1005. It has been held that the violence need not be used toward the person of the man assaulted. Striking and kicking his horse, attached to a wagon, in which he is, may be an assault on him. Clark v. Downing, 55 Vt. 259, 45 Am. Rep. 612. Words alone never constitute an assault. State v. Mooney, Phil. (N. C.) 434; Smith v. State, 39 Miss. 521; Warren v. State, 33 Tex. 517; Reid v. State, 71 Ga. 865; Norris v. Casel, 90 Ind. 143; Scott v. Fleming, 16 Ill. App. 539; State v. Daniel, 136 N. C. 571, 48 S. E. 544.

near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is within its range;[2] the pointing of a pistol not loaded at one who is not aware of that fact, and making an apparent attempt to shoot;[3] shaking a whip or the fist in a man's face in anger;[4] riding or running after him in threatening and hostile manner with a club or other weapon;[5] and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; "a right to live in society without being put in fear of personal harm."[6]

§ 72. Batteries. A successful assault becomes a battery. A battery consists in an injury actually done to the person of

[2] Hickey v. Welch, 91 Mo. App. 4; State v. Baker, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863; State v. Taylor, 20 Kan. 643. Not if he is not within range. Tarver v. State, 43 Ala. 354. Shooting a gun loaded only with powder at twenty steps distance is an assault. Crumbley v. State, 61 Ga. 582. See Redman v. Edolfe, 1 Mod. 3; Blake v. Barnard, 9 C. & P. 626; Cutler v. State, 59 Ind. 300; Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392.

[3] Beach v. Hancock, 27 N. H. 223; Regina v. St. George, 9 C. & P. 483; Richels v. State, 1 Sneed, 606. See Rapp v. Commonwealth, 14 B. Mon. 614; State v. Cherry, 11 Ired. 475. Threatening to shoot, with pistol in hand, is an assault, though it be neither cocked nor loaded. State v. Church, 53 N. C. 15. *Contra*, State v. Sears, 86 Mo. 169; see McKay v. State, 44 Tex. 43. Compare Regina v. James, 1 C. & K. 530; Chapman v. State, 78 Ala. 436, 56 Am. Rep. 42.

[4] See People v. Yslas, 27 Cal. 630; State v. Rawles, 65 N. C. 334, 6 Am. Rep. 744; State v. Martin, 85 N. C. 508; State v. Horne, 92 N. C. 805.

[5] Mortin v. Shoppe, 3 C. & P. 373. Making apparently an attempt to ride over one is an assault. State v. Sims, 3 Strob. 137. It is an assault upon a woman to chase after her, calling upon her to stop, with an apparent purpose to commit a rape upon her, though she is not overtaken. State v. Neeley, 74 N. C. 425, 21 Am. Rep. 496. So to put one's arm around her neck. Goodrum v. State, 60 Ga. 509. So to sit upon the bed of a woman and lean over her bed making indecent proposals. Newell v. Whitcher, 53 Vt. 584, 38 Am. Rep. 703.

[6] Gilchrist, J., in Beach v. Hancock, 27 N. H. 223, 229. The judge truly says: "Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security."

another in an angry or revengeful, or rude or insolent manner, as by spitting in his face, or in any way touching him in anger, or violently jostling him out of the way,[7] or in doing any intentional violence to the person of another.[8] The wrong here consists, not in the touching, so much as in the manner or spirit in which it is done, and the question of bodily pain and injury is important only as affecting the damages. Thus, to lay hands on another in a hostile manner is a battery, though no damage follows; but to touch another merely to attract his attention, is no battery, and not unlawful.[9] And to push gently against one, in the endeavor to make way through a crowd, is no battery; but to do so rudely and insolently is, and may justify damages proportioned to the rudeness.[10] Where defendant was licensed to enter the plaintiff's outer door for the purpose of delivering milk and, in disregard of a command not to enter his sleeping room, did so and took hold of the plaintiff to wake him up in order to present a bill, it was held to be an assault and battery.[11] So where the defendant recklessly rode a bicycle against the plaintiff who was standing on the sidewalk.[12]

§ 73. **Batteries assented to.** Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to.[12a] But in case of a breach of the

[7] 1 Hawk. P. C. 263; Coward v. Baddeley, 4 H. & N. 478. Every battery includes an assault. Fitzgerald v. Fitzgerald, 51 Vt. 420.

[8] Birmingham Ry. & Elec. Co. v. Ward, 124 Ala. 409, 27 So. 471; Reeden v. Evans, 52 Ill. App. 209; White v. Kellogg, 119 Ind. 320, 21 N. E. 901; McMurrin v. Rigby, 80 Ia. 322, 45 N. W. 877; Watson v. Rinderknecht, 82 Minn. 235, 84 N. W. 798; Emmons v. Quade, 176 Mo. 22, 75 S. W. 103; Collins v. Butler, 179 N. Y. 156, 71 N. E. 746; Goldsmith v. Joy, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500; Ward v. White, 86 Va. 212, 9 S. E. 1021, 19 Am. St. Rep. 883; Beck v. Thompson, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870; Bosburg v. Putney, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226; Morgan v. Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445.

[9] Coward v. Baddeley, 4 H. & N. 478.

[10] Cole v. Turner, 7 Mod. 149; Bigelow, Lead. Cas. on Torts, 231.

[11] Richmond v. Fisk, 160 Mass 34, 35 N. E. 103.

[12] Mercer v. Corbin, 147 Ind 450, 20 N. E. 132, 10 Am. St. Rep 76, 3 L. R. A. 221

[12a] *Ante*, § 65.

peace it is different. The state is wronged by this, and forbids it on public grounds. If men fight, the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. There are three parties here, one being the state, which, for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable, that consent to an assault is no justification.[13] The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order; such as slight batteries in play or lawful games,[14] such unimportant injuries, as even when they constitute technical wrongs, may well be overlooked and excused by the party injured, if not done of deliberate malice. But an injury, even in sport, would be an assault if it went beyond what was admissible in sports of the sort, and was intentional.[15] Deception may sometimes be equivalent to force as an ingredient in an assault.[16]

[13] Buller, N. P., 16; Stephens, N. P., 211; Mather v. Ollerton, Comb. 218; Hannen v. Edes, 15 Mass. 346; Stout v. Wren, 1 Hawks. 420, 9 Am. Dec. 653; Bell v. Hansley, 3 Jones (N. C.), 131; Logan v. Austin, 1 Stew. 476; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 231; Shay v. Thompson, 59 Wis. 540, 48 Am. Rep. 538; Lund v. Tyler, 115 Ia. 236, 88 N. W. 333; Grotton v. Glidden, 84 Me. 589, 24 Atl. 1008; Barholt v. Wright, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535; Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Jones v. Gale, 22 Mo. App. 637; Commonwealth v. Collberg, 119 Mass. 530, 20 Am. Rep. 328. See State v. Beck, 1 Hill (S. C.), 363; Champer v. State, 14 Ohio St. 437.

[14] If one is injured in mutual play, it is no battery, unless there was an intention to injure. Fitzgerald v. Cavin, 110 Mass. 153; Gibelene v. Smith, 106 Mo. App. 545, 80 S. W. 961. As to liability for death from boxing in sport with soft gloves, see Reg. v. Young, 10 Cox Cr. C. 371.

[15] See Christopherson v. Bare, 11 Q. B. 473, 477; Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81.

[16] See Commonwealth v. Burke, 105 Mass. 376, 7 Am. Rep. 531; Commonwealth v. Stratton, 114 Mass. 303, 19 Am. Rep. 350; Regina v. Loch, 12 Cox Cr. C. 244; Regina v. Sinclair, 13 Id. 28; Regina v. Button, 8 C. & P. 660, and disapproving Regina v. Hanson, 2 C. & K. 912. Where defendants induce, by an offer of money, an habitual drunkard to drink three pints of liquor at a sitting and so produce death, his administrators may recover for the death. McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260.

§ 74. **Intent.** In batteries there must always be an intent, express or implied, to do injury; and therefore an accidental hurt, in which the actor was blameless, is no battery. But it is not essential that the precise injury which was done should have been designed. One who hurls a missile into a crowd may have no one in view as the object of injury, but he commits a battery upon the person struck.[17] So where the defendant, in driving boys away from his premises, threw a stick at two boys and unintentionally hit a third.[18] While the plaintiff was talking to another person who had hold of his arm, the defendant, a mutual friend, came along and, in fun, gave the other person a violent jerk, which threw the plaintiff down and injured him. The defendant was held liable, though no harm was intended.[19] So if two persons fight, and unintentionally one strikes a third, this is a battery of the latter, and is not excused as mere accident, for the purpose was to strike an unlawful blow to the injury of some one.[20] Where one, threatened with an immediate attack upon his premises in the night, mistook a friend for an enemy and hit him with a club, it was held there was no liability if there was no negligence in making the mistake.[21]

§ 75. **Battery in self-protection.** In any case of forcible assaults on the person, as in other cases of actions seemingly unlawful there may sometimes be lawful justification. Thus, where one attempts a battery of another, the latter is not obliged to submit until an officer can be found or a suit commenced; but he may oppose violence to violence, and the limit to his privilege to do so is only this: that he must not employ a

[17] Scott v. Shepherd, 2 W. Bl. 892. One who in sport and not meaning to do harm, but intentionally threw a piece of mortar at another and injured a third person is liable for a battery. Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81.

[18] Talmage v. Smith, 101 Mich. 370, 59 N. W. 45 Am. St. Rep. 414.

[19] Reynolds v. Pierson, 29 Ind. App. 273, 64 N. E. 484. See also Judd v. Ballard, 66 Vt. 668, 30 Atl. 96; Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403, 27 Am St. Rep. 47, 14 L. R. A. 226.

[20] James v. Campbell, 5 C. & P. 372.

[21] Crabtree v. Dawson, 26 Ky. L. R. 1046, 83 S. W. 557; Courvoisier v. Raymond, 23 Colo. 113, 47 Pac. 284.

degree of force not called for in self-defense; he must not inflict serious injuries unnecessarily in repelling slight injuries; nor take life unless life or limb is in danger, nor even then if, by retreating, he can safely avoid such extremity.[22] When he exceeds the limits of necessary protection, and employs excessive force, he becomes a trespasser himself, and his assailant may recover damages from him for repelling the assault with a violence not called for.[23] In such a case each party may have an action against the other: the one for the original assault and the other for the assault which commences with the employment of excessive force.[24]

In the matter of justifying an assault in self-defense, the conduct of the defendant is to be judged by the appearances at the time as they were calculated to affect the mind of a reasonable man, and not by the actual facts or the defendant's belief.[25] As words never constitute an assault, neither will they justify the employment of force in protection against

[22] That one may repel force by force, see Miller v. State, 74 Ind. 1; Keep v. Quallman, 68 Wis. 451, 32 N. W. 233; Drew v. Comstock, 57 Mich. 176; Foss v. Smith, 76 Vt. 113, 56 Atl. 1135; Higgins v. Minaghan, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138.

[23] Cockcroft v. Smith, Salk. 642; State v. Wood, 1 Bay, 351; Elliott v. Brown, 2 Wend. 497, 20 Am. Dec. 644; Curtis v. Carson, 2 N. H. 539; Dole v. Erskine, 35 N. H. 503; Philbrick v. Foster, 4 Ind. 442; Steinmetz v. Kelly, 72 Ind. 442; Trogden v. Henn, 85 Ill. 237; Bartlett v. Churchill, 24 Vt. 218; Brown v. Gordon, 1 Gray, 182. See Ogden v. Claycomb, 52 Ill. 365; Riddle v. State, 49 Ala. 389. An unlawful arrest may be resisted like any other unlawful assault. Williams v. State, 44 Ala. 41, and authorities cited; People v. McLean, 68 Mich. 480, 36 N. W. 231. As to the limit of violence in self-defense, see the following cases: State v. Kennedy, 20 Ia. 569; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; Murray v. Commonwealth, 79 Pa. St. 311; Roach v. People, 77 Ill. 25; Holloway v. Commonwealth, 11 Bush, 344; Lewis v. State, 51 Ala. 1; Eiland v. State, 52 Ala. 322; Irwin v. State, 43 Tex. 236; McPherson v. State, 29 Ark. 225; Miller v. State, 74 Ind. 1.

[24] Dole v. Erskine, 35 N. H. 503, 510. And see Gizler v. Witzel, 82 Ill. 322; Ogden v. Claycomb, 52 Ill. 365; Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744. But see Elliott v. Brown, 2 Wend. 497, 20 Am. Dec. 644.

[25] Germolus v. Sausser, 83 Minn. 141, 85 N. W. 946; Jemison v. Moseley, 69 Miss. 478, 10 So. 582; Courvoisier v. Raymond, 23 Colo. 113, 47 Pac. 284.

them, however gross or abusive they may be.[26] According to some authorities insulting words or abusive language may be shown in mitigation of damages both actual and punitive,[27] and according to others only in mitigation of the latter.[28]

§ 76. Defense of family. Such force as one may employ in his own defense he may also employ in defense of his wife, his child, or any member of his family.[29] But to revenge the wrongs of himself or of his family is no part of his legal right, and when the danger is repelled, justification for the further use of violence is at an end.[30]

§ 77. Defense of possessions. One may also justify an assault or battery committed in defending his possession of property, either personal or real, subject to the same restriction that he must not employ excessive force.[31] One may not only

[26] Richardson v. Zuntz, 26 La. Ann. 313; State v. Martin, 30 Wis. 216; Sorgenfrei v. Schrader, 75 Ill. 397; Murray v. Boyne, 42 Mo. 472; Rarden v. Maddox, 141 Ala. 506; Tatnall v. Courtney, 6 Houst. 434; Berkner v. Dannenberg, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559, Beck v. Bierl, 101 Ia. 240, 67 N. W. 304, 70 N. W. 206; Lund v. Tyler, 115 Ia. 236, 88 N. W. 333; Munday v. Landry, 51 La. Ann. 303, 25 So. 66; Goucher v. Jamison, 124 Mich. 21, 82 N. W. 663; Haman v. Omaha Horse Ry. Co., 35 Neb. 74, 52 N. W. 830; Palmer v. Winston-Salem Ry. & Elec. Co., 131 N. C. 250, 42 S. E. 604; Mahoning Valley Ry. Co. v. De Pascale, 70 Ohio St. 179, 71 N. E. 633; Goldsmith v. Joy, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500. See Norris v. Casel, 90 Ind. 143; Cross v. State, 63 Ala. 40; Dupee v. Lentine, 147 Mass. 580, 18 N. E. 465.

[27] Berkner v. Dannenberg, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559; Casper v. Prosdame, 46 La. Ann. 36, 14 So. 317; Palmer v. Winston-Salem Ry. & Elec. Co., 131 N. C. 250, 42 S. E. 604; Hayes v. Sease, 51 S. C. 534, 29 S. E. 259; Ward v. White, 86 Va. 212, 9 S. E. 104, 19 Am. St. Rep. 883.

[28] Mitchell v. Gambill, 140 Ala. 316, 37 So. 290; Mahoning Valley Ry. Co. v. De Pascale, 70 Ohio St. 179, 71 N. E. 633; Goldsmith v. Joy, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500.

[29] Patton v. People, 18 Mich. 314, 100 Am. Dec. 173; Commonwealth v. Malone, 114 Mass. 295; Stoneman v. Commonwealth, 25 Grat. 887; Staten v. The State, 30 Miss. 619; State v. Johnson, 75 N. C. 174; Tickell v. Read, Lofft. 215.

[30] Cockcroft v. Smith, 11 Mod. 43; State v. Gibson, 10 Ired. 214; Barfoot v. Reynolds, 2 Stra. 953; Regina v. Driscoll, 1 C. & M. 214.

[31] Abt v. Burgheim, 80 Ill. 92; Ayres v. Birtch, 35 Mich. 501; Johnson v. Perry, 56 Vt. 703, 48 Am. Rep. 826; Fossbinder v. Svitak, 16 Neb. 499; Green v. Goddard, 2 Salk. 641; Townsend v. Briggs, 99 Cal. 481, 34 Pac. 116; Heminway v. Heminway, 58 Conn

resist an aggression upon his property, but if his possession is actually invaded, he may employ force to remove the intruder, if the latter fail to go on request.[32] In the language of the law, his defense will be, that he laid his hands gently on the trespasser and removed him by the employment of so much force as was necessary, and no more.[33] And what one may do himself his servants may do in his behalf.[34] But if one in resisting aggression or removing an intruder exceeds the bounds of reasonable force he will be guilty of an assault.[35] But although one is permitted to defend a right by force, it does not follow that he is at liberty to recover by force a right which is denied;[36] the latter can only be justified in extreme cases,

143, 19 Atl. 766; Keller v. Lewis, 116 Ia. 369, 89 N. W. 1102; Young v. Gormley, 120 Ia. 372, 94 N. W. 922; Breitenbach v. Trowbridge, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829; Gillespie v. Beecher, 85 Mich. 347; Commonwealth v. Wright, 158 Mass. 149, 33 N. E. 82, 35 Am. St. Rep. 475, 19 L. R. A. 206; Hoagland v. Forest Park, etc., Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740; O'Donnell v. McIntyre, 118 N. Y. 156, 23 N. E. 455. A man assaulted in his dwelling is not obliged to retreat, but may defend his possession to the last extremity. Pond v. People, 8 Mich. 150; Pitford v. Armstrong, Wright (Ohio) 94. He may kill a burglar breaking in. McPherson v. State, 22 Ga. 478.

[32] Townsend v. Briggs, 99 Cal. 481, 34 Pac. 116; Illinois Steel Co. v. Novak, 84 Ill. App. 641; Redfield v. Redfield, 75 Ia. 435, 39 N. W. 688; Harshman v. Rose, 50 Neb. 113, 69 N. W. 755; Breitenbach v. Trowbridge, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829; Liebstadter v. Federgreen, 80 Hun, 245, 29 N. Y. S. 1039; State v. Lockwood, 1 Penn. 76, 39 Atl. 589.

[33] Harrison v. Harrison, 43 Vt. 417; Drew v. Comstock, 57 Mich 176; Bristor v. Burr, 120 N. Y. 427, 24 N. E. 937.

[34] Strickland v. Atlanta, etc., R. R. Co., 99 Ga. 124, 24 S. E. 981.

[35] Chappell v. Schmidt, 104 Cal. 511, 38 Pac. 892; Keller v. Lewis, 116 Ia. 369, 89 N. W. 1102; Redfield v. Redfield, 75 Ia. 435, 39 N. W. 688; Everton v. Esgate, 24 Neb. 235, 38 N. W. 794; Harshman v. Rose, 50 Neb. 113, 69 N. W. 755; Emmons v. Quade, 176 Mo. 220, 75 S. W. 103; Haman v Omaha Horse Ry. Co., 35 Neb. 74, 52 N. W. 830; O'Connell v. Samuel, 81 Hun, 357, 30 N. Y. S. 889. As to the use of spring guns and ferocious dogs in defense of property see State v. Moore, 31 Conn 479; Bird v. Holbrook, 4 Bing 628; Gray v. Combs, 7 J. J Marsh 478, 23 Am. Dec. 431; Hooker v Miller, 37 Ia. 613, 18 Am. Rep. 18; Aldrich v. Wright, 53 N. H. 398, 404, 16 Am. Rep. 339.

[36] State v Boynton, 76 Ia. 753, 40 N. W. 84; Concanan v. Boyn-

such as would justify force in preventing crime or in arresting offenders.[37]

§ 78. **Teacher and pupil.** A school teacher, acting in a proper spirit and on a proper occasion, may, without being guilty of an assault administer reasonable corporal punishment to a pupil, having regard to the character of the offense and to the age, sex, size and strength of the child.[38] If the punishment is excessive or malicious, the teacher will be liable.[39]

§ 79. **Parent and child.** Parents, or those standing *in loco parentis,* may administer reasonable and proper chastisement to their children,[40] and may deputize another to do so for them, and such other will not be liable for assault.[41] If the punishment is unreasonable or excessive, parents will be liable to the state for a criminal assault.[42]

ton, 76 Ia. 543, 41 N. W. 213; Isaacs v. Flahire, 14 Misc. 249, 35 N. Y. S. 716; Barr v. Post, 56 Neb. 698, 77 N W. 123; Kirby v. Foster, 17 R I. 437, 22 Atl. 1111, 14 L. R A. 317.

[37] Ibid. The right to retake by force property of which one has been wrongfully dispossessed has been considered in a former chapter See *ante,* §§ 47, 50; also Lambert v. Robinson, 162 Mass. 34, 37 N. E. 753, 44 Am. St. Rep. 326; Mattice v. Scutt, 94 App. Div. 479, 87 N. Y. S. 1009; Higgins v. State, 7 Ind. 549; Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442; Manning v Brown, 47 Md. 506; Commonwealth v. Haley, 4 Allen, 318; Mussey v. Scott, 32 Vt. 82.

[38] Boyd v. State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; Dean v. State, 89 Ala. 46, 8 So. 38; Fox v. People, 84 Ill. App. 270; Vannactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; State v Boyer, 70 Mo. App. 156; Drum v. Miller, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528; Mack v. Kelsey, 61 Vt. 399, 17 Atl. 780; State v. Thornton, 136 N. C. 610, 48 S. E. 602.

[39] State v. Long, 117 N. C. 791, 23 S. E. 431; Boyd v. State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; Dean v. State, 89 Ala. 46, 8 So. 38; Fox v. People, 84 Ill. App. 270; State v. Boyer, 70 Mo. App 156; State v. Thornton, 136 N. C. 610, 48 S. E. 602.

[40] Hornbeck v. State, 16 Ind. App. 484, 45 N. E. 620; State v. Bost, 125 N. C. 707, 34 S. E. 650; Hewlett v. Ragsdale, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682; McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664, 102 Am. St. Rep. 787.

[41] Harris v. State, 115 Ga. 578, 41 S. E. 983; Rowe v. Rugg, 117 Ia. 606, 91 N. W. 903, 94 Am. St. Rep. 318.

[42] See cases in last two notes. A stepmother is liable to her stepchild for a malicious assault upon the child. Treschman v. Treschman, 28 Ind. App. 206, 69 N. E 961.

§ 80. Excessive force a question of fact. The question whether the force employed in defense of person, family, or property, is excessive, must generally be one of fact. Some cases are so clear that the judge would be warranted in saying that as matter of law the force was or was not excessive; but they are not numerous.[43]

False Imprisonment.

§ 81. The nature of the wrong. False imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion.[44] *Prima facie* any restraint put by fear or force upon the actions of another is unlawful and constitutes a false imprisonment, unless a showing of justification makes it a true or legal imprisonment.[45] A submission

[43] Commonwealth v. Bush, 112 Mass. 280; Edwards v. Leavitt, 46 Vt. 126; Commonwealth v. Mann, 116 Mass. 58; Hanson v. European, etc., R. R. Co., 62 Me. 84, 16 Am. Rep. 404; Currier v. Swann, 63 Me. 323; State v. Taylor, 82 N. C. 554. An unintentional injury inflicted in self-defense and without negligence, is no assault. Morris v. Platt, 32 Conn. 75; Paxton v. Boyer, 67 Ill. 132, 16 Am. Rep. 615.

[44] Bird v. Jones, 7 Q. B. 742, 752; Crowell v. Gleason, 10 Me. 325; Rich v. McInerny, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32; Golibart v. Sullivan, 30 Ind. App. 428, 66 N. E. 188; Garnier v. Squires, 62 Kan. 321, 62 Pac. 1005; State v. Buxton, 102 N. C. 129, 8 S. E. 774. If the imprisonment is under legal process but the action has been begun and carried on maliciously and without probable cause, the wrong is malicious prosecution. Gelzenleuchter v. Niemeyer, 64 Wis. 316, 54 Am. Rep. 616; Murphy v. Martin, 58 Wis 276; Marks v. Townsend, 97 N. Y. 590; Mullen v. Brown, 138 Mass. 114; Herzog v. Graham, 9 Lea, 152. The burden of proof to show the imprisonment lawful is on the defendant. Hicks v. Faulkner, L. R. 8 Q. B. D. 167.

[45] "False imprisonment is necessarily a wrongful interference with the personal liberty of an individual. The wrong may be committed by words alone or by acts alone, or by both, and by merely operating on the will of the individual or by personal violence, or by both. It is not necessary that the individual be confined within a prison or within walls, or that he be assaulted or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation. Nor is it necessary that the wrongful act be committed with malice or ill will, or even with the slightest wrongful intention. Nor

to reasonably apprehended force is sufficient to constitute unlawful imprisonment, though no force is used or threatened.[46] To tell one on a ferry that he shall not leave it until a certain demand is paid, is an imprisonment if one submits through fear, though the person is not touched and no actual violence offered.[47] Any arrest or detention of a person is presumed to be unlawful and the burden is on the defendant to show it was lawful.[48]

§ 82. **Lawful restraints in certain relations.** The justification of imprisonment may be either under process or without process. In certain relations a degree of restraint is permitted by the law, for which no writ or legal process of any sort is usually required. The following are the cases referred to: The parent in respect to the child, the guardian in respect to the ward, the master in respect to his apprentice, the teacher in respect to his pupil, and the bail in respect to his principal. The latter it is usual to regulate by statute, and one of the regulations is, that arrest and imprisonment shall not take place without the exhibition of proper papers showing the relation and the rights under it and the authority must be ex-

is it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard." Garnier v. Squires, 62 Kan. 321, 62 Pac. 1005; Comer v. Knowles, 17 Kan. 436.

[46] Bingham v. Lipman, 40 Ore. 363, 67 Pac. 98. See Callahan v. Searles, 78 Hun, 238, 28 N. Y. S. 904; Brushaber v. Stegemann, 22 Mich. 266; Greathouse v. Summerfield, 25 Ill. App. 296; Field v. Kane, 99 Ill. App. 1; McDonald v. Franchere Bros., 102 Ia. 496, 71 N. W. 427; Stevens v. O'Neill, 51 App. Div. 364, 64 N. Y. S. 663; Granger v. Hill, 4 Bing. (N. C.) 212, 222. And see Bird v. Jones, 7 Q. B. 742; Warner v. Riddiford, 4 C. B. (N. S.) 180; Hill v. Taylor, 50 Mich. 549.

[47] Smith v. State, 7 Humph. 43, 45. Shutting up in a room, threatening with weapons to extort a promise, is false imprisonment. Hildebrand v. McCrum, 101 Ind. 61. But it is not if one goes with another voluntarily though hoaxed. State v. Lunsford, 81 N. C. 528. See Bird v. Jones, 7 Q. B. 742. But see Harkins v. State, 6 Tex. App. 457; Ollet v. Pittsburg, etc., Ry. Co., 201 Pa. St. 361, 50 Atl. 1011.

[48] Jackson v. Knowlton, 173 Mass. 94, 53 N. E. 134; Barker v. Anderson, 81 Mich. 508, 45 N. W. 1108; Hicks v. Faulkner, L. R. 8 Q. B. D. 167.

ercised without needless violence or annoyance.[49] The others are cases resting upon principles which are so familiar that little need be said concerning them here. Restraints are admissible within such limits as the parent, guardian, teacher, or master, in the exercise of a sound discretion, may decide to be necessary. To a certain extent a judicial power is vested in him which others are not at liberty to interfere with, except in a case of manifest abuse.[50] To take by itself the case of the parent, though the old ideas regarding the need of severity and strict discipline have to a large extent passed away, the father may still not only restrain the liberty of his infant child, but he may, as reason shall seem to him to require, inflict corporal punishment for misbehavior. The limit to his authority is that uncertain limit that the correction must be moderate, and dictated by reason and not by passion.[51] If he plainly exceeds all bounds, he is liable to criminal prosecution, but it seems never to have been held that the child might maintain a personal action for his injury.[52]

The teacher to whom a child is committed by his parents or guardian has also the right of restraint, and even of punishment, to compel obedience to lawful orders. Like the parent's, the authority must be exercised with moderation, and while all presumptions favor the correctness of his action,[53] yet, in a clear case of abuse of authority, he may be held liable as for criminal assault, and also in a civil suit for damages.[54]

[49] See Cooley, Const. Lim. 341, and note.

[50] In this country the master probably has no power of restraint or punishment but he may have in England. Penn v. Ward, 2 C. M. & R. 338.

[51] Johnson v. State, 2 Humph. 283; Winterburn v. Brooks, 2 C. & K. 16.

[52] See *post*, § 137.

[53] Cooper v. McJunkin, 4 Ind. 290; State v. Pendergrass, 2 Dev. & Bat. 365, 31 Am. Dec. 416; Commonwealth v. Randall, 4 Gray, 36; Hathaway v. Rice, 19 Vt. 102; Sheehan v. Sturges, 53 Conn. 481; Danenhoffer v. State, 69 Ind. 295. Not liable for error of judgment when he has acted in good faith. Heritage v. Dodge, 64 N. H. 297, 9 Atl. 722; Fertich v. Michener, 111 Ind 472.

[54] Commonwealth v. Randall, 4 Gray, 36; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156, Patterson v. Nutter, 78 Me. 509, 57 Am. Rep. 818. It has been held that if the child's parent gives him directions what to do, the teacher has no right to punish the child for obeying them. Morrow v. Wood,

Circumstances may place one in authority over another, when restraint would not only become excusable, but a duty. Thus, the safety of a ship, its passengers and crew, might depend upon the strict subordination of all persons on board; and all persons must then of necessity, submit themselves to the proper orders of the master.[55]

§ 83 **Arrest by virtue of legal process.** Excepting the cases already named, and a few more which will be referred to further on, whoever would justify an arrest must have legal process duly emanating from some judicial authority. This process must be pleaded, and it must have certain requisites, in order to render it available as a defense. Speaking generally, these requisites are the following: It must have been issued by a court or officer having authority of law to issue such process, and there must be nothing on the face of the process apprising the officer to whom it is delivered for service, that in the particular case there was no authority for issuing it.[56] When the process will bear this test, the officer is protected in obeying its command.[57]

As the rules of protection by process are the same, whether unlawful restraint upon the person is in question, or unlawful intermeddling with goods, it will be convenient to postpone a particular consideration of them until trespasses to property are discussed.[58] In this place only a very few general rules will be mentioned. 1. A writ may be absolutely void because it does not emanate from the court or officer purporting to issue it. This may happen because it is forged, or because

35 Wis. 59, 17 Am. Rep. 471. At least in the absence of a compulsory education law. State v. Misner, 50 Ia. 145.

[55] Brown v. Howard, 14 Johns. 119; Flemming v. Ball, 1 Bay, 3.

[56] Rousey v. Wood, 47 Mo. App. 465; Rousey v. Wood, 57 Mo. App. 650.

[57] Leib v. Shelby Iron Co., 97 Ala. 626, 12 So. 67; O'Neal v. McKenna, 116 Ala. 606, 22 So. 905; Tidball v. Williams, 2 Ariz. 50, 8 Pac. 351; Rush v. Buckley, 100 Me. 322; Martin v. Collins, 165 Mass. 256, 43 N. E. 91; Schultz v. Huebner, 108 Mich. 274, 66 N. W. 67; Miller v. Hahn, 116 Mich. 607, 74 N. W. 1051; Atwood v. Atwater, 43 Neb. 147, 61 N. W. 574; Hann v. Lloyd, 50 N. J. L. 1, 11 Atl. 346; Jennings v. Thompson, 54 N. J. L. 56, 22 Atl. 1008; Smith v. Jones, 16 S. D. 337, 92 N. W. 1084; Marks v. Sullivan, 9 Utah, 12, 33 Pac. 224; King v. Johnston, 81 Wis. 578, 51 N. W. 1011.

[58] *Post*, ch. 14.

some unauthorized person has assumed to fill out and issue process in the name of a magistrate.[59] 2. A writ may be void because it proceeds from a court or magistrate having, by law, no jurisdiction of the subject matter, either generally, or to the extent to which it has been assumed.[60] 3. The writ may also be void because it emanates from an inferior court or officer, whose jurisdiction is never presumed, but must be shown, and is not shown on the face of the proceedings.[61] In such cases there may have been jurisdiction in fact, but because it is not shown, it is as if it did not exist.[62] 4. The writ may also be void for many other reasons, such as that it is tested of a Sunday or other day which is *dies non* for such process, or that it was issued without compliance with some statutory requisite which is a condition precedent and shows the defect on its face, or for other defects, which will be more particularly referred to hereafter. It is enough to repeat here that the writ which an officer can justify himself in serving

[59] Pierce v. Hubbard, 10 Johns. 405; People v. Smith, 20 Johns. 63; Rafferty v. People, 69 Ill. 111; S. C. 72 Ill. 37, 18 Am. Rep. 601.

[60] See Tellefsen v. Fee, 168 Mass. 188, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481; Strozzi v. Wines, 24 Nev. 389, 55 Pac. 828; Swart v. Rickard, 74 Hun, 339, 26 N. Y. S. 408; Lueck v. Heister, 87 Wis. 644, 58 N. W. 1101; Holz v. Rediske, 116 Wis. 353, 92 N. W. 1105. But where the jurisdiction depends not on matter of law, but on matter of fact which the court or magistrate is to pass upon, the decision upon it is conclusive, and a protection not only to the officer serving process, but to the court or magistrate also. Brittain v. Kinnard, 1 Brod. & B. 432; Mather v. Hood, 8 Johns. 44; Mackaboy v. Commonwealth, 2 Virg. Cas. 268; Clarke v. May, 2 Gray, 410; State v. Scott, 1 Bailey, 294; Wall v. Trumbull, 16 Mich. 228; Sheldon v. Wright, 5 N. Y. 497; Freeman on Judgments, § 523, and cases cited; Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80.

[61] Jacques v. Parks, 96 Me. 268, 52 Atl. 763.

[62] The officer is bound to know the law, and that his writ is bad on its face, if such is the fact. Grumon v. Raymond, 1 Conn. 39, 6 Am. Dec. 200; Lewis v. Avery, 8 Vt. 287; Clayton v. Scott, 45 Vt. 386. So if examining magistrate convicts and constable takes to jail. Patzack v Von Gerichten, 10 Mo. App. 424. In serving a valid process, he is liable only for acts not authorized by it. Gage v. Barnes, 11 Vt. 195; Churchill v. Churchill, 12 Vt. 661. But for such acts he may be treated as a trespasser. Coffin v Field, 7 Cush. 355; Morse v. Reed, 28 Me. 481; Smith v. Gates, 21 Pick. 55; Gordon v. Clifford, 28 N H. 402; Cate v. Cate, 44 N. H. 211.

must be a valid writ and that those concerned in issuing it must be able by the law to justify its issue.

§ 84. Arrest without warrant. Arrests without warrant rest upon the inherent right of society to defend itself against sudden assaults by the spontaneous action of its members and peace officers. To justify such an arrest one must be able to show a felony actually committed and reasonable grounds for believing the person arrested to be the felon or a felony being committed by the person arrested and an arrest to stay and prevent it.[63] This seems to be the least that could be required, and if one errs in these particulars, it is better that he be left to take the consequences, than that they be visited upon an innocent party who is improperly arrested.[64] Some authorities lay down the rule that a private person arrests for felony at his peril, and that, to justify the arrest, he must show that a felony has been committed and that the person arrested committed it.[65] But a peace officer may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made on reasonable grounds of belief, he will be excused, even though it appear afterwards that in fact no felony had been committed.[66]

[63] Ruloff v. People, 45 N. Y. 213; Keenan v State, 8 Wis. 132; Neal v. Joyner, 89 N. C. 287; Union Depot R. R. Co. v. Smith, 16 Colo. 361, 27 Pac. 329; Hight v. Naylor, 86 Ill. App. 508; Garnier v. Squires, 62 Kan. 321, 62 Pac. 1005. An arrest by a constable out of his jurisdiction must be regarded as an arrest without warrant, even though he may have a warrant which commanded the arrest within his jurisdiction. Krug v. Ward, 77 Il. 603.

[64] Holley v. Mix, 3 Wend. 350, 20 Am. Dec. 702; Commonwealth v. Deacon, 8 S. & R. 47; State v. Roane, 2 Dev. 58; Brockway v. Crawford, 3 Jones N. C. 434, 67 Am. Dec. 250; Eanes v. State, 6 Humph. 53, 44 Am. Dec. 289; Long v. State, 12 Ga. 293; Reuck v. McGregor, 32 N. J. L. 70; State v. Holmes, 48 N. H. 377; Karner v. Stump, 12 Tex. Civ. App. 460, 34 S. W. 656.

[65] Palmer v. Maine Cent. R. R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; Enright v. Gibson, 219 Ill. 550, — N. E. —; Pandjiris v. Hartman, 196 Mo. 539.

[66] Marsh v. Loader, 14 C. B. (N. S.) 535; Lawrence v. Hadger, 3 Taunt. 14; Davis v. Russell, 5 Bing. 354, 365; Wakely v. Hart, 6 Binn. 316; Burns v. Erben, 40 N. Y. 463; Holley v. Mix, 3 Wend. 350, 20 Am. Dec. 702; Rohan v. Sawin, 5 Cush. 281; Drennan v.

Forcible breaches of the peace, in affrays, riots, etc., are placed, as regards arrest without warrant, on the footing of felonies. The reason for this is found in their tendency to lead to serious, and perhaps fatal injuries.[67] Peace officers are also allowed, without warrant, to enforce the ordinary laws of police by the arrest of vagrants, and drunken and disorderly persons, detaining them for the action of the proper police magistrates.[68] Except in cases of breaches of the peace the general rule is that a private person cannot arrest without warrant for a misdemeanor or the violation of an ordinance and that peace officers can only make such arrests when the

People, 10 Mich. 169; State v. Underwood, 75 Mo. 230; Union Depot & R. R. Co. v. Smith, 16 Colo. 361, 27 Pac. 329; Harness v. Steele, 159 Ind. 286, 64 N. E. 875; Palmer v. Maine Cent. R. R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089; Firestone v. Rice, 71 Mich. 377, 37 N. W. 303, 15 Am. St. Rep. 266; Diess v. Mallon, 46 Neb. 121, 64 N. W. 722, 50 Am. St. Rep. 598; Thompson v. Fisk, 50 App. Div. 71, 63 N. Y. S. 352. In such case probable cause is a question of law depending on the reasonable belief of the party. McCarthy v. DeArmit, 99 Pa. St. 63; Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089. If one undertakes to justify an arrest as an officer he must show that he was an officer *de jure*, "that he was duly and legally qualified to act as such officer." Short v. Symmes, 150 Mass. 298, 23 N. E. 42, 15 Am. St. Rep. 204.

[67] Respublica v. Montgomery, 1 Yeates, 419; City Council v. Payne 2 N. & McCord, 475; State v. Brown, 5 Harr. (Del.) 505; Phillips v. Trull, 11 Johns. 487; Vandeveer v. Mattocks, 3 Ind. 479; Palmer v. Maine Cent. R. R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; Baltimore, etc., R. R. Co. v. Cain, 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688; Tillman v. Beard, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215. The officer may so arrest to prevent a threatened breach of the peace. Hayes v. Mitchell, 80 Ala. 183.

[68] Beville v. State, 16 Tex. App. 70; Wiltse v. Holt, 95 Ind. 469. But the fact that one at the time orderly has been recently intoxicated is no justification for arrest without warrant. Newton v. Locklin, 77 Ill. 103. In Massachusetts if an officer arrests for drunkenness one in fact not drunk, he is liable civilly. Phillips v. Fadden, 125 Mass. 198. But not criminally. Com. v. Cheney, 141 Mass. 102, 55 Am. Rep. 448. If a peace officer arrest one without warrant on an oral complaint by another, and handcuffs and confines him, he will be held liable for false imprisonment, if it turns out that he was innocent. Griffin v. Coleman, 4 H. & N. 265. See Ross v. Leggett, 61 Mich. 445, 28 N. W. 675.

offense was committed in view of the officer.[69] An officer may not arrest without warrant for a misdemeanor committed in another state,[70] nor for a past misdemeanor committed in his own state.[71] Though an arrest without a warrant has been legally made, yet if the officer lets the prisoner go or detains him an unreasonable time without procuring a proper warrant or order for his detention, he will be a trespasser from the beginning and liable for false imprisonment.[72]

§ 85. **Restraint of the insane.** Under the right of self-defense there must undoubtedly be authority to seize and restrain any person incapable of controlling his own actions, and whose being at large endangers the safety or property of others.[73] But a person exercising this right must be sure of

[69] Gambill v. Schmuck, 131 Ala. 321, 31 So. 604; Union Depot & R. R. Co. v. Smith, 16 Colo. 361, 27 Pac. 329; Bright v. Patton, 5 Mackey 534, 60 Am. Rep. 396; Markey v. Griffin, 109 Ill. App. 212; Veneman v. Jones, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100; Curran v. Taylor, 92 Ky. 537, 18 S. W. 232; Palmer v. Maine Cent. R. R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; Baltimore, etc., R. R. Co. v. Cain, 81 Md. 87, 31 Atl. 801; Parkerton v. Verberg, 78 Mich. 573, 44 N. W. 579, 18 Am. St. Rep. 473, 7 L. R. A. 507; Tillman v. Beard, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; Webb v. State, 51 N. J. L. 189, 17 Atl. 113. See White v. McQueen, 96 Mich. 249, 55 N. W. 843; Franklin v. Amerson, 118 Ga. 860, 45 S. E. 698.

[70] Scott v. Eldridge, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379.

[71] Ibid.; Quinn v. Heisel, 40 Mich. 576; Way's Case, 41 Mich. 299; People v. Haley, 48 Mich. 495; People v. McLean, 68 Mich. 480, 36 N. W. 231; Wahl v. Walton, 30 Minn. 506. A deputy sheriff cannot arrest for past misdemeanor where a warrant has been issued if he does not have it in his possession at the time. People v. McLean, 68 Mich. 480, 36 N. W 231. An officer is not justified in arresting, upon a letter or telegram from a peace officer of another county or state, without warrant where a misdemeanor is charged. Manning v. Mitchell, 73 Ga. 660. Or for an offense not a crime by the laws of his own state. Malcolmson v. Scott, 56 Mich. 459.

[72] Harness v. Steele, 159 Ind. 286, 64 N. E. 875; Stewart v. Feeley, 118 Ia. 524, 92 N. W. 670; Twilley v. Perkins, 77 Md. 252, 26 Atl. 286, 39 Am. St. Rep. 408, 19 L. R. A. 632; Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089; Martin v. Golden, 180 Mass. 549, 62 N. E. 977; Anderson v. Beck, 64 Miss. 113; Leger v. Warren, 62 Ohio St. 500, 57 N. E. 506, 78 Am. St. Rep. 738, 51 L. R. A. 193; Newby v. Gunn, 74 Tex. 455, 12 S. W. 67. Compare Mulberry v. Fuelhart, 203 Pa. St. 573, 53 Atl. 504.

[73] Brookshaw v. Hopkins, Lofft.

his facts and be certain that they will justify him.[74] But self-protection will not justify the restraint of an insane person who is harmless.[75] It is not insanity that excuses, but insanity of a type that impels the person to acts which endanger the rights of others.

It is sometimes provided by statute that no one shall be restrained of his liberty as an insane person except upon the certificate of a reputable physician, or, perhaps, of more than one. If a physician, acting under such a statute, intentionally gives a false certificate whereby a person is confined in an asylum, he is liable for false imprisonment.[76] If the certificate is given in good faith but is erroneous, his liability depends upon whether he was negligent in the matter and the burden is on the plaintiff to show such negligence.[77] If a person procures another, who is not insane, to be arrested and committed to an insane asylum, he will be liable for malicious prosecution and the order of commitment is held not to be conclusive on the question of sanity.[78]

§ 86. **What constitutes false imprisonment — Illustrative cases.** Where a person is arrested or imprisoned by virtue of proceedings which are regular in form but not justified by the real facts, the remedy is malicious prosecution and not false imprisonment.[79] One who merely states the facts to a magis-

235. This right ceases when the seizure is no longer reasonably necessary. Keleher v. Putnam, 60 N. H. 30, 49 Am. Rep. 304.

[74] Look v. Dean, 108 Mass. 116, 11 Am. Rep. 323; Emmerick v. Thorley, 35 App. Div. 452, 54 N. Y. S. 791; Washer v. Slater, 67 App. Div. 385, 73 N. Y. S. 425.

[75] Anderson v. Burrows, 4 C. & P. 210; Scott v. Wahan, 3 Fost. & Finl. 328; Look v. Dean, 108 Mass. 116, 11 Am. Rep. 323; Lott v. Sweet, 33 Mich. 308. See Commonwealth v. Kirkbride, 3 Brewster, 586.

[76] Bacon v. Bacon, 76 Miss. 548, 24 So. 968.

[77] Ayers v. Russell, 50 Hun, 282, 3 N. Y. S. 338; Williams v. Le Bar, 141 Pa. St. 149, 21 Atl. 525.

[78] Kellogg v. Cochran, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104; Smith v. Nippert, 76 Wis. 86, 44 N. W. 846, 20 Am. St. Rep. 26; Smith v. Nippert, 79 Wis. 135, 48 N. W. 253.

[79] Shipman v. Fletcher, 9 Mackey, 245; Schultz v. Huebner, 108 Mich. 274, 66 N. W. 57; Finley v. St. Louis Refrigerator, etc., Co., 99 Mo. 559, 13 S. W. 87; Swart v. Rickard, 148 N. Y. 264, 42 N. E. 665; Foster v. Orr, 17 Ore. 447, 21 Pac. 440; McConnell v. Kennedy, 29 S. C. 180, 7 S. E.

trate and signs and swears to a complaint embodying such facts, is not liable for false imprisonment, though the complaint is insufficient and the magistrate has no jurisdiction.[80] So where one merely gives information to an officer which leads to the plaintiff's arrest,[81] or erroneously identifies the plaintiff as the person wanted.[82] But in either of the foregoing cases if the party requests the service of the warrant or aids or participates in the arrest he is liable.[83] If an officer, after having made a lawful arrest, abuses his authority, he becomes a trespasser *ab initio* and liable for false imprisonment.[84] Where one was arrested on suspicion of felony, but without sufficient grounds to justify it, and, after being detained two days, was fined for carrying concealed weapons, it was held that the conviction did not cure the original wrong.[85] Those who procure one's arrest for the violation of an ordinance will not be liable for false imprisonment be-

76; Marks v. Sullivan, 9 Utah, 12, 33 Pac. 224; King v. Johnston, 81 Wis. 578, 51 N. W. 1011.

[80] Wilmerton v. Sample, 42 Ill. App. 254; Rush v. Buckley, 100 Me. 322; Langford v. Boston, etc., Co., 144 Mass. 431; Doty v. Hurd, 124 Mich. 671, 83 N. W. 632; Gifford v. Wiggins, 50 Minn. 401, 52 N. W. 904; Booth v. Kurrus, 55 N. J. L. 370, 26 Atl. 1013; Whitney v. Hause, 36 App. Div. 420, 55 N. Y. S. 375; Smith v. Jones, 16 S. D. 337, 92 N. W. 1084. But where the complaining witness signed the warrant instead of the affidavit, and the magistrate signed the jurat only and issued the warrant in this condition to a constable who arrested the plaintiff thereon, it was held that the complainant had contributed to the wrong by his negligence and was liable. Oates v. Bullock, 136 Ala. 537, 33 So. 835, 96 Am. St. Rep. 38.

[81] Benham v. Vernon, 5 Mackey, 18; Waters v. Anthony, 20 App. D. C. 124.

[82] Miller v. Fano, 134 Cal. 103, 66 Pac. 183.

[83] Hewitt v. Newburger, 141 N. Y. 538, 36 N. E. 593, 38 Am. St. Rep. 807.

[84] Harness v. Steele, 159 Ind 286, 64 N. E. 875; Stewart v. Feeley, 118 Ia. 524, 92 N. W. 670; Robbins v. Swift, 86 Me. 197, 29 Atl. 981; Twilley v. Perkins, 77 Md. 252, 26 Atl. 286, 39 Am. St. Rep. 408, 19 L. R. A. 632; Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089; Martin v. Golden, 180 Mass. 549, 62 N. E. 977; Anderson v. Beck, 64 Miss. 113; Leger v. Warren, 62 Ohio St. 500, 57 N. E. 506, 78 Am. St. Rep. 738, 51 L. R. A. 193; Newby v. Gunn, 74 Tex. 455, 12 S. W. 67. But see Mulberry v. Fuelhart, 203 Pa. St. 573, 53 Atl. 504.

[85] Sneed v. Bonnoil, 166 N. Y. 325, 59 N. E. 899. And see Francis v. Telyon, 26 App. Div. 340, 49 N. Y. S. 799.

cause the ordinance afterwards turns out to be invalid.[86] In making or procuring the arrest of a person both officers and private persons act at their peril in the matter of identity. If the wrong party is arrested they are liable for false imprisonment and good faith is no defense.[87] But where a sheriff, acting upon a description and photograph, arrested the plaintiff by mistake, as the person wanted in a distant city on a warrant for felony, it was held by the supreme court of Michigan that if the officer in such cases acts honestly and prudently, and makes such inquiry and investigation, as a reasonably prudent man would and the circumstances permit, he will not be liable.[88] Where an officer makes an arrest by virtue of a warrant void on its face, he cannot justify by showing facts that justified the arrest without a warrant.[89] So where a private person directs or requests an officer to arrest the plaintiff on a criminal charge, he cannot justify by showing that the officer had good ground for making the arrest on his own motion, when the officer did not act on his own initiative.[90] One officer cannot justify an arrest on the ground that there was a valid warrant for such arrest in the hands of another officer.[91]

It has been held in Massachusetts that though a warrant is regular on its face and is issued by a court of general jurisdiction, yet if the officer receiving the warrant knows of the existence of facts by virtue of which the court has no jurisdiction in the case, he will be liable for false imprisonment,

[86] James v. Sweet, 125 Mich. 132, 84 N. W. 61; Wheeler v. Gavin, 5 Ohio C. C. 246; Goodwin v. Guild, 94 Tenn. 486, 29 S. W. 721, 45 Am. St. Rep. 743, 27 L. R. A. 660; Gifford v. Wiggins, 50 Minn. 401, 52 N. W. 904; Brooks v. Mangan, 86 Mich. 576, 24 Am. St. Rep. 137; Tillman v. Beard, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; Bohri v. Barnet, 144 Fed. 389 (C. C. A.).

[87] Wells v. Johnston, 52 La. Ann. 713, 27 So. 185; Grinnell v. Weston, 95 App. Div. 454, 88 N. Y. S. 781; Clark v. Winn, 19 Tex. Civ. App. 223, 46 S. W. 915; Holmes v. Blyler, 80 Ia. 365, 367, 45 N. W. 756. The arrest of the plaintiff may be justified under a warrant describing him by a fictitious name. Tidball v. Williams, 2 Ari. 50, 8 Pac. 351.

[88] Filer v. Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

[89] Elwell v. Reynolds, 6 Kan. App. 545, 51 Pac. 578.

[90] Rich v. McInerny, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32.

[91] McCullough v. Greenfield, 133 Mich. 463, 95 N. W. 532; Webb v. State, 51 N. J. L. 189, 17 Atl. 113.

if he makes an arrest under the warrant.[92] A statute authorized the sheriff to call upon citizens to aid in the arrest of a person for felony or breach of the peace and imposed a penalty for refusal to comply. It was held that one who obeyed and who aided in the arrest of a person and only did what he was directed to do by the officer was not liable for false imprisonment, though the arrest was unlawful.[93] But, as a general rule, all who aid, assist, direct, advise or encourage the unlawful arrest of a person are liable for the consequences,[94] and corporations will be liable for a false imprisonment made or procured by their agents or servants, if within the scope of their employment, or authorized or ratified by them.[95] Where the person arrested pleads guilty and submits to a fine in order to avoid being locked up, or his discharge is the result of a compromise, or is on request and the promise of good behavior, a recovery for false imprisonment is barred.[96] But the giving of bail[97] or a judgment remanding the prisoner on habeas corpus[98] does not have that effect.

[92] Tellefsen v. Fee, 168 Mass. 188, 194, 195, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481. The following are to the same effect: Sprague v. Birchard, 1 Wis. 457, 60 Am. Dec. 393; Grace v. Mitchell, 31 Wis. 533, 11 Am. Rep. 613; Leachman v. Dougherty, 81 Ill. 324. The point is discussed in a note in 22 Am. Dec., pp. 201-204. If an officer arrests without a warrant and on the direction of another a person whom he believes to be innocent and who is so in fact, the officer will be liable. Yoant v. Carney, 91 Ia. 559, 60 N. W. 114.

[93] Firestone v. Rice, 71 Mich. 377, 37 N. W. 303, 15 Am. St. Rep. 266.

[94] Pearce v. Needham, 37 Ill. App. 90; Bright v. Patton, 5 Mackey (D. C.), 534, 60 Am. Rep. 396; Allison v. Hobbs, 96 Me. 26, 51 Atl. 245; Cameron v. Pacific Express Co., 48 Mo. App. 99; Johnson v. Bouton, 35 Neb. 898, 53 N. W. 995; Burk v. Howley, 179 Pa. St. 539, 36 Atl. 327, 57 Am. St. Rep. 607; Tenny v. Harvey, 63 Vt. 520, 22 Atl. 659.

[95] Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Lovick v. Atlantic Coast Line R. R. Co., 129 N. C. 427, 40 S. E. 191; Duggan v. Baltimore, etc., R. R. Co., 159 Pa. St. 248, 28 Atl. 182, 39 Am. St. Rep. 248; Eichengreen v. Railroad Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702; Cunningham v. Seattle Elec. Ry. & P. Co., 3 Wash. 471, 28 Pac. 745.

[96] Fadner v. Filer, 27 Ill. App. 506; Joyce v. Parkhurst, 150 Mass. 243, 22 N. E. 899; Jones v. Foster, 43 App. Div. 33, 59 N. Y. S. 738.

[97] Buzzell v. Emerton, 161 Mass. 176, 36 N. E. 796.

[98] Bradley v. Beeth, 153 Mass. 154, 26 N. E. 429.

MALICIOUS PROSECUTION; CRIMINAL PROCEEDINGS.

§ 87. **Nature of the wrong.** It is the lawful right of every man to institute or set on foot criminal proceedings whenever he believes a public offense has been committed. But it is a duty which every man owes to every other not to institute proceedings maliciously, which he has no good reason to believe are justified by the facts and the law. Therefore, an action as for tort will lie when there is a concurrence of the following circumstances: 1. A suit or proceeding has been instituted without any probable cause therefor. 2. The motive in instituting it was malicious. 3. The prosecution has terminated in the acquittal or discharge of the accused.[99] Each of these circumstances requires separate attention.

§ 88. **Probable cause.** Probable cause has been defined to be "a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the party is guilty of the offense."[1] It involves a consideration of what the facts are, and what are the reasonable deductions from the facts. It is, therefore, what is denomi-

[99] Lunsford v. Dietrich, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37; National Surety Co. v. Mabrey, 139 Ala. 217, 35 So. 698; Lacey v. Porter, 103 Cal. 597, 37 Pac. 635; Davis v. Pacific Tel. & Tel. Co., 127 Cal. 312, 59 Pac. 698; Porter v. White, 5 Mackey, 180; Schattgen v. Holnback, 52 Ill. App. 54; Paddock v. Watts, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832; Davis v. Seeley, 91 Ia. 583, 60 N. W. 183; Noble v. White, 103 Ia. 352, 72 N. W. 556; Cointement v. Cropper, 41 La. Ann. 303, 6 So. 127; Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282; Kline v. Hibbard, 80 Hun, 50, 29 N. Y. S. 807; Stamper v. Raymond, 38 Ore. 17, 62 Pac. 20; Madison v. Pennsylvania R. R. Co., 147 Pa. St. 509, 23 Atl. 764, 30 Am. St. Rep. 756; Stoddard v. Roland, 31 S. C. 342, 9 S. E. 1027; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101; Staunton v. Goshorn, 94 Fed. 52, 36 C. C. A. 75.

[1] McClafferty v. Philip, 151 Pa. St. 86, 90, 24 Atl. 1042. Further definitions and statements of the doctrine will be found in the following cases: Hitson v. Sims, 69 Ark. 439, 64 S. W. 219; Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Coleman v. Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. 913; Ahrens, etc., Mfg. Co. v. Hoeher, 106 Ky. 692, 51 S. W. 194; Sandoz v. Veazie, 106 La. Ann. 202, 30 So. 767; Bacon v. Towne, 4 Cush. 217; Wilson v. Bowen, 64 Mich. 133, 31 N. W. 81; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Boeger v.

nated a mixed question of law and fact.[2] If the facts are not in dispute the question is for the court.[3] As to what facts are sufficient to show probable cause is a question of law for the court and whether such facts are proved by the evidence is a question for the jury.[4] "The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that if they find such facts to be established, there was or was not probable cause, and that their verdict must be accordingly."[5] A mere belief that cause

Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; Rider v. Murphy, 47 Neb. 857, 66 N. W. 837; Braveboy v. Cockfield, 2 McMul. 270; Mitchell v. Logan, 172 Pa. St. 349, 33 Atl. 554; Markley v. Snow, 207 Pa. St. 447, 56 Atl. 990, 64 L. R. A. 685; Fox v. Smith, 25 R. I. 255, 55 Atl. 698; Graham v. Life Ass'n, 98 Tenn. 48, 37 S. W. 995; Mussman v. Ihlenfeldt, 89 Wis. 585, 62 N. W. 522; Broad v. Ham, 5 Bing. N. C. 722.

[2] Porter v. White, 5 Mackey, 180; Lewton v. Hower, 35 Fla. 58, 16 So. 616; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. 969; Cooper v. Fleming, 114 Tenn. 40.

[3] Busst v. Gibbons, 6 H. & N. 912; McWilliams v. Hoban, 42 Md. 56; Speck v. Judson, 63 Me. 207; Thompson v. Force, 65 Ill. 370; Swaim v. Stafford, 4 Ired. 392; Ulmer v. Leland, 1 Me. 135, 10 Am. Dec. 48; Crescent City, etc., Co. v. Butchers, etc., Co., 120 U. S. 141; McNulty v. Walker, 64 Miss. 198; Bell v. Keepers, 37 Kan. 64, 14 Pac. 542; Sartwell v. Parker, 141 Mass. 405; Seabridge v. McAdams, 108 Cal. 345, 41 Pac. 409; Lancaster v. McKay, 103 Ky. 616, 45 S. W. 887; Huntington v. Gault, 81 Mich. 144, 45 N. W. 970; Hazzard v. Flury, 120 N. Y. 223, 24 N. E. 194.

[4] Lacey v. Porter, 103 Cal. 597, 37 Pac. 635; Sandell v. Sherman, 107 Cal. 391, 40 Pac. 493; Donnelly v. Burkett, 75 Ia. 613, 34 N. W. 330; Ahrens, etc., Mfg. Co. v. Hoeher, 106 Ky. 692, 51 S. W. 194; Metropolitan Life Ins. Co. v. Miller, 114 Ky. 754; 71 S. W. 921; Campbell v. Baltimore, etc., R. R. Co., 97 Md. 341, 55 Atl. 532; Shafer v. Hertzig, 92 Minn. 171, 99 N. W. 796; Bank of Miller v. Richman, 64 Neb. 111, 89 N. W. 627; Hess v. Ore. Baking Co., 31 Ore. 503, 49 Pac. 803; Stamper v. Raymond, 38 Ore. 17, 62 Pac. 20; Mahaffy v. Byers, 151 Pa. St. 92, 25 Atl. 93; Huckestein v. New York Life Ins. Co., 205 Pa. St. 27, 54 Atl. 461.

[5] Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174. To same effect: Porter v. White, 5 Mackey, 180; Lewton v. Hower, 35 Fla. 58, 16 So. 616; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. 969; Cottrell v. Cottrell, 126 Ind. 181, 25 N. E. 905; Drumm v. Cesnum, 58 Kan. 331, 49 Pac. 78; Rankin v. Crane, 104 Mich. 6, 61 N. W. 1007; Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282; Boush v. Fidelity & Dep. Co., 100 Va. 735, 42 S. E. 877.

exists is not sufficient, for one may believe on suspicion and suspect without cause, or his belief may proceed from some mental peculiarity of his own; there must be such grounds of belief as would influence the mind of a reasonable person, and nothing short of this could justify a serious and formal charge against another.[6]

The test of probable cause is to be applied as of the time when the action complained of was taken; and if upon the facts then known the party had no probable cause for action, it will be no protection to him that facts came to his knowledge afterwards that might have constituted a justification had he been aware of them.[7] But the plaintiff's guilt of the crime charged may be shown in any case and will be a complete defense, though the facts known to the defendant at the time of the arrest were insufficient to show even probable guilt or probable cause.[8] "The action for malicious prosecution was designed for the benefit of the innocent, not of the guilty. It matters not whether there was proper cause for the prosecution, or how malicious may have been the motives of the prosecutor, if the accused is guilty he has no legal cause of complaint." [8a]

[6] Mowry v. Whipple, 8 R. I. 360; Farnam v. Feeley, 56 N. Y. 451; Winebiddle v. Portefield, 9 Pa. St. 137, 139; Collins v. Hayte, 50 Ill. 353, 99 Am. Dec. 521; Fagnam v. Knox, 66 N. Y. 525, 526; Spangler v. Davy, 15 Gratt. 381; Shaul v. Brown, 28 Ia. 37, 4 Am. Rep. 151; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. 913; Terre Haute, etc., R. R. Co. v. Mason, 148 Ind. 578, 46 N. E. 332; Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174.

[7] Delegal v. Highley, 3 Bing. (N. C.) 950; Bell v. Pearcy, 5 Ired. 83; Johnson v. Chambers, 10 Ired. (N. C.) L. 287; Galloway v. Stewart, 49 Ind. 156, 19 Am. Rep. 677; Skidmore v. Bricker, 77 Ill. 164; Josselyn v. McAllister, 25 Mich. 45; Foshay v. Ferguson, 2 Denio, 617; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Smith v. King, 62 Conn. 515, 26 Atl. 1059.

[8] Whitehurst v. Ward, 12 Ala 264; Adams v. Lisher, 3 Blackf. 241; Parkhurst v. Masteller, 57 Ia. 474; Lancaster v. McKay, 103 Ky. 616; Mack v. Sharp, 138 Mich. 448; Threefoot v. Nuckols, 68 Miss. 116, 8 So. 335; Bell v. Pearcy, 5 Ired. L. 84; Johnson v. Chambers, 10 Ired. L. 287; Thurber v. Eastern B. & L. Ass'n, 118 N. C. 129, 24 S. E. 730; Newton v. Weaver, 13 R. I. 617.

[8a] Newton v. Weaver, 13 R. I. 617.

Probable cause is not made out if the defendant knew facts sufficient on their face to make the guilt of the plaintiff reasonably probable but did not believe the facts or believe the plaintiff guilty. It is essential that the prosecutor believe in the guilt of the accused.[9] Whether the defendant is entitled to rely upon information received is a question of fact for the jury.[10] It is held that the defendant should exercise reasonable care or due diligence to ascertain the facts and that he is chargeable with a knowledge of all facts which such care or diligence would have disclosed.[11] But it would seem that if the facts known to the defendant show probable cause he need not make further inquiries, unless there is something in the nature of those facts or of the surrounding circumstances that would put a reasonable man on inquiry.[12]

§ 89. Advice of counsel. It may perhaps turn out that the complainant, instead of relying upon his own judgment, has taken the advice of counsel learned in the law and acted upon that. This should be safer and more reliable than his own judgment, not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearings. A prudent man is therefore expected to take such advice; and when he does so and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause,[13] provided the disclosure appears to have

[9] Dunlap v. New Zealand, etc., Ins. Co., 109 Cal. 365, 42 Pac. 29; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. 969; Harris v. Woodford, 98 Mich. 147, 57 N. W. 96; Jackson v. Bell, 5 S. D. 257, 58 N. W. 671; Acton v. Coffman, 74 Ia. 17, 36 N. W. 774; Johnson v. Miller, 82 Ia. 693, 48 N. W. 925, 31 Am. St. Rep. 514; Burbanks v. Leporsky, 134 Mich. 384, 96 N. W. 456; Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135; Plummer v. Johnson, 70 Wis. 131, 35 N. W. 334; Markley v. Snow, 207 Pa. St. 447, 56 Atl. 990, 64 L. R. A. 685.

[10] Owens v. New Rochelle, etc., Co., 38 App. Div. 53, 55 N. Y. S. 913.

[11] Flam v. Lee, 116 Ia. 289, 90 N. W. 70, 93 Am. St. Rep. 242; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650.

[12] Kansas, etc., Coal Co. v. Galloway, 71 Ark. 351, 74 Pac. 521, 100 Am. St. Rep. 79; Dunlap v. New Zealand, etc., Ins. Co., 109 Cal. 365, 42 Pac. 29; Boyd v. Mendenhall, 53 Minn. 274, 55 N. W. 45.

[13] Ravenga v. Mackintosh, 2 B. & C. 693; Stone v. Swift, 4 Pick. 389, 16 Am. Dec. 349; Walter v. Sample, 25 Pa. St. 275; Olmstead v. Partridge, 16 Gray, 381; Wicker

been full and fair, and not to have withheld any of the material facts.[14] The advice of a justice of the peace will not avail,[15] unless he is also a lawyer and gives the advice in the

v. Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75; Burgett v. Burgett, 43 Ind. 78; Stewart v. Sonneborn, 98 U. S. 187; St. Johnsbury, etc., Co. v. Hunt, 59 Vt. 294; Sharpe v. Johnston, 76 Mo. 660; Allen v. Codman, 139 Mass. 136; O'Neal v. McKinna, 116 Ala. 606, 22 So. 905; Dunlap v. New Zealand, etc., Ins. Co., 109 Cal. 365, 42 Pac. 29; Hicks v. Brantley, 102 Ga. 264, 29 S. E. 459; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. 913; Womack v. Fudeckar, 47 La. Ann. 33, 16 So. 645; Kampass v. Light, 122 Mich. 86, 80 N. W. 1008; Moore v. Northern Pac. R. R. Co., 37 Minn. 147, 33 N. W. 334; Maynard v. Sigman, 65 Neb. 590, 91 N. W. 576; Hess v. Oregon Baking Co., 31 Ore. 503, 49 Pac. 803; Beihofer v. Loeffert, 159 Pa. St. 374, 28 Atl. 216; Staunton v. Goshorn, 94 Fed. 52, 36 C. C. A. 75; Cooper v. Fleming, 114 Tenn. 40; Brinsley v. Schultz, 124 Wis. 426, 102 N. W. 918. Some authorities hold that the advice of counsel is not conclusive of probable cause but is only a circumstance to be considered by the jury. Smith v. Eastern B. & L. Ass'n, 116 N. C. 73, 20 S. E. 963; Thurber v. Eastern B. & L. Ass'n, 116 N. C. 75, 21 S. E. 193; Shannon v. Jones, 76 Tex. 141, 13 S. W. 477.

[14] National Surety Co. v. Mabry, 139 Ala. 217, 35 So. 698; Seabridge v. McAdam, 108 Cal. 345, 41 Pac. 409; Lewton v. Hower, 35 Fla. 58, 16 So. 616; Paddock v. Watts, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832; Connelly v. White, 122 Ia. 391, 98 N. W. 144; Lange v. Ill. Cent. R. R. Co., 107 La. Ann. 687, 31 So. 1003; Torsch v. Dell, 88 Md. 459, 41 Atl. 903; Webster v. Fowler, 89 Mich. 303, 50 N. W. 1074; Jeremy v. St. Paul Boom Co., 84 Minn. 516, 88 N. W. 13; Jensen v. Halstead, 61 Neb. 249, 85 N. W. 78; Barhight v. Tammany, 158 Pa. St. 545, 28 Atl. 135, 38 Am. St. Rep. 853; Jackson v. Bell, 5 S. D. 257, 58 N. W. 671; Palmer v. Broder, 78 Wis. 483, 47 N. W. 744; Ash v. Marlow, 20 Ohio, 119; Walter v. Sample, 25 Pa. St. 275; Kimmel v. Henry, 64 Ill. 505; Sharp v. Johnston, 59 Mo. 557; Cooper v. Utterbach, 37 Md. 282; Bliss v. Wyman, 7 Cal. 257; Anderson v. Friend, 85 Ill. 135; Mesher v. Iddings, 72 Ia. 553, 34 N. W. 328; Wild v. Odell, 56 Cal. 136.

[15] Olmstead v. Partridge, 16 Gray, 381; Beel v. Robeson, 8 Ired. 276; Straus v. Young, 36 Md. 246; Burgett v. Burgett, 43 Ind. 78; Stanton v. Hart, 27 Mich. 539; Murphy v. Larson, 77 Ill. 172; Sutton v. McConnell, 46 Wis. 269; Brobst v. Ruff, 100 Pa. St. 91, 45 Am. Rep. 358; Gee v. Culver, 12 Ore. 228; Colbert v. Hicks, 5 Ont. App. 571; McCullough v. Rice, 59 Ind. 580; Stewart v. Sonneborn, 98 U. S. 187; Rigden v. Jordan, 81 Ga. 668, 7 S. E. 857; Necker v. Bates, 118 Ia. 545, 92 N. W. 667; Finn v. Frink, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348; Beihofer v. Loeffert, 159 Pa. St. 365, 28 Atl.

latter capacity.[16] Though the defendant is a lawyer, he will be protected by the advice of counsel the same as a layman,[17] but he cannot shelter himself behind his own advice as his own counsel.[18] The advice of the prosecuting attorney stands on the same footing as the advice of a lay attorney.[19] Some authorities hold that the advice of counsel goes to the question of malice, not of probable cause.[20] All the authorities agree that the advice of counsel will be of no avail, unless sought and acted upon in good faith and with a genuine belief in the plaintiff's guilt.[21] Nor if the attorney selected is known to be interested in the subject matter, or biased or prejudiced against the plaintiff.[22] But the fact that the advice is not given honestly and in good faith will not affect the defendant, if he was ignorant of the fact and had no reason to suspect

217; Moulton v. Ball, 104 Tenn. 597, 58 S. W. 248; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101.

[16] Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Monaghan v. Cox, 155 Mass. 487, 30 N. E. 467. See Marks v. Hastings, 101 Ala. 165, 13 So. 297.

[17] Terre Haute, etc., R. R. Co. v. Mason, 148 Ind. 578, 46 N. E. 332.

[18] Epstein v. Berkowsky, 64 Ill. App. 498.

[19] Kansas, etc., Coal Co. v. Galloway, 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79; Hicks v. Brantley, 102 Ga. 264, 29 S. E. 459; Schippel v. Norton, 38 Kan. 567, 16 Pac. 804; Sandoz v. Veazie, 106 La. Ann. 202, 30 So. 767; Moore v. Northern Pac. R. R. Co., 37 Minn. 147, 33 N. W. 334; Sebastian v. Cheney, 86 Tex. 497, 25 S. W. 691; Small v. McGovern, 117 Wis. 608, 94 N. W. 651; Hess v. Oregon Baking Co., 31 Ore. 503, 49 Pac. 803.

[20] Wright v. Hanna, 98 Ind. 217; Lemay v. Williams, 32 Ark. 166; Ramsey v. Arrott, 64 Tex. 320; McClafferty v. Philp, 151 Pa. St. 86, 24 Atl. 1042; Smith v. Walters, 125 Pa. St. 453, 17 Atl. 466.

[21] Vaun v. McCreary, 77 Cal. 434, 19 Pac. 826; Seabridge v. McAdams, 119 Cal. 460, 51 Pac. 691; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. 913; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. 969; Acton v. Coffman, 74 Ia. 17, 36 N. W. 774; Johnson v. Miller, 82 Ia. 693, 48 N. W. 925, 31 Am. St. Rep. 514; Torsch v. Dell, 88 Md. 459, 41 Atl. 903; Burbanks v. Leposky, 134 Mich. 384, 96 N. W. 456; Kehl v Hope Oil Mill, etc., Co., 77 Miss. 762, 27 So. 641; Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574; Smith v. Walters, 125 Pa. St. 453, 17 Atl. 466; Palmer v. Broder, 78 Wis. 483, 47 N. W. 744; Billingsley v. Maas, 93 Wis. 176, 67 N. W. 49; Eastman v. Keasor, 44 N. H 518; Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644.

[22] White v. Carr, 71 Me. 555, 36 Am. Rep. 533; Perrenoud v. Helm, 65 Neb. 77, 90 N. W. 980; Adkin v. Pillen, 136 Mich. 682, 100 N. W. 176.

it.[23] Some cases hold that the defendant must disclose to counsel all the facts known to him or which, by reasonable diligence, he might have ascertained, or in other words that the advice of counsel will be of no avail, if there are material facts which the defendant might have ascertained and submitted by the exercise of reasonable diligence, but failed to do so.[24] Other cases hold it sufficient if the defendant discloses all the material facts within his knowledge.[25] When the defendant places himself under the guidance of counsel, if facts subsequently come to his knowledge which seem to be important, it is his duty to communicate these to counsel, if he expects to rely upon his advice as a justification in the steps subsequently taken.[26] The burden is on the defendant to show that he made a full and fair disclosure and acted in good faith and these are questions of fact for the jury.[27] The advice of counsel is a defense, though not warranted by the facts submitted,[28] but in New York it has been held that where the facts submitted do not show or tend to show a crime, the advice of counsel that they do will be of no avail.[29]

§ 90. Proof of probable cause or the want of it. A conviction of the accused is conclusive evidence of probable cause, unless is was obtained by fraud or unfair means, which may be shown in rebuttal,[30] and this is true though afterwards, on

[23] Seabridge v. McAdam, 119 Cal. 460, 51 Pac. 691; Shea v. Cloquet Lumber Co., 92 Minn. 348, 100 N. W. 111.

[24] Motes v. Bates, 80 Ala. 382; Roy v. Goings, 112 Ill. 656; White v. Carr, 71 Me. 555, 36 Am. Rep. 533; National Surety Co. v. Mabrey, 139 Ala. 217, 35 So. 698; Parker v. Parker, 102 Ia. 500, 77 N. W. 421; Ahrens, etc., Mfg. Co. v. Hoeher, 106 Ky. 692, 51 S. W. 194.

[25] Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703; Hess v. Oregon Baking Co., 31 Ore. 503, 49 Pac. 803.

[26] Cole v. Curtis, 16 Minn. 182; Ash v. Marlow, 20 Ohio, 119.

[27] Williams v. Kyes, 9 Colo. App. 190, 48 Pac. 663; Chicago Forge & Belt Co. v. Rose, 69 Ill. App. 123; Webster v. Fowler, 89 Mich. 303, 50 N. W. 1074; Jonasen v. Kennedy, 39 Neb. 313, 58 N. W. 122.

[28] Kompass v. Light, 122 Mich 86, 80 N. W. 1008.

[29] Hazzard v. Flury, 120 N. Y. 223, 24 N. E. 194.

[30] Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703; Hartshorn v. Smith, 104 Ga. 235, 30 S. E. 666; Adams v. Bicknell, 126 Ind. 210, 25 N. E. 804, 22 Am. St. Rep. 576; Barber v. Scott, 92 Ia. 52, 60 N. W. 497; Boogher v. Hough, 99 Mo. 183, 12 S. W. 524; Maynard v. Sigman, 65 Neb. 590, 91 N. W. 576.

appeal, the conviction is set aside or the accused acquitted.[31] A waiver of examination by the accused is an admission of the existence of probable cause,[32] but is only *prima facie* evidence thereof.[33] So of a commitment or binding over by the magistrate or of an indictment by the grand jury.[34] In Rhode Island it is held that the commitment or indictment is conclusive of probable cause unless shown to have been procured by fraud or undue means.[35] The burden of proof to show a want of probable cause is upon the plaintiff.[36] In other words, the want of probable cause will not be inferred from the mere failure of the prosecution.[37] Nor does malice establish a want

Price v. Stanley, 128 N. C. 38, 38 S. E. 33; Root v. Rose, 6 N. D. 575, 72 N. W. 1022; Lawrence v. Cleary, 88 Wis. 473, 60 N. W. 793; Welch v. Boston, etc., R. R. Co., 14 R. I. 609; Phillips v. Kalamazoo, 53 Mich. 33; Womack v. Circle, 32 Gratt. 324.

[31] Griffs v. Sellars, 4 Dev. & Bat. 176; Whitney v. Peckham, 15 Mass. 242; Payson v. Caswell, 22 Me. 212; Witham v. Gowen, 14 Me. 362; Hartshorn v. Smith, 104 Ga. 235, 30 S. E. 666; Adams v. Bicknell, 126 Ind. 210, 25 N. E. 804, 22 Am. St. Rep. 576; Blucher v. Zonker, 19 Ind. App. 615, 49 N. E. 911; Price v. Stanley, 128 N. C. 38, 38 S. E. 33; Root v. Rose, 6 N. D. 575, 72 N. W. 1022. In the following cases a conviction reversed on appeal was held to be only *prima facie* evidence of probable cause: Nicholson v. Sternberg, 61 App. Div. 51, 70 N. Y. S. 212; Knight v. International, etc., Ry. Co., 61 Fed. 87, 9 C. C. A. 376.

[32] Barber v. Scott, 92 Ia. 52, 60 N. W. 497; Jones v. Wilmington, etc., R. R. Co., 125 N. C. 227, 34 S. E. 398; Jones v. Wilmington, etc., R. R. Co., 127 N. C. 188, 37 S. E. 215; Jones v. Wilmington, etc., R. R. Co., 131 N. C. 133, 42 S. E. 559; Hess v. Oregon Baking Co., 31 Ore. 503, 49 Pac. 803.

[33] Ibid.

[34] Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703; Lewton v. Hower, 35 Fla. 58, 16 So. 616; Ross v. Hixon, 46 Kan. 550, 26 Pac. 955, 26 Am. St. Rep. 123, 12 L. R. A. 760; Whaling v. Wells, 50 La. Ann. 562, 23 So. 447; Perkins v. Spaulding, 182 Mass. 218, 65 N. E. 72; Firer v. Lowery, 59 Mo. App. 92; Bechel v. Pacific Express Co., 65 Neb. 826, 91 N. W. 853; Guisti v. Del Papa, 19 R. I. 338, 33 Atl. 525; Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022.

[35] Guisti v. Del Papa, 19 R. I. 338, 33 Atl. 525.

[36] See on the burden of proof, Abrath v. Northeastern Ry. Co. L. R. 11 Q. B. D. 440; Legallee v. Blaisdell, 134 Mass. 473; Sutton v. Anderson, 103 Pa. St. 151; Bernar v. Dunlap, 94 Pa. St. 329; Mosley v. Yearwood, 48 La. Ann. 334, 19 So. 274.

[37] Boyd v. Cross, 35 Md. 194, and cases cited; Good v. French, 115 Mass. 201; Levy v. Brannan 39 Cal. 485; Wilkinson v. Arnold 11 Ind. 45; Frost v. Holland, 75

of probable cause, because, as is well said in one case, a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution;[38] and, indeed, the offense itself, or the belief in its having been committed, is likely to excite malice. A discharge by a magistrate on the preliminary hearing, is evidence of want of probable cause, as is the ignoring of a bill by a grand jury.[39] But neither of these is conclusive.[40] But as already seen an acquittal on the merits is not evidence of the want of probable cause.[41] Where the plaintiff, after having been acquitted on a criminal charge, was arrested

Me. 108; Anderson v. Friend, 85 Ill 135; Davis v. McMildan, 142 Mich. 391.

[38] Tindall, Ch. J., in Williams v. Taylor, 6 Bing. 183, 186. And, see, Heyne v. Blair, 62 N. Y. 19, 22; Skidmore v. Bricker, 77 Ill. 164; Krug v. Ward, 77 Ill. 603; Chapman v. Cawrey, 50 Ill. 512; Caperson v. Sproule, 39 Mo. 39; Hall v. Hawkins, 5 Humph. 357; Bell v. Pearcy, 5 Ired. 83; Center v. Spring, 2 Clarke (Iowa), 393; Cloon v. Gerry, 13 Gray, 201; Kidder v. Parkhurst, 3 Allen, 393; Travis v. Smith, 1 Pa. St. 234; Stewart v. Sonneborn, 98 U. S. 187; Sharpe v. Johnston, 76 Mo. 660; Flickinger v. Wagner, 46 Md. 580; Bitting v. Ten-Eyck, 82 Ind. 421, 42 Am. Rep. 505.

[39] Mitchinson v. Cross, 58 Ill. 366; Cooper v. Utterbach, 37 Md. 282; Frost v. Holland, 75 Me. 108; Bornholdt v. Souillard, 36 La. Ann. 103; Hidy v. Murray, 101 Ia. 65, 69 N. W. 1138; Brown v. Viltur, 47 La. Ann. 607, 1780, 193; Rankin v. Crane, 104 Mich. 6, 61 N. W. 1007; Stubbs v. Mulholland, 108 Mo. 47, 67 S. W. 650; Magowan v. Rickey, 64 N. J. L. 402, 45 Atl. 804; Smith v. Eastern B. & L. Ass'n, 116 N. C. 73, 20 S. E. 963; Barhight v. Tammany, 158 Pa. St. 545, 28 Atl. 135, 38 Am. St. Rep. 853; Ritter v. Ewing, 174 Pa. St. 341, 34 Atl. 584; Fox v. Smith, 26 R. I. 1; Harper v. Harper, 49 W. Va. 661, 39 S. E. 661; Bigelow v. Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25; Eggett v. Allen, 119 Wis. 625, 96 N. W. 803. Discharge on preliminary hearing held not admissible to show want of probable cause. Thompson v. Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Farwell v. Laird, 58 Kan. 402, 49 Pac. 518.

[40] Parkhurst v. Masteller, 57 Ia. 474; Barber v. Gould, 20 Hun, 446; Sharpe v. Johnson, 76 Mo. 660; Raleigh v. Cook, 60 Tex. 438; Plassan v. Louisiana Lottery Co., 34 La. Ann. 246; Hale v. Boylen, 22 W. Va. 234.

[41] *Ante*, p. —, n. —; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Sweeney v. Penney, 40 Kan. 102, 19 Pac. 382; Boeger v. Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; Obernalte v. Johnson, 36 Neb. 772, 55 N. W. 220; Eastman v. Monastes, 32 Ore. 291, 51 Pac. 1095, 67 Am. St. Rep. 531; Fox v. Smith, 26 R. I. 1; Bekke

a second time on the same charge without any new evidence, the latter is *prima facie* without probable cause, though there was probable cause for the first arrest.[42] The fact that the prosecution was instituted for some ulterior purpose, as to enforce the payment of a debt or to obtain possession of property, is held to show a want of probable cause,[43] and to render the defendant liable.[44]

§ 91. Malice. The burden of proving that the prosecution was malicious is also upon the plaintiff.[45] If a want of probable cause is shown, malice may be inferred; but the deduction is not a necessary one,[46] and the mere discontinuance of a criminal prosecution, or the acquittal of the accused, will establish for the purposes of this suit neither malice nor want of probable cause.[47] Legal malice is made out by showing

land v. Lyons, 96 Tex. 255, 72 S. W. 56. But see Sutor v. Wood, 76 Tex. 403, 13 S. W. 321; Cullen v. Hanish, 114 Wis. 24, 89 N. W. 900.

[42] Hinson v. Powell, 109 N. C. 534, 14 S. E. 301.

[43] Paddock v. Watts, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832; Peden v. Mail, 118 Ind. 560, 20 N. E. 446; Peterson v. Reisdorph, 49 Neb. 529, 68 N. W. 943; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101. But see Strehlow v. Pettit, 96 Wis. 22, 71 N. W. 102; Woodman v. Prescott, 65 N. H. 224, 19 Atl. 999.

[44] Pace v. Aubrey, 43 La. Ann. 1052, 10 So. 381; Gann v. Varnado, 51 La. Ann. 370, 25 So. 79; Hiatt v. Kinkaid, 28 Neb. 721, 45 N. W. 236; Sebastian v. Cheney, 86 Tex. 497, 25 S. W. 691; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101.

[45] Dietz v. Langfitt, 63 Pa. St. 234; Purcell v. McNamara, 9 East. 361; Savil v. Roberts, 1 Salk. 14, 15; Willans v. Taylor, 6 Bing. 183; McKnown v. Hunter, 30 N. Y. 625; Flickinger v. Wagner, 46 Md. 581.

[46] Pangburn v. Bull, 12 Wend. 345; Merriam v. Mitchell, 13 Me. 439, 29 Am. Rep. 514; Fuller v. Glidden, 68 Me. 559; Gilliford v. Windel, 108 Pa. St. 142; Mowry v. Whipple, 8 R. I. 360; Roy v. Goings, 112 Ill. 656; Vansickle v. Brown, 68 Mo. 627; Harkrader v. Moore, 44 Cal. 144; Paukett v. Livermore, 5 Clarke (Iowa), 227; Heap v. Parrish, 104 Ind. 36; Falvey v. Faxon, 143 Mass. 284; Carson v. Edgeworth, 43 Mich. 241; Hoyt v. Fallett, 65 Tex. 550; Wagstaff v. Schippel, 27 Kan. 450; Stewart v. Sonneborn, 98 U. S. 187; Murphy v. Hobbs, 7 Col. 541; Lunsford v. Dietrich, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37; Weil v. Israel, 42 La. Ann. 955, 8 So. 826; Torsch v. Dell, 88 Md. 459, 41 Atl. 903; Stamper v. Raymond, 38 Ore. 17, 62 Pac. 20; Baker v. Hornick, 57 S. C. 213, 35 S. E. 524.

[47] Willans v. Taylor, 6 Bing. 183; Yocum v. Polly, 1 B. Mon.

that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or corrupt design be shown.[48] Sometimes the accompanying circumstances show the bad motive very clearly, as for instance, where an arrest on an unfounded criminal charge was made use of to compel the surrender of securities to which both parties were equally entitled,[49] or to enforce payment of a debt.[50] If probable cause exists no amount of malice will render the defendant liable.[51]

§ 92. **What is an end of the proceeding.** The termination of the proceeding must, in general, be by a final acquittal.[52] It is not enough that the parties in a case which they might lawfully settle, have effected a compromise, and thereby terminated it.[53] Or that the defendant was discharged because

358, 17 Am. Dec. 184; Skidmore v. Bricker, 77 Ill. 164; Kidder v. Parkhurst, 3 Allen, 393; Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Spear v. Hiles, 67 Wis. 350; Hamilton v. Smith, 39 Mich. 222; Johns v. Marsh, 52 Md. 323; Jordan v. Ala., etc., Co., 81 Ala. 220; Gee v. Culver, 13 Ore. 598; Bekkeland v. Lyons, 96 Tex. 255, 72 S. W. 56.

[48] Page v. Cushing, 38 Me. 523; Barron v. Mason, 31 Vt. 189; Harpham v. Whitney, 77 Ill. 32. The jury are the exclusive judges of malice. Munns v. Dupont, 3 Wash. C. C. 31; Center v. Spring, 2 Clarke (Iowa), 393; Mitchel v. Jenkins, 5 B. & A. 587; Stewart v. Sonneborn, 98 U. S. 187; Vinal v. Core, 18 W. Va. 1; Torsch v. Dell, 88 Md. 459, 41 Atl. 903; Southwestern R. R. Co. v. Mitchell, 80 Ga. 438, 5 S. E. 490; Shannon v. Jones, 76 Tex. 141, 13 S. W. 477; Bartlett v. Hawley, 38 Minn. 308, 37 N. W. 580. But whether the facts found are such as to warrant the inference of malice is for the court. Sharpe v. Johnson, 76 Mo. 660.

[49] Kimball v. Bates, 50 Me. 308 See Willans v. Taylor, 6 Bing. 183; Brown v. Randall, 36 Conn. 56, 4 Am. Rep. 35; Krug v. Ward, 77 Ill. 603; Prough v. Entriken, 11 Pa. St. 81; Schmidt v. Weidman, 63 Pa. St. 173; Gann v. Varnado, 51 La. Ann. 370, 25 So. 79.

[50] Ross v. Langworthy, 13 Neb. 492; Williams v. Kyes, 9 Colo. App. 220, 47 Pac. 839; Morgan v. Duffy, 94 Tenn. 686, 30 S. W. 735.

[51] Lacey v. Porter, 103 Cal. 597, 37 Pac. 635; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Seamans v. Hoge, 105 Ga. 159, 31 S. E. 156; Sanders v. Palmer, 55 Fed. 217, 5 C. C. A. 77; Staunton v. Goshorn, 94 Fed. 52, 36 C. C. A. 75; Rankin v. Crane, 104 Mich. 6, 61 N. W. 1007.

[52] Bacon v. Towne, 4 Cush. 217; Boyd v. Cross, 35 Md. 194; Kirkpatrick v. Kirkpatrick, 39 Pa. St. 288; Williams v. Woodhouse, 3 Dev. (N. C.) L. 257.

[53] Rosenberg v. Hart, 83 Ill

the offense was misnamed in the papers, or because of formal defects.[54] But if the proceeding is *ex parte* to hold to bail, and the accused party has no opportunity to disprove the case made against him, he may maintain the suit, notwithstanding he was required to give bail;[55] and so he may, if on a preliminary examination before a magistrate on charge of crime he is discharged.[56] But where a new prosecution was commenced by the defendant in another court for the same offense, on the same day or within two months, the discharge by the magistrate was held not to be such a termination as would sustain the action.[57] Where on the same evidence and for the same offense the grand jury returned two indictments, it was held that the prosecution was not terminated until both were disposed of.[57a] Whether the entry of a *nolle prosequi* by the prosecuting officer is a sufficient discharge has been made a question. In some cases it has been held that it was;[58] but other cases hold the contrary.[59] The reasonable rule seems

App. 262; Lyenberger v. Paul, 40 Ill. App. 516; Gallagher v. Stoddard, 47 Hun, 101; Welch v. Cheek, 125 N. C. 353, 34 S. E. 531; McCormick v. Sisson, 7 Cow. 715; Hamilburgh v. Shephard, 119 Mass. 30; Mayer v. Walter, 64 Pa. St. 283. But if one compounds under protest to procure his discharge, this does not afterwards estop him from showing the groundlessness and malice of the proceeding. Morton v. Young, 55 Me. 24, 92 Am. Dec. 565.

[54] Sears v. Hathaway, 12 Cal. 277.

[55] Stewart v. Gromett, 7 C. B. (N. S.) 191. Where a peace warrant is maliciously taken out, no termination need be shown. Hyde v. Greuch, 62 Md. 577.

[56] Cardival v. Smith, 109 Mass. 158, 12 Am. Rep. 582; Sayles v. Briggs, 4 Met. 421; Burkett v. Lanata, 15 La. Ann. 337; Moyle v. Drake, 141 Mass. 238; Swensgaard v. Davis, 33 Minn. 368; Page v. Citizens' Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463; Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282; Rider v. Kite, 61 N. J. L. 8, 38 Atl. 754; Waldron v. Sperry, 53 W. Va. 116, 44 S. E. 283.

[57] Hartshorn v. Smith, 104 Ga. 235, 30 S. E. 666; Schippel v. Norton, 38 Kan. 567, 16 Pac. 804.

[57a] Gaiser v. Hurleman, 74 Ohio St. 271.

[58] Brown v. Randall, 36 Conn. 56, 4 Am. Rep. 34; Stanton v. Hart, 27 Mich. 539; Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135; Kennedy v. Holladay, 25 Mo. App. 503; Bell v. Matthews, 37 Kan. 686, 16 Pac. 97; Hatch v. Cohen, 84 N. C. 602, 37 Am. Rep. 630; Clegg v. Waterbury, 88 Ind. 21; Marcus v. Bernstein, 117 N. C. 31, 23 S. E. 38; Douglas v. Allen, 56 Ohio St. 156, 46 N. E. 707.

[59] Cardival v. Smith, 109 Mass.

to be, that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one.[60] A discharge on habeas corpus was held a sufficient termination in Pennsylvania,[61] but otherwise in New York.[62]

§ 93. Who liable. All concerned in originating and carrying on a malicious prosecution are jointly and severally responsible; it is not necessary that all should have been complainants.[63] But if one merely furnishes the prosecuting officer with the facts, and the latter, on his own judgment, commences a prosecution, making use of the former as a witness, this is not a prosecution by the witness, and unless he interferes improperly afterwards, he cannot be held responsible as having instituted it.[64] A corporation may be liable for malicious prosecution,[65] but corporations and other principals are in general not liable for a malicious prosecution instituted by

159, 12 Am. Rep. 582; Ward v. Reasor, 98 Va. 399, 36 S. E. 470. See Langford v. Boston, etc., Co., 144 Mass. 431; Graves v. Dawson, 133 Mass. 419.

[60] Southern Car & T. Co. v. Adams, 131 Ala. 147, 32 So. 503; Clark v. Cleveland, 6 Hill, 344, 347; Casebeer v. Rice, 18 Neb. 203; Apgar v. Woolston, 43 N. J. L. 57. See Cardival v. Smith, 109 Mass. 159, 12 Am. Rep. 682; Driggs v. Burton, 44 Vt. 124; Graves v. Scott, 104 Va. 372. The dismissal of a complaint with intent, afterwards executed, of laying another in a higher court, is not a sufficient termination. Schippel v. Norton, 38 Kan. 567, 16 Pac. 804.

[61] Zebley v. Storey, 117 Pa. St. 478, 12 Atl. 569.

[62] Hinds v. Parker, 11 App. Div. 327, 32 N. Y. S. 230; Vorce v. Oppenheim, 37 App. Div. 69, 55 N. Y. S. 596.

[63] Stansbury v. Fogle, 37 Md. 369; Clements v. Ohrly, 2 C. & K. 686; Tangley v. Sullivan, 163 Mass. 166, 39 N. E. 799; Dann v. Wormser, 38 App. Div. 460, 56 N. Y. S. 474; Johnson v. Miller, 69 Ia. 562.

[64] O'Neal v. McKinna, 116 Ala. 606, 22 So. 905; Chambliss v. Blau, 127 Ala. 86, 28 So. 602; Burnham v. Collateral Loan Co., 179 Mass. 268, 60 N. E. 617; Clark v. Thompson, 160 Mo. 461, 61 S. W. 194; Boeger v. Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; Navarino v. Dudrop, 66 N. J. L. 620, 50 Atl. 353. See Holden v. Merritt, 92 Ia. 707, 61 N. W. 390.

[65] Southern Car & T. Co. v. Adams, 131 Ala. 147, 32 So. 503; Hibbard, Spencer, Bartlett & Co. v. Ryan, 46 Ill. App. 313; Willard v. Holmes, 142 N. Y. 492, 37 N. E. 480.

their agents, or servants for the supposed protection of the property of their principals,[66] and this is especially true when the prosecution is instituted for a past crime. A member of the grand jury which returned an indictment against the plaintiff cannot be held liable for malicious prosecution for anything he did or said as such member.[67] A prosecution by one partner for larceny of the partnership property does not render the other partners liable without proof of complicity on their part.[68]

Malicious Prosecution; Civil Proceedings.

§ 94. When there is an interference with person or property. In some cases an action may be maintained for the malicious institution of a civil suit, but the authorities are not entirely agreed what cases are embraced within the rule. The case of the malicious institution of proceedings in bankruptcy is undoubtedly one. If these are instituted maliciously, and without probable cause, and terminate without an adjudication of bankruptcy, an action will lie for the damages sustained.[69] The case of a civil suit begun maliciously, and without probable cause, by the arrest of the party, is another.[70] So is the case of a suit commenced by an attachment of property,[71] or

[66] Robertson v. Marion, 97 Ill. App. 332; Flora v. Russell, 138 Ind. 153, 37 N. E. 593; Baltimore, etc., Turnpike Road v. Green, 86 Md. 161, 37 Atl. 642; Govaski v. Downey, 100 Mich. 429, 59 N. W. 167; Horton v. Newell, 17 R. I. 571, 23 Atl. 910; Markley v. Snow, 207 Pa. St. 447, 56 Atl. 990, 64 L. R. A. 685.

[67] Sidener v. Russell, 34 Ill. App. 446; Engelke v. Chouteau, 98 Mo. 629, 12 S. W. 358.

[68] Noblett v. Bartsch, 31 Wash. 24, 71 Pac. 551, 96 Am. St. Rep. 886.

[69] Wilkinson v. Goodfellow-B. Shoe Co., 141 Fed. 218. See In Chapman v Pickersgill, 2 Wils. 145, and Farley v. Danks, 4 El. & Bl. 493; Whitworth v. Hall, 2 B & Ad. 695. So for causing a petition to be filed to wind up a trading company. Quartz-Hill Co. v Eyre, L. R. 11 Q. B. D. 674.

[70] Lanzon v. Charroux, 18 R. I 467, 28 Atl. 975; Collins v. Hayte 50 Ill. 337, 353, 99 Am. Dec. 521; Turner v. Walker, 3 G. & J. 377; Burhans v. Sanford, 19 Wend 417; Watkins v. Baird, 6 Mass 506; Austin v. Debnam, 3 B. & C 139; Sinclair v. Eldred, 4 Taunt 7; Goslin v. Wilcox, 2 Wils. 302

[71] Alsop v. Lidden, 130 Ala 548, 30 So. 401; Clark v. Nordholt, 121 Cal. 26, 53 Pac. 400; French v. Guyot, 30 Colo. 222, 70

by garnishment.[72] And in Ohio it has been held that the suit will lie, even though there may have been a valid cause of action, if in fact there was no probable cause for the attachment, and it was taken out maliciously; also, that it is not essential in such a case that the suit in attachment should be first terminated.[73] In order to maintain the action it must be shown (1) that the attachment was wrongfully sued out, (2) that it was sued out maliciously, and (3) that it was sued out without probable cause.[74]

Still another case in which an action will lie for the malicious institution of unfounded proceedings not criminal in their nature, is where they are taken to have the party declared insane, and put under guardianship. Such proceedings are almost necessarily damaging beyond what a civil suit can well be; and, if unfounded and malicious, deserve more than a mere punishment in costs.[75] So a suit for malicious prose-

Pac. 683; Connolly v. White, 122 Ia. 391, 98 N. W. 144; Le Clear v. Perkins, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; Wiesinger v. First Nat. Bank, 106 Mich. 291, 64 N. W. 59; Byersdorf v. Sump, 39 Minn. 495, 41 N. W. 101, 12 Am. St. Rep. 678; Jones v. Fruin, 26 Neb. 76, 42 N. W. 283; Cohn v. Saidel, 71 N. H. 558, 53 Atl. 800; Leyser v. Fried, 5 N. M. 356, 23 Pac. 173; Willard v. Holmes, 142 N. Y. 492, 37 N. E. 480; Willard v. Holmes, 2 Misc. 303, 21 N. Y. S. 998; Pittsburgh, etc., R. R. Co. v. Wakefield Hardware Co., 138 N. C. 174; Hamer v. First Nat. Bank, 9 Utah, 215, 33 Pac. 941; L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469. Merely suing out the writ is not sufficient. It must be levied on the plaintiff's property. Maskell v. Barker, 99 Cal. 642, 34 Pac. 340. But see Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362.

[72] Gunderman v. Buschner, 73 Ill. App. 180.

[73] Fortman v. Rottier, 8 Ohio St 548, 72 Am. Dec. 606, citing and relying upon Tomlinson v. Warner 9 Ohio, 104. In a late case, where use of property had been enjoined it is said an action lies whenever by virtue of any order or writ in a cause, the defendant in that cause "has been deprived of his personal liberty, or the possession, use, or enjoyment of property of value." Newark Coal Co v. Upson, 40 Ohio St. 17.

[74] Brown v. Master, 104 Ala 451, 16 So. 443. As to the necessity for the termination of the attachment suit, see Alsop v. Lidden, 130 Ala. 548, 30 So. 401; Hibbard, Spencer, Bartlett & Co. v. Ryan, 46 Ill. App. 313; Brand v. Hinchman, 68 Mich. 590, 36 N W. 664, 13 Am. St. Rep. 362.

[75] Lockenour v. Sides, 57 Ind. 360.

cution will lie where the plaintiff's property or business has been interfered with by the appointment of a receiver,[76] the granting of an unjunction,[77] or by writ of replevin,[78] obtained maliciously and without probable cause.

§ 95. When no interference with person or property. Whether an action may be maintained for the malicious institution, without probable cause, of a civil suit which has terminated in favor of the defendant, and in which there has been no interference with the person or property of the defendant is a question upon which the authorities are conflicting. At the present time the preponderance of authority seems to be in favor of the right to maintain the action.[79] The

[76] Luby v. Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261; Burt v. Smith, 181 N. Y. 1, 73 N. E. 495.

[77] Butchers, etc., Co. v. Crescent City, etc., Co., 37 La. Ann. 874; Newark Coal Co. v. Upson, 40 Ohio St. 17; Wright v. Ascheim, 5 Utah, 480, 17 Pac. 125; Glen Jean, etc., R. R. Co. v. Kanawha, etc., R. R. Co., 47 W. Va. 725, 35 S. E. 978. See Short v. Spragins, 104 Ga. 628, 30 S. E. 810.

[78] Brownstein v. Sahlein, 65 Hun, 365, 20 N. Y. S. 213; McPherson v. Runyon, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727. And see Porter v. Johnson, 96 Ga. 145, 23 S. E. 123.

[79] Eastin v. Bank, 66 Cal. 123, 56 Am. Rep. 77; McKenna v. Heinlen, 128 Cal. 97, 60 Pac. 668; Dowdell v. Carpy, 129 Cal. 168, 61 Pac. 948; Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 Pac. 168; Whipple v. Fuller, 11 Conn. 581, 29 Am. Dec. 330; McCordle v. McGinley, 86 Ind. 538, 44 Am. Rep. 343; Marbourg v. Smith, 11 Kan. 554; Carbondale Inv. Co. v. Burdick, 67 Kan. 329, 72 Pac. 781; Cox v. Taylor, 10 B. Mon. 17; Woods v. Finnell, 13 Bush, 628; Livingston v. Hardin Bros., 41 La. Ann. 311, 6 So. 129; Davis v. Stuart, 47 La. Ann. 378, 16 So. 871; Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362; McPherson v. Runyon, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727; O'Neill v. Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615; Eickhoff v. Fidelity & Casualty Co., 74 Minn. 139, 76 N. W. 1030; Smith v. Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59; McCormick Co. v. Willan, 63 Neb. 391, 88 N. W. 497, 93 Am. St. Rep. 449; Kolka v. Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615; Foster v. Denison, 19 R. I. 351, 36 Atl. 93; Lipscomb v. Shofner, 96 Tenn. 112, 33 S. W. 818; Swepson v. Davis, 109 Tenn. 99, 70 S. W. 65; Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Porter v. Mack, 50 W. Va. 581, 40 S. E. 459; Burnap v. Albert, Taney, 244; Wade v. Nat. Bank of Com., 114 Fed. 377. And see Pawlowski v. Jenks, 115 Mich. 275, 73 N. W. 238; Luby v.

reasons in support of the action are thus given in one of the cases referred to: One who maliciously sets in motion the formidable machinery of the courts to harass and oppress his neighbor "abuses the process of the law intended for parties who act in good faith, and his offense is of the same character, and only less in degree, with that of one who accompanies such an action with the seizure of the person or the property of the defendant. To refuse a remedy for the wrong in either case would violate the well-recognized rule of the common law that no injury, improperly inflicted, should go unredressed. The spirit of this rule, if not its letter, requires the courts, in every case where they find that one, in bad faith, has prostituted their process to gratify his malice, to afford the party so wronged personal redress for the damages sustained by him, when this is found to be in excess of the taxable costs of the suit."[80] It is held that the want of probable cause must be very palpable and that greater latitude in the doctrine of reasonable cause must be exercised in such cases than would be permissible in an action for maliciously prosecuting a criminal case.

On the other hand a number of courts hold that an action will not lie for the malicious prosecution of a civil suit when there is no interference with person or property.[81] The rea-

Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

[80] Lipscomb v. Shofner, 96 Tenn. 112, 115, 116, 33 S. W. 818. Prior to the statute of Marlbridge, 52 Hen. III (A. D. 1277), which provided for costs in civil actions, it was the rule at common law that an action on the case was given for all civil actions brought falsely, maliciously and without probable cause. Supreme Lodge v. Unverzagt, 76 Md. 104, 105, 24 Atl. 323; Mitchell v. S. W. R. R. Co., 75 Ga. 398; Lipscomb v. Shofner, 96 Tenn. 112, 33 S. W. 818.

[81] Mitchell v. S. W. Ry. Co., 75 Ga. 398; Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N. E. 569; Smith v. Michigan Buggy Co., 66 Ill. App. 516; Wetmore v. Mellinger, 64 Ia. 741, 18 N. W. 870, 52 Am. Rep. 465; Smith v. Hintrager, 67 Ia. 109, 24 N. W. 744; Cross v. Elliott, 69 Me. 387; McNamee v. Minke, 49 Md. 122; Bartlett v. Christhelf, 69 Md. 219, 14 Atl. 518; Supreme Lodge v. Unverzagt, 76 Md. 104, 24 Atl. 323; Enfield v. Colburn, 63 N. H. 218; Potts v. Imlay, 4 N. J. L. 330, 7 Am. Dec. 603; Bitz v. Meyer, 40 N J. L. 252, 29 Am. Rep. 233; Paul v. Fargo, 84 App. Div. 9, 82 N. Y. S. 369; Ely v. Davis, 111 N. C. 24, 15 S. E. 878; Terry v. Da-

sons in support of this view are that the opposite rule would deter honest suitors from ascertaining their rights by putting them in fear of being made liable in damages if they failed, and would promote litigation, by tempting every successful defendant to bring a suit for malicious prosecution.[82]

§ 96. The same rules apply to actions for malicious civil suits as for criminal prosecution. It is laid down or assumed in all the cases that an action for the malicious prosecution of a civil suit is governed by the same principles as one for the malicious prosecution of a criminal action.[83] There must be malice and the want of probable cause and the same rules apply in the proof or disproof of these elements.[84] So the advice of counsel will have the same effect as in case of criminal prosecution, under the same conditions.[85] And the mali-

vis, 114 N. C. 31, 18 S. E. 943; Kramer v. Stock, 10 Watts, 115; Mayer v. Walter, 64 Pa. St. 283; Eberly v. Rupp, 90 Pa. St. 259; Muldoon v. Rickey, 103 Pa. St. 110, 49 Am. Rep. 117; Norcross v. Otis Bros. & Co., 152 Pa. St. 481, 25 Atl. 575, 34 Am. St. Rep. 669; Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433, distinguishing Pope v. Pollock, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255; Johnson v. King, 64 Tex. 226; Ray v. Law, 1 Pet. C. C. 207. While the supreme court of New York denies the right to maintain the action, in the case above cited, the court of appeals has not passed on the question. Ferguson v. Arnow, 142 N. Y. 580, 37 N. E. 626, was such a case but was disposed of on the ground that want of probable cause was not shown. See Pangborn v. Bull, 1 Wend. 345.

[82] See especially Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N. E. 569.

[83] Dowdell v. Carpy, 129 Cal. 168, 61 Pac. 948; Gurley v. Tomkins, 17 Colo. 437, 30 Pac. 344; Woodley v. Coker, 119 Ga. 226, 46 S. E. 89; Carbondale Investment Co. v. Burdick, 67 Kan. 329, 72 Pac. 781; Le Clear v. Perkins, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; Grant v. Reinhart, 33 Mo. App. 74; Jones v. Fruin, 26 Neb. 76, 42 N. W. 283; Hamer v. First Nat. Bank, 9 Utah, 215, 33 Pac. 941.

[84] Ibid.; Gonzales v. Cobliner, 68 Cal. 15; Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 Pac. 168; Porter v. Johnson, 96 Ga. 145, 23 S. E. 123; Georgia Loan & T. Co. v. Johnston, 116 Ga. 628, 43 S. E. 27; Richards v. Jewett Bros., 118 Ia. 629, 92 N. W. 689; Connelly v. White, 122 Ia. 391, 98 N. W. 144; Willard v. Holmes, 142 N. Y. 492, 37 N. E. 480.

[85] Connelly v. White, 122 Ia. 391, 98 N. W. 144; Le Clear v. Perkins, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; Wiesinger v.

cious suit must be terminated in favor of the plaintiff in that action.[86] In a suit for a partnership accounting the plaintiff alleged fraud and the misappropriation of funds by the defendant. On the hearing these latter allegations were held to be unfounded but the plaintiff had a decree for a sum of money found due on the accounting. The defendant claiming that the charges of fraud and misfeasance formed the main contention in the suit and that these were malicious and without probable cause and had been adjudged unfounded, sued the plaintiff for malicious prosecution. It was held that malicious prosecution could not be founded on a separate issue within a suit and that the judgment for the plaintiff was a bar.[87]

Other Wrongs to the Person.

§ 97. Malicious abuse of process. If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse or which an action will lie.[88] The following are illustrations: Entering up a judgment and suing out execution after the demand is satisfied;[89] suing out an attachment for an amount greatly in excess of the debt;[90] causing an arrest for more than is due;[91] levying an execution for an excessive amount;[92] causing an arrest when the party

First Nat. Bank, 106 Mich. 291, 64 N. W. 59; Pawlowski v. Jenks, 115 Mich. 275, 73 N. W. 238.

[86] Fulton Grocery Co. v. Maddox, 111 Ga. 260, 36 S. E. 647; Liquid Carbonic Acid Mfg. Co. v. Convert, 82 Ill. App. 39; Bonney v. King, 103 Ill. App. 601; Davis v. Stuart, 47 La. Ann. 378, 16 So. 871; Swepson v. Davis, 109 Tenn. 99, 70 S. W. 65.

[87] Swepson v. Davis, 109 Tenn. 99, 70 S. W. 65.

[88] Bonney v. King, 201 Ill. 47, 66 N. E. 377; Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518; White v. Apsley Rubber Co., 181 Mass. 339, 63 N. E. 885; Jackson v. Telegraph Co., 139 N. C. 347; Lauzon v. Charroux, 18 R. I. 467, 28 Atl. 975.

[89] Barnett v. Reed, 51 Pa. St. 190, 88 Am. Dec. 574. See Hathaway v. Smith, 117 Ga. 946, 43 S. E. 984.

[90] Clark v. Nordholt, 121 Cal. 26, 53 Pac. 400; Savage v. Brewer, 16 Pick. 453, 28 Am. Dec. 255; Zinn v. Rice, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288; Zinn v. Rice, 161 Mass. 571, 37 N. E. 747; Moody v. Deutsch, 85 Mo. 237.

[91] Jennings v. Florence, 2 C. B. (N. S.) 467; Austin v. Debnam, 3 B. & C. 139.

[92] Sommer v. Wilt, 4 S. & R. 19; Churchill v. Siggers, 3 El. & Bl. 929.

cannot procure bail, and keeping him imprisoned until, by stress thereof, he is compelled to surrender property to which the other is not entitled.[93] In a suit for malicious abuse of process it is not necessary that there should have been a termination of the suit in which the process was issued, nor a want of probable cause for the suit.[94] Where the defendant in a writ of forcible entry and detainer was ejected under the writ on a cold, cloudy day, while she was sick with measles and still broken out, and by reason of the exposure she died in a few days, it was held a case of abuse of process, and the plaintiff in the writ, being present and directing, was held liable for the death.[95]

§ 98. **Arrests for an ulterior purpose.** One way in which process is sometimes abused, is by making use of it to accomplish not the ostensible purpose for which it is taken out, but some other purpose for which it is an illegitimate and unlawful means. An illustration is where, by means of a subpoena, and on pretense of desiring his testimony, a person is brought within the reach of process which otherwise could not have been served upon him. Here there may in strictness be no unlawful action, and possibly no suit would lie; but it is the duty of the court, where the service of the writ is brought about by deception through abuse of other process, or by any unlawful act, to take care that no benefit be derived from it. The effectual mode to accomplish this will be to set aside the service as unauthorized. It has, therefore, been very justly said that the courts will not tolerate service of process on any person who, for that purpose, has been deceitfully brought within their jurisdiction;[96] a court will also protect from ar-

[93] Grainger v. Hill, 4 Bing. N. C. 212; Krug v. Ward, 77 Ill. 603.

[94] Emery v. Ginnan, 24 Ill. App. 65; Zinn v. Rice, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288; White v. Apsley Rubber Co., 181 Mass. 339, 63 N. E. 885; Pittsburgh, etc., R. R. Co. v. Wakefield Hardware Co., 138 N. C. 174. As to malice, probable cause, etc., see Emerson v. Cochran, 111 Pa. St. 619; Eberly v. Rupp, 90 Pa. St. 259; Juchter v. Boehm, 67 Ga. 534, 44 Am. Rep. 724; Crusselli v. Pugh, 71 Ga. 744; Hazard v. Harding, 63 How. Pr. 326; Stewart v. Cole, 46 Ala. 646.

[95] Bradshaw v. Frazier, 113 Ia. 579, 85 N. W. 752, 86 Am. St. Rep 394, 55 L. R. A. 258.

[96] Sweet v. Kimball, 166 Mass 332, 44 N. E. 243, 5 Am. St. Rep. 406.

rest "*eundo et redeundo*," not only the parties, but also the witnesses, who in obedience to its process, or *in furtherance of its proceedings*, appear within its jurisdiction.[97] So, if a party is detained over Sunday, when civil process cannot be served, and is arrested the next day, he will be discharged;[98] and so if he is detained on a void writ, or one that has become *functus officio*,[99] or without any writ at all, until one shall be obtained.[1] So if service is accomplished by unlawfully breaking into a dwelling-house.[2] The principle is, that no one shall derive advantage from abuse of the process of the courts, or by his own fraud or other misconduct. And the principle should apply to cases where the process of extradition, either as between the states or as between one sovereignty and another, is resorted to for the purpose of obtaining service of civil process.[3]

In some of the cases above mentioned, an action for false imprisonment would lie; but where there has been no actual

[97] Robinson, J., in Slade v. Joseph, 5 Daly, 187. See Luttin v. Benin, 11 Mod. 50; United States v. Edme, 9 S. & R. 147; Goupil v. Simonson, 3 Abb. Pr. 474. The court will not sanction any attempt to bring a party within its jurisdiction by fraud or misrepresentation. Carpenter v. Spooner, 2 Sanf. 717, 718; Baker v Wales, 45 How. Pr. 137; McNab v. Bennett, 64 Ill. 158. Service of process on one fraudulently brought within the jurisdiction is null and void. Wood v. Wood, 78 Ky. 624; Duringer v. Moschino, 93 Ind. 495. But the arrest of a witness is not a cause for action apart from malice and want of probable cause. The remedy is by application for discharge. Smith v. Jones, 76 Me. 138.

[98] Lyford v. Tyrrel, Anstr. 85; Wells v. Gurney, 8 B. & C. 769. Procuring arrest in order to serve other process is an abuse of process. Service will be set aside. Byler v. Jones, 79 Mo. 261, 22 Mo. App. 623.

[99] Loveridge v. Plaistow, 2 H. Bl. 29; *Ex parte* Wilson, 1 Atk. 152.

[1] Birch v. Prodger, 4 B. & P. 135; Barlow v. Hall, 2 Anstr. 462.

[2] Ilsley v. Nichols, 12 Pick. 270, 22 Am. Dec. 425; People v. Hubbard, 24 Wend. 369, 35 Am. Dec. 628; Swain v. Mizner, 8 Gray, 182, 69 Am. Dec. 244.

[3] See Wharton, Conf. L. § 2965; *In re* Hawes, 4 Am. Law Times Rep. (N. S.) 524; Compton v. Wilder, 40 Ohio St. 130. But if the creditor has had no part in the extradition he may proceed in a civil action. Nichols v. Goodheart, 5 Ill. App. 574.

illegal detention, the fraudulent use of the process to bring one within a jurisdiction must be actionable.[4]

§ 99. **Officer serving his own process.** The law will not permit an officer to serve process in a case in which he is a party or is the complainant. "The law wisely foreseeing that the ministers of justice should be freed, as far as practicable, from all the improper bias which may result from self-interest, has declared that no man shall be his own officer, and that no one shall in his own person, and by his own hand, do himself right by legal process. Therefore, where an officer is interested, it declares that another shall act; and this, in principle, applies to all, though to some with greater, others with less, force."[5] Nor can any reasonable distinction be taken as respects the nature of the process or the degree of interest; the broad ground is the safest, that no officer who is interested in a suit, or who is even a party to it without interest, shall serve any process appertaining to it from the commencement to the conclusion.[6] This is by no means a mere technical rule, but as the law, upon very imperative reasons, makes official returns conclusive for very many purposes, a different doctrine would be equivalent, in numerous cases, to making the officer judge in his own cause, and placing the other party at his mercy. A service, therefore, by the officer in such a case must be a mere nullity.[7]

Where an officer cannot act, neither can the deputy, since the deputy can act only for him and in his name.[8] And if the officer is not a party, but is the husband of a party this also would disqualify him.[9]

[4] Where those not privy to the fraud obtain service by means thereof, such service is valid. Slade v. Joseph, 5 Daly, 187. See State v. Ross, 21 Ia. 467; Adriance v. Lagrave, 59 N. Y. 110, 17 Am. Rep. 317.

[5] Colcock, J., in Singletary v. Carter, 1 Bailey, 467, 21 Am. Dec. 480.

[6] Singletary v. Carter, 1 Bailey, 467, 21 Am. Dec. 480; Knott v. Jarboe, 1 Met. (Ky.) 504; Gage v. Graffan, 11 Mass. 181; Chambers v. Thomas, 3 A. K. Marsh. 536; Boykin v. Edwards, 21 Ala. 261; Woods v. Gilson, 17 Ill. 218; Ford v. Dyer, 26 Miss. 243; Filkins v. O'Sullivan, 79 Ill. 524.

[7] It is sometimes forbidden by statute, but where that is the case the statute is generally looked upon as affirming common-law principles. See Knott v. Jarboe, 1 Met. (Ky.) 504.

[8] Gage v. Graffan, 11 Mass. 181; May v. Walters, 2 McCord 470.

[9] See Scanlan v. Turner, 1

§ 100. Arrest of privileged persons The arrest of a person privileged from arrest is not a trespass, even though the officer may be aware of the facts. It is only voidable; the party may waive his privilege, or at his option he may apply for his discharge to the court in which the suit is commenced, or on habeas corpus: and where the privilege is given on public grounds, or for the benefit of another, he may be discharged on the proper application of any one concerned. Thus, if a witness is arrested while in attendance on court as such, the party who has subpoenaed him may move for his discharge, or the court, of its own motion, may order it.[10]

§ 101. Violating right of privacy. Within the past few years, the existence of a right of privacy, or right to be let alone, has been considerably discussed in the courts and legal periodicals. The question has arisen mostly in suits to enjoin or recover damages for the unauthorized use of one's name or likeness for advertising purposes. So

Bailey, 421. The exclusion ought to go further and embrace near kinship, and perhaps does. One difficulty may be encountered in some of our statutes, which make provision for a service by some other officer when a sheriff is interested or a party, but do not go further. It is held in New York that the officer may serve the process in his own favor by which suit is commenced, if it is not process of arrest. Bennett v. Fuller, 4 Johns. 486; Tuttle v. Hunt, 2 Cow. 436; Putnam v. Man, 3 Wend. 202, 20 Am. Dec. 686. The danger of such a doctrine is perceived in the last case, in which it is held that the constable's return of service of a summons in his own favor is not traversable.

[10] Blight v. Fisher, Pet. C. C. 41; Tarlton v. Fisher, Doug. 671; Magnay v. Burt, 5 Q. B. 381; Yearsley v. Heane, 14 M. & W. 322, 334; Fletcher v. Baxter, 2 Aik. 224; Waterman v. Merritt, 7 R. I. 345; Fox v. Wood, 1 Rawle, 143; Aldrich v. Aldrich, 8 Met. 102; Wilmarth v. Burt, 7 Met. 257; Smith v. Jones, 76 Me. 138. The exemption extends to service of civil summons. *In re* Healey, 53 Vt. 694; Kauffman v. Kennedy, 25 Fed. Rep. 785. Gregg v. Sumner, 21 Ill. App. 110. But not to case of arrest for an indictable offense. *Ex parte* Levi, 28 Fed. Rep. 651. Where one has come into the jurisdiction as a plaintiff and then been subpœnaed as a witness in another court, he is privileged from service of process while such witness, to which he would not have been liable unless he had come into the jurisdiction. Small v. Montgomery, 23 Fed. Rep. 707. One is privileged from service of a summons while in another state attending to taking of depositions to be used in suit

far, we believe, the question has been squarely presented and squarely decided by but two courts of last resort. The New York court of appeals has decided against the right by a bare majority of four to three. In a more recent case the supreme court of Georgia has unanimously affirmed the existence of the right. In the New York case the opinion of the court was rendered by Chief Justice Parker and is based upon the lack of any precedent, the failure of the great commentators on the common law to even mention such a right, and especially upon the evil consequences that would attend the judicial establishment of such a right. Upon the latter point the learned judge says: "If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And were the right of privacy once legally asserted it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely left alone. An insult would certainly be in violation of such a right and with many persons would more seriously wound the feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply. I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal

of his in his own state, service being made before he can return home after the close of such taking. Green v. Youngs, 17 Ill. App. 106. *Contra*, Parker v. Manco, 61 Hun, 519, 16 N. Y. S. 325. A non-resident defendant attending a U. S. court at which his presence is necessary, is privileged from service of a new writ against him. Wilson Sewing Machine Co. v. Wilson, 22 Fed. 803.

right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief."[11]

The suit was brought by a young woman to enjoin the use of her likeness by the defendants in advertising their wares. The supreme court sustained the motion and granted the relief.[12] This decision was reversed by the court of appeals in the case referred to. The dissenting opinion was rendered by Mr. Justice Gray and was not only concurred in by his two associates but has been fully approved and adopted by the supreme court of Georgia. We quote from this opinion on the nature of the right and the grounds upon which it is based. "Security of person is as necessary as the security of property; and for that complete personal security, which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is to me an inconceivable one, that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity. * * * It seems to me that the principle, which is applicable, is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind. The writer or the lecturer, has been protected in his right to a literary property in a letter, or a lecture, against its unauthorized publication; because it is property, to which the right of privacy attaches. I think that this plaintiff has the same property in the right to be protected in the use of her face for defendant's commercial purposes, as she would have, if they were publishing her literary compositions. The right would be conceded if she

[11] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 544, 545, 64 N. E. 442, 89 Am. St. Rep. 828. Appended to this case in the Am. State Reports is an instructive note.

[12] Roberson v. Rochester Folding Box Co., 64 App. Div. 30, 71 N. Y. S. 876.

had sat for her photograph; but if her face or her portrait has a value, the value is hers exclusively; until the use be granted away to the public."

The Georgia case was a suit for damages for the unauthorized publication of the plaintiff's picture in a life insurance advertisement. The court unanimously decided that the action was maintainable.[13]

The right of privacy, conceding it to exist, is a purely personal one, that is it is a right of each individual to be let alone, or not to be dragged into publicity. One has no right of privacy with respect to his relatives, living or dead. Thus a parent may not enjoin the publication of the picture of his infant child.[14] And the widow, children or other relatives of a deceased person cannot enjoin the use of such person's likeness for advertising purposes,[15] the erection of a statue of such deceased,[16] or the publication of a memoir of his life.[17]

[13] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101. In Marks v. Jaffa, 6 Misc. 290, 26 N. Y. S. 908, the publication of the plaintiff's picture was enjoined. And see Mackenzie v. Mineral Spring Co., 27 Abb. N. C. 402; Dockrell v. Dougall, 78 L. T. R. 840. The Georgia case cites the following articles and notes on the subject: 4 Harvard Law Rev. 195; 36 Am. Law Rev. 614, 634-636; 34 Am. Law Reg. (N. S.) 134; 41 Ibid, 669; 1 Colo. Law Rev. 491; 2 Ibid, 437; 44 Alb. Law J. 428; 55 Cent. Law J. 123; 57 Ibid. 361; 12 Yale Law J. 35; 24 Nat. Corp. Rep. 709; 25 Ibid, 183, 415; 6 Law Notes, 79; 36 Chicago Legal News, 126; Case & Comment, July, 1902; North Am. Rev. Sept. 1902, p. 361; 22 Am. & Eng. Enc. L. (2d Ed.) 1311; 89 Am. St. Rep. 844; 31 L. R. A. 283.

[14] Murray v. Lithographic Co., 8 Misc. 36, 28 N. Y. S. 271.

[15] Atkinson v. Doherty, 121 Mich. 372, 80 N. W. 285, 80 Am. St. Rep. 507.

[16] Schuyler v. Curtis, 147 N. Y. 436, 42 N. E. 22, 49 Am. St. Rep. 671, 31 L. R. A. 236, reversing S. C. in lower courts, which held for the plaintiff. See Schuyler v. Curtis, 15 N. Y. S. 787; S. C. 64 Hun, 594, 19 N. Y. S. 264; S. C. 70 Hun, 598, 24 N. Y. S. 509.

[17] Corliss v. Walker, 57 Fed. 434; 64 Fed. 280, 31 L. R. A. 283. This case favors the existence of the right of privacy but the injunction was denied on the ground that the deceased was a public character. A husband cannot maintain a suit for a libel on his deceased wife. Wellman v. Sun Printing & Pub. Co., 66 Hun, 331, 21 N. Y. S. 577. Nor a parent for a libel on a deceased child. Bradt v New Nonpareil Co., 108 Ia. 449, 79 N. W. 122, 45 L. R. A. 681; Sorensen v. Balaban, 11 App. Div. 164, 32 N. Y. S. 91.

CHAPTER VI.

THE WRONGS OF SLANDER AND LIBEL.

§ 102. **Nature of the wrong.** Slander and libel are different names for the same wrong accomplished in different ways. Slander is oral defamation published without legal excuse, and libel is defamation published by means of writing, printing, pictures, images, or anything that is the object of the sense of sight.[1] By defamation is understood a false publication, calculated to bring one into disrepute.[2] The right that is violated in these cases is the right of every man to be secure in his reputation, the right to be protected in acquiring, and then maintaining and enjoying, a good reputation.[3]

§ 103. **Publication.** In a legal sense, there is no wrong until the defamatory charge or representation is given to the world. This is done when it is put before one or more third persons; it is then said to be published.[4] To say to a man's face any evil thing concerning him is no defamation; for though it may be annoying, aggravating and possibly injurious to him in its effect upon his mind, and indirectly upon his business, still there is as yet no publication, and consequently nothing to affect the party's reputation. If the party who is thus falsely accused repeats it to others, by way of complaint or otherwise, it may then become public, but it is

[1] For definitions see Townshend, Slander and Libel, § 21; Quinn v. Prudential Ins. Co., 116 Ia. 522, 90 N. W. 349; Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392.

[2] Hollenbeck v. Hall, 103 Ia. 214, 72 N. W. 518, 64 Am. St. Rep. 175, 39 L. R. A. 734.

[3] Harris v. Minville, 48 La. Ann. 908, 19 So. 925.

[4] Publication must be shown. Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265; Schoepflin v. Coffey, 162 N. Y. 12, 56 N. E. 502. "Publication, in the law of libel and slander, means the transmission of ideas and thoughts to the perception of a person, other than the parties to the suit." Gambrill v. Schooley, 93 Md. 48, 60, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87.

still no slander, because the publication is not made by the defamer. So a defamatory writing is no libel so long as it remains in the possession of the composer, and is seen by no one else; but if he keeps such a paper in his possession, he must, at his peril, see that it does not fall into the hands of others; if it does, the publication is in law attributable to him as the party who originated the wrong, and was the means of its becoming injurious.[5] But delivering the writing to the party himself is no more a publication of a libel than would be the addressing to him of defamatory words.[6] And when the words are repeated to, or in the presence of a third person at the plaintiff's request, it is no publication.[7] So where those in whose hearing a slander is uttered do not understand the meaning of the words and do not repeat them.[8]

Though the sending of a libelous letter by mail direct to the plaintiff, who receives and opens it, is no publication, yet if the sender has any reason to believe that other persons have authority to open and read his mail and it is opened and read by such a third person, or if the sender has reason to believe that the plaintiff is illiterate and that a third person will necessarily have to be called in, then in either case there is a publication by the sender.[9] And some cases seem to hold there is a publication in such a case, whether or not the sender had reason for such belief.[10] But it is no publication if a letter is

[5] If a third person reads a libel or hears it read, whether by design or inadvertence, there is a publication. McLaughlin v. Schuellbacher, 65 Ill. App. 50.

[6] Spaits v. Poundstone, 87 Ind. 522, 44 Am. Rep. 773; Yousling v. Dare, 122 Ia. 539, 98 N. W. 371; Apolinaire v. Roca, 43 La. Ann. 842, 9 So. 629; Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87. For effect of delivery to party's agent, see Brunswick v. Harmer, 14 Q. B 185; Railroad Co. v. Delaney, 102 Tenn. 289, 52 S. W. 151, 45 L. R. A. 600; Haynes v. Leland, 29 Me. 233; Sutton v. Smith, 13 Mo. 120.

[7] Heller v. Howard, 11 Ill. App. 554; Shinglemeyer v. Wright, 124 Mich. 231, 82 N. W. 887, 50 L. R. A. 129.

[8] Sullivan v. Sullivan, 48 Ill. App. 435; Kiene v. Ruff, 1 Ia. 482.

[9] Rumney v. Worthley, 186 Mass. 144, 71 N. E. 316. See State v. Syphrett, 27 S. C. 29, 2 S. E. 624.

[10] Allen v. Wortham, 89 Ky. 485, 13 S. W. 73; Seip v. Deshler, 170 Pa. St. 334, 32 Atl. 1032; Pullman v. Hill, (1891) 11 Q. B. 524.

opened and read by one having no legal right to do so.[11] If a letter is purposely or carelessly directed in an ambiguous manner, so that it is uncertain for which of two persons it is intended, and it is opened by the wrong party, there is a publication.[12] The mere fact of sending a libelous letter to the plaintiff unsealed is held not to prove publication.[13] So of sending a libel on a postal card.[14] But the contrary has also been held with respect to the latter.[15] If a libelous letter is dictated by the defendant to a stenographer and is then written out or printed by the latter, there is a publication, and any custom to conduct correspondence in that way, or necessity of doing so in the press of business, does not change the law.[16] But it has been held to be otherwise in the case of corporations, which must necessarily act by agents.[17] But if the letter is privileged, it is held that the privilege covers the incidental publication to clerks, who assist in preparing and copying the letter according to the usual course of business.[17a]

If one writes a libelous message and delivers it to a telegraph company or its agent for transmission, it is a publication by the sender.[18] And if the message is libelous on its face or is clearly susceptible of a libelous meaning and is transmitted by the agent and is written out and delivered to the sendee, there is a publication by the company.[19]

[11] Wilcox v. Moon, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760.

[12] Schmuck v. Hill, 2 Neb. (unofficial) 79, 96 N. W. 158.

[13] Fry v. McCord Bros., 95 Tenn. 678, 33 S. W. 568.

[14] Steele v. Edwards, 15 Ohio C. C. 52.

[15] Sadgrove v. Hole, (1901) 2 Q. B. 1.

[16] Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87; State v. McIntyre, 115 N. C. 769, 20 S. E. 721; Pullman v. Hill, (1891) 1 Q. B. 524. So if one gives a letter to a third party to make a letter press copy. Pullman v. Hill, (1891) 1 Q. B. 524.

[17] Owen v. Ogilvie Pub. Co., 32 App. Div. 465, 53 N. Y. S. 1033.

[17a] Edmondson v. John Birch & Co., 76 L. J. Rep. 346, 1907 K. B. See *post*, § 121.

[18] Monson v. Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

[19] Peterson v. Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; S. C. 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581. See Nye v. W. U. Tel. Co., 104 Fed. 628.

A communication between husband and wife, not in the presence of any third person, is not a publication,[20] but there is a publication when the wife is slandered in the presence of her husband.[21] One who writes or signs a libelous article for publication,[22] or gives information for that purpose, which is substantially embodied in an article and published,[23] and all who procure, instigate or assist in the publication of a libel are liable.[24] Every separate and distinct publication of a libel is a distinct offense, as when it is published in different papers, or in the same paper on different days.[25] Where the defendant circulates a book containing a libel on the plaintiff it is a publication and he will be liable, unless he can show that he did not know of the libel and was not negligent in not knowing.[26]

The publisher of a newspaper must, at his peril, see that the supervision of his business is such as to exclude all libelous publications, and he is responsible, though one is made without his knowledge, and notwithstanding stringent regulations made by himself, which, if observed, would have prevented it.[27] And the same is true of the general manager [28] or man-

[20] Sesler v Montgomery, 78 Cal. 486, 21 Pac. 185, 12 Am. St. Rep. 76, 3 L. R. A. 653.

[21] Linck v. Driscoll, 13 Ind. App. 279, 41 N. E. 463, 55 Am. St. Rep. 224.

[22] Union Associated Press v. Heath, 49 App. Div. 247, 63 N. Y. S. 96; Loibl v. Breidenbach, 78 Wis. 49, 47 N. W. 15.

[23] Hazy v. Woitke, 23 Colo. 556, 48 Pac. 1048; Washington Gas Lt. Co. v. Lansden, 9 App. D. C. 508; State v. Osborne, 54 Kan. 473, 38 Pac. 572; Roberts v. Breckon, 31 App. Div. 431, 52 N. Y. S. 638; Wills v. Hardcastle, 19 Pa. Supr. Ct. 525.

[24] Weston v. Weston, 83 App. Div. 526, 82 N. Y. S. 351; Willis v. Hardcastle, 19 Pa. Supr. Ct. 525; Belo v. Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75.

[25] Underwood v. Smith, 93 Tenn. 687, 27 S. W. 1008, 42 Am. St. Rep. 946.

[26] Vizetelly v. Mudie's Select Library, Limited, (1900) 2 Q. B. 170; Emmons v. Pottle, L. R. 16 Q. B. D. 354. Every sale and delivery of a printed libel is a fresh publication. Staub v. Van Benthuysen, 36 La. Ann. 467.

[27] Perrett v. Times Newspaper, 25 La. Ann. 170; Buckley v. Knapp, 48 Mo. 152; Storey v. Wallace, 60 Ill. 51; Commonwealth v. Morgan, 107 Mass. 199; Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575; Same case, 38 Mich. 10; Andres v. Wells, 7 Johns. 260; Dunn v. Hall, 1 Ind. 345; Taylor v.

[28] Danville Press Co. v. Harrison, 99 Ill. App. 344.

aging editor.[29] It is immaterial that the proprietor has turned over the entire management of his paper to others and resides abroad.[30] This liability is not planted on the ground merely of the duty of the principal to see that his business is managed in good faith and with proper care, but it corresponds to the liability of one who, having brought upon his premises something extremely liable to inflict great and irreparable injury, is required at all events to make good the injury resulting from the inadequacy of his precautions.[31]

§ 104. Words actionable per se. Certain publications are said to be actionable *per se*. By this is meant that an action will lie for making them without proof of actual injury, because their necessary or natural and proximate consequence would be to cause injury to the person of whom they are spoken, and therefore injury is to be presumed.[32] In the case of certain other publications no such presumption can be made, because observation does not justify a like conclusion. Therefore, in such cases, the publications are only actionable on averment and proof that injury which the law can notice actually followed as a natural and proximate consequence.[33]

§ 105. Classification of slanderous words. In the recent case of *Pollard v. Lyon*, spoken words, as a cause of action, are classified by Mr. Justice Clifford as follows: "1. Words falsely spoken of a person which impute to the party the commission

Hearst, 107 Cal. 262, 40 Pac. 392; Dunn v. Hearst, 139 Cal. 239, 73 Pac. 138; International Fraternal Alliance v. Mallalien, 87 Md. 97, 39 Atl. 93; Haines v. Schultz, 50 N. J. L. 481, 14 Atl. 488; Hoboken P. & P. Co. v. Kahn, 59 N. J. L. 218, 35 Atl. 1053, 59 Am. St. Rep. 585; Clifford v. Press Pub. Co., 78 App. Div. 79, 79 N. Y. S. 767.

[29] Smith v. Utley, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620. But the rule does not include an editor in chief. Folwell v. Miller, 145 Fed. 495 (C. C. A.).

[30] Crane v. Bennett, 177 N. Y 106, 69 N. E. 274, 101 Am. St. Rep. 722.

[31] Long v. Tribune Printing Co., 107 Mich. 207, 65 N. W. 108.

[32] Trimble v. Tautlinger, 104 Ia. 665, 69 N. W. 1045; Continental Nat. Bank v. Bowdre Bros., 92 Tenn. 723, 23 S. W. 131; Townshend on Slander and Libel, § 146.

[33] In Louisiana the distinction between words actionable *per se* and those actionable only where special damage is alleged, is rejected, and only the actual damages proved can be recovered in any case. Sportono v. Fourichon, 40 La. Ann. 423, 4 So. 71; Tarleton v. Lagarde, 46 La. Ann. 1368, 16 So. 180, 49 Am. St. Rep. 353, 26 L. R. A. 325.

of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. 2. Words falsely spoken of a person which impute that the party is infected with some contagious disease, where if the charge is true, it would exclude the party from society. 3. Defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or employment of profit or the want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. 5. Defamatory words falsely spoken of a person which though not in themselves actionable, occasion the party special damage."[34] The first four of these classes are of words actionable *per se*. The fifth embraces cases which are actionable only when the special damage is averred. Brief notice will be taken of these several classes.

§ 106. Words which impute an indictable offense. It is agreed on all hands that is is not always *prima facie* actionable to impute to one an act which is subject to indictment and punishment. Importance in the law of defamation is attached to the inherent nature of the indictable act, and also to the punishment which the law assigns to it. In the leading case of *Brooker v. Coffin*, the following was given as the test: "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable;"[35] and this test has been accepted and applied so often and so generally that it may now be accepted as settled law.[36] The word *infamous* is to be taken, not in its technical

[34] Pollard v. Lyon, 91 U. S. 225.

[35] Brooker v. Coffin, 5 Johns. 188, 4 Am. Dec. 337.

[36] See Pollard v. Lyon, 91 U. S. Rep. 225; Anonymous, 60 N. Y. 263, 19 Am. Rep. 174; McKee v. Wilson, 87 N. C. 300; Graybill v. De Young, 140 Cal. 323, 73 Pac. 1067; Kenney v. Ill. State Journal Co., 64 Ill. App. 39; Frederickson v. Johnson, 60 Minn, 337, 62 N. W. 388; Pokrok Zapader Pub. Co. v. Zizkoosky, 42 Neb. 64, 60 N. W. 358; Collyer v. Collyer, 50 Hun. 422, 3 N. Y. S. 310; Gosling v. Morgan, 32 Pa. St. 273; Hoag v. Hatch, 23 Conn. 585; Hollingsworth v. Shaw, 19 Ohio St. 430, 2 Am. Rep. 411; Filber v. Dauterman, 26 Wis. 518; Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162.

but in its popular sense, as denoting a punishment involving degradation or disgrace.[37]

Words charging a person with theft,[38] burglary,[39] arson,[40] perjury,[41] murder or attempt to murder, are actionable *per se*.[42] It is held to be actionable *per se* to charge a man with being a swindler,[43] or a blackmailer,[44] or the greatest rum-seller in town,[45] or with unlawfully interfering with the mails,[46] or with keeping a house of ill fame.[47] So to charge that a franchise was obtained from certain officers by the use of boodle.[48] Where drunkenness is a statutory offense it is actionable *per se* to charge one therewith,[49] but otherwise if it is only punishable by ordinance.[50] Where the promulgation of certain an-

[37] Davis v. Carey, 141 Pa. St. 314, 21 Atl. 633; Miller v. Parish, 8 Pick. 384; Brown v. Nickerson, 5 Gray, 1; Kelley v. Flaherty, 16 R. I. 234, 14 Atl. 876, 27 Am. St. Rep. 739.

[38] Gaines v. Belding, 56 Ark. 100, 19 S. W. 236; Smullen v. Phillips, 92 Cal. 408, 28 Pac. 442; Harris v. Zazone, 93 Cal. 59, 28 Pac. 845; Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Roberts v. Ramsey, 86 Ga. 432, 12 S. E. 644; Stumer v. Pitchman, 124 Ill. 250, 15 N. E. 757; Lehrer v. Elmore, 100 Ky. 56, 37 S. W. 292; Savoie v Scanlan, 43 La. Ann. 967, 9 So. 916, 26 Am. St. Rep. 200; Fatjo v. Seidel, 109 La. 699, 33 So. 737; Williams v. McKee, 98 Tenn. 139, 38 S. W. 730; Darling v. Clement, 69 Vt. 292, 37 Atl. 779.

[39] Childers v. Mercury P. & P. Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

[40] Clugstone v. Garretson, 103 Cal. 441, 37 Pac. 469; Cox v. Strickland, 101 Ga. 482, 28 S. E. 655; Taylor v. Ellington, 46 La. Ann. 371, 51 So. 499.

[41] Stallings v. Whittaker, 55 Ark. 494, 18 S. W. 829; Huffer v. Miller, 74 Md. 454, 22 Atl. 205; Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119.

[42] Republican Pub. Co. v. Miner, 12 Colo. 77, 20 Pac. 345; Furr v. Speed, 74 Miss. 423, 21 So. 562; Thomas v. Blasdale, 147 Mass. 438, 18 N. E. 214.

[43] Schultz v. Huebner, 108 Mich. 274, 66 N. W. 57.

[44] Hess v. Sparks, 44 Kan. 465, 24 Pac. 979, 21 Am. St. Rep. 300; Palmer v. Mahn, 120 Fed. 737, 57 C. C. A. 41.

[45] Davis v. Starrett, 97 Me. 568, 55 Atl. 516.

[46] Witts v. Jones, 13 App. D. C. 482.

[47] Coloney v. Farrow, 5 App. D. C. 607, 39 N. Y. S. 460; Knapp v. Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765; Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162.

[48] Boehmer v. Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822, 34 Am. St. Rep. 318.

[49] Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912, 54 Am. St. Rep. 647, 30 L. R. A. 521.

[50] Seery v. Viall, 16 R. I. 517, 17 Atl. 552; Lodge v. O'Toole, 20 R. I. 405, 39 Atl. 752.

archistic sentiments is made a felony, it is actionable *per se* to call a man an anarchist.[51] The charge of criminal conduct for which punishment has been inflicted, or which has been pardoned, or a prosecution for which is barred by the statute of limitations, will support an action under corresponding circumstances to those which support one where the charge, if true, would still subject the party to punishment.[51a]

Whatever the moral turpitude involved in the act, it is generally agreed that it is not actionable *per se* to charge it if it is not indictable, even though it be punishable as disorderly conduct.[52] Therefore, to charge a female with being a common prostitute is held not actionable without averment of special damage, though it is difficult to conceive that any other charge can be more likely to injure, and the conduct itself is punishable as vagrancy.[53] But words imputing unchastity are held actionable *per se* in some states.[54] And so in states where-

[51] Von Gerichten v. Seitz, 94 App. Div. 130, 87 N. Y. S. 968.

[51a] Carpenter v. Tarrant, Cas. Temp. Hardw. 339; Smith v. Stewart, 5 Pa. St. 372; Holley v. Burgess, 9 Ala. 728; Van Ankin v. Westfall, 14 Johns. 233; Krebs v. Oliver, 12 Gray, 239; Shipp v. McCraw, 3 Murph. 463, 9 Am. Dec. 611. A child too young to be punishable for a crime may nevertheless maintain an action for slander in charging him with it. Stewart v. Howe, 17 Ill. 71.

[52] See Seery v. Viall, 16 R. I. 517, 17 Atl. 552; Lodge v. O'Toole, 20 R. I. 405, 39 Atl. 752.

[53] Brooker v. Coffin, 5 Johns. 188, 4 Am. Dec. 337. See Keller v. Lessford, 2 Cranch, 190; Pollard v. Lyon, 91 U. S. Rep. 225; Bissell v. Cornell, 24 Wend. 354; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420; Wilson v. Goit, 17 N. Y. 442; Stanfield v. Boyer, 6 Har. & J. 248; Woodbury v. Thompson, 3 N. H. 194; Boyd v. Brent, 3 Brev. 241; Underhill v. Welton, 32 Vt. 40; Castleberry v. Kelly, 26 Ga. 606; W. v. L., 2 Nott & McCord, 204; Berry v. Carter, 4 Stew. & Port. 387, 24 Am. Dec. 762; Elliott v. Ailsberry, 2 Bibb. 473, 5 Am. Dec. 631; Linney v. Maton, 13 Texas, 449; McQueen v. Fulghman, 27 Texas, 463; Douglas v. Douglas, 4 Idaho, 293, 38 Pac. 934; Lidlie v. Wallen, 17 Mont. 150, 42 Pac. 289.

[54] Kedrolivansky v. Niebaum, 70 Cal. 216; Page v. Merwin, 54 Conn. 426; Reitan v. Goebel, 33 Minn. 151; Williams v. McManus, 38 La. Ann. 161, 58 Am. Rep. 171; Barnett v. Ward, 36 Ohio St. 107, 38 Am. Rep. 561; Hitchcock v. Caruthers, 82 Cal. 523, 23 Pac. 48; Preston v. Frey, 91 Cal. 107, 27 Pac. 533; Wimer v. Allbaugh, 78 Ia. 79, 42 N. W. 587, 16 Am. Rep. 422; Cushing v. Hederman, 117 Ia. 637, 91 N. W. 940, 94 Am. St. Rep. 320; Johnson v. Forse, 80 Minn. 315, 83 N. W. 182; Hen-

in adultery and fornication are made criminal offenses by statute.[55]

It is not actionable to accuse a man of an intent to commit a crime, as to say of a person: "He is going to start a house of ill fame."[56] The charge of a merely immoral offense which is not criminal, is not actionable without special damages result.[57] Such charges fall within the category of mere vituperation and abuse.[58] However positive may be the charge of a crime, if it is accompanied with words which qualify the meaning, and show to the bystanders that the act imputed is not criminal, this is no slander, since the charge, taken together, does not convey to the minds of those who hear it an imputa-

drickson v. Sullivan, 28 Neb. 329, 44 N. W. 448; Kelley v. Flaherty, 16 R. I. 234, 14 Atl. 876, 27 Am. St. Rep. 739.

[55] Mayer v. Schleichter, 29 Wis. 646; Cox v. Bunker, Morris, 269; Haynes v. Ritchey, 30 Ia. 76, 6 Am. Rep. 642; Zeliff v. Jennings, 61 Texas, 458. But see Ross v. Fitch, 58 Texas, 148; Iles v. Swank, 202 Ill. 453, 66 N. E. 1042; Binford v. Young, 115 Ind. 174, 16 N. E. 142; Freeman v. Sanderson, 123 Ind. 264, 24 N. E. 239; Hibner v. Fleetwood, 19 Ind. App. 421, 49 N. E. 607; Stutsman v. Stutsman, 32 Ind. App. 73, 66 N. E. 773; Lyons v. Stratton, 102 Ky. 317, 43 S. W. 446; Nicholson v. Merritt, 109 Ky. 369, 59 S. W. 25; Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342; Davis v. Sladden, 17 Ore. 259, 21 Pac. 140; Hutcher v. Range, 98 Texas, 85. Calling a woman a *bitch* is not actionable *per se*. Roby v. Murphy, 27 Ill. App. 394; Claypool v. Claypool, 56 Ill. App. 17; Craig v. Pyles, 101 Ky. 593, 39 S. W. 33; Blake v. Smith, 19 R. I. 476, 34 Atl. 995. So held, though it was alleged in the narr. that at the place where spoken the word was commonly understood to mean whore or prostitute and that the defendant was aware of this fact and meant so to charge. Robertson v. Edelstein, 104 Wis. 440, 80 N. W. 724. But in Pennsylvania it is held that the word may mean a lewd woman and that whether so understood is for the jury. Stoner v. Erisman, 206 Pa. St. 600, 56 Atl. 77.

[56] Fanning v. Chase, 17 R. I. 388, 22 Atl. 275, 33 Am. St. Rep. 878, 13 L. R. A. 134.

[57] That plaintiff sold his vote at an election, there being no penalty prescribed. Doyle v. Kirby, 184 Mass. 409, 68 N. E. 843. That he is a drummer for a whore house. Mudd v. Rogers, 102 Ky. 280, 43 S. W. 255. That he belongs to a band of robbers. Story v. Jones, 52 Ill. App. 112. That he procured another to cast more than one vote at an election, such election not being authorized by law. Shepherd v. Piper, 98 Me. 384, 57 Atl. 84.

[58] Foster v. Bone, 38 Ill. App. 613; Robertson v. Edelstein, 104 Wis. 440, 80 N. W. 724.

tion of criminal conduct. Thus, it would not be slanderous *per se* to say: "He is a thief: he has stolen my land;" land not being the subject of larceny, and one part of the charge being relieved of its criminal character by the other part.[59]

§ 107. **Words which impute a contagious or infectious disease.** The reason for holding such words actionable is, that they tend to exclude the party from society; and therefore the charge should impute the existence of the disease at the time.[60] What diseases would be embraced within this rule is not certain, but it is probable that at the present day only those which are contagious or infectious, and which are also usually brought upon one by disreputable practices: and the list would perhaps be limited to venereal diseases.[61] It has been held actionable to charge one with having a loathsome disease.[62] So of leprosy.[63] But consumption is not within the rule.[64]

§ 108. **Words damaging as respects office or profession.** This class of cases, in order to be *prima facie* actionable, must clearly appear to be spoken of the party in respect to his office, profession or employment, and if the words counted on do not by themselves show this, the declaration must contain the necessary averments to connect them.[65] An illustration of such a slander is when a professional man is charged with general

[59] Stitzell v. Reynolds, 67 Pa. St. 54; Brown v. Myers, 40 Ohio St. 99; Ogden v. Riley, 14 N. J. L. 186; Underhill v. Welton, 32 Vt. 40; McCaleb v. Smith, 22 Ia. 242; Edgerly v. Swain, 32 N. H. 478; Ayers v. Grider, 15 Ill. 37; Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573; Trabue v. Mays, 3 Dana, 138; Williams v. Hill, 19 Wend. 305; Dexter v. Taber, 12 Johns. 239; Crone v. Angell, 14 Mich. 340; Harrison v. Manship, 120 Ind. 43, 22 N. E. 87; Divens v. Meredith, 147 Ind. 693, 47 N. E. 143; Barnes v. Crawford, 115 N. C. 76, 20 S. E. 386; Egan v. Semrod, 113 Wis. 84, 88 N. W. 906; Pollock v. Hastings, 88 Ind. 248.

[60] Taylor v. Hall, 2 Stra. 1189; Williams v. Holdredge, 22 Barb. 396; Carslake v. Mapledoram, 2 T. R. 473; Nichols v. Gray, 2 Ind. 82; Bruce v. Soule, 69 Me. 502.

[61] See Watson v. McCarthy, 2 Kelly, 57; Irons v. Field, 9 R. I. 216; Nichols v. Gray, 2 Ind. 82; Kaucher v. Blinn, 29 Ohio St. 62; McDonald v. Nugent, 122 Ia. 651, 98 N. W. 506.

[62] Monks v. Monks, 118 Ind. 238, 20 N. E. 744.

[63] Simpson v. Press Pub. Co., 33 Wis. 228, 67 N. Y. S. 401.

[64] Rade v. Press Pub. Co., 37 Misc. 254, 75 N. Y. S. 298; Butler v. News-Leader Co., 104 Va. 1.

[65] Ayre v. Craven, 2 Ad. & El. 7.

professional ignorance or incompetency.[66] It is actionable to accuse a lawyer of charging outrageous and excessive fees,[67] or to impute to him dishonesty in his profession.[68] But not to say that he is slow in paying his bills,[69] or that he has moved his office to his house to save expense.[70] To call a physician a quack is actionable *per se*.[71] So it is actionable to call a clergyman an unscrupulous liar,[73] or to charge him with the use of profane language,[74] or to charge a teacher with disgraceful conduct towards his pupils.[75] Words, though not

[66] Camp v. Martin, 23 Conn. 86. See cases of slanders of physicians; Ayre v. Craven, 2 Ad. & El. 7; Jones v. Diver, 22 Ind. 184; Sumner v. Utley, 7 Conn. 258; Camp v. Martin, 23 Conn. 86; Rice v. Cottrel, 5 R. I. 340; De-Pew v. Robinson, 95 Ind. 109; Turner v. Hearst, 115 Cal. 394, 47 Pac. 129; Ritchie v. Widdemer, 59 N. J. L. 290, 35 Atl. 825; Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. 457; Mattice v. Wilcox, 147 N. Y. 624, 42 N. E. 270; Bornmann v. Star Co., 174 N. Y. 212, 66 N. E. 723; Krug v. Pitass, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317; Weston v. Com. Advertiser Ass'n, 184 N. Y. 479. Cases of slanders of lawyers; Rich v. Cavenaugh, 2 Pa. St. 187; Goodenow v. Tappan, 1 Ohio, 60; Chipman v. Cook, 2 Tyler, 456. See Ludwig v. Cramer, 53 Wis. 193; Hetherington v. Sterry, 28 Kan. 426, 42 Am. Rep. 169; Barr v. Moore, 87 Pa. St. 385. Cases of slanders of clergymen; McMillan v. Birch, 1 Binn. 178, 2 Am. Dec. 426; Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 203; Hartley v. Herring, 8 T. R. 130; Gallwey v. Marshall, 24 Eng. L. & E. 463; Chaddock v. Briggs, 13 Mass. 248, 7 Am. Dec. 137.

[67] Ivey v. Pioneer Sav. & L. Co., 113 Ala. 349, 21 So. 531; Mosnat v. Snyder, 105 Ia. 500, 75 N. W. 356.

[68] Mains v. Whiting, 87 Mich. 172, 49 N. W. 559; Wallace v. Jameson, 179 Pa. St. 98, 36 Atl. 142.

[69] McDermott v. Union Credit Co. 76 Minn. 84, 78 N. W. 967, 79 N. W. 673.

[70] Stewart v. Minn. Tribune Co., 40 Minn. 101, 41 N. W. 457, 12 Am. St. Rep. 696.

[71] Hargan v. Purdy, 93 Ky. 424, 20 S. W. 432; Elmergreen v. Horn, 115 Wis. 385, 91 N. W. 973.

[73] Monson v. Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

[74] Potter v. N. Y. Evening Journal Pub. Co., 68 App. Div. 95, 74 N. Y. S. 317. Or that he is devoid of moral principles. Coles v. Thompson, 7 Tex. Civ. App. 666, 46 S. W. 46. A case of libel.

[75] Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624. So to charge a clergyman with incontinence. Gallwey v. Marshall, 9 Exch. 294. Or with misappropriating collections and being unfit to be a minister. Franklin v. Browne, 67 Ga. 272. Or a school superintendent with official corruption (here a libel). Hartford v. State, 96 Ind. 461. See Larra-

defamatory, if false, and made for the purpose of injuring one in his profession, and which naturally and probably would have that effect and do in fact have that effect; are actionable.[76] Words are actionable *per se* which impute to an official dishonesty or corruption in his office,[77] or general misconduct therein,[78] or willful neglect of official duty.[79]

§ 109. Words which tend to injure one in his business or trade. To bring a case within the fourth class mentioned, the imputation must be such as is calculated to affect the party prejudicially in the business in which he is engaged. Therefore, a false charge that in respect to one person might be slanderous, if made in respect to another would support no action. The reason would be that in the one case it would be almost certainly injurious, while in the other no presumption of injury would arise. Thus, if it be said of a day laborer: "He is a bankrupt," the remark, so far as his business is concerned, is perfectly harmless, while if the same remark were

bee v. Minn. Tribune Co., 36 Minn. 141. Or the architect of a public building with mental unsoundness. Clifford v. Cochrane, 10 Ill. App. 570. Or a temperance organizer with being a seducer and hypocrite. Finch v. Vifquain, 11 Neb. 280.

[76] Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 467, 8 L. R. A. 524.

[77] Wofford v. Meeks, 129 Ala. 349, 30 So. 625, 87 Am. St. Rep. 66, 55 L. R. A. 214; Schomberg v. Walker, 132 Cal. 224, 64 Pac. 290; Jarman v. Rea, 137 Cal. 339, 70 Pac. 216; Randall v. Evening News Ass'n, 79 Mich. 266, 44 N. W. 783, 7 L. R. A. 309.

[78] Augusta Evening News v. Radford, 91 Ga. 494, 17 S. E. 612, 44 Am. St. Rep. 53, 20 L. R. A. 533; Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320; Sharpe v. Larson, 67 Minn. 428. 70 N. W. 1, 554; Martin v. Paine, 69 Minn. 482, 72 N. W. 450; Osborn v. Leach, 135 N. C. 628, 47 S. E. 811; Nehrling v. Herald Co., 112 Wis. 558, 88 N. W. 614.

[79] Hay v. Reid, 85 Mich. 296, 48 N. W. 507; Scougale v. Sweet, 124 Mich. 311, 82 N. W. 1061. See further Craig v. Brown, 5 Blackf. 44; Gottbehuet v. Hubachek, 36 Wis. 515; Gove v. Blethen, 21 Minn. 80, 18 Am. Rep. 380; Robbins v. Treadway, 2 J. J. Marsh. 540, 19 Am. Dec. 152; Sillars v. Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680. But the rule does not apply if at the time the words were spoken the party had ceased to hold the office. Gibbs v. Prices, Styles, 231; Collins v. Mellen, Cro. Car. 282; Bellamy v. Burch, 16 M. & W. 590; Forward v. Adams, 7 Wend. 204; Edwards v. Howell, 10 Ired. 211; Allen v. Hillman, 12 Pick. 101. But see Sharpe v. Larson, 67 Minn. 428, 70 N. W. 1, 55.

made of a merchant, or of any one to whose business a good financial credit was indispensable, the natural and probable tendency would be to inflict an injury which would be serious and might be disastrous.[80] The merchant is therefore slandered when his pecuniary credit is impugned; the day laborer is not. The rules which protect persons against slanders in their business are nevertheless applicable to all kinds and all grades of business; to the day laborer and the servant as much as to the banker, the broker or the merchant.[81] And while men engaged in rival business may puff their own wares, and will be excused for any extravagance of statement, so long as they do not unjustly assail the business of their rivals, yet they have no more liberty in making unfounded and injurious imputations against rivals to the prejudice of their business than they have upon other persons, but must keep within the same limits of truth and fairness.[82] It is legitimate for a manufacturer or dealer to proclaim that his own goods are superior to those of his rival, though this may cause loss of trade to the latter.[83]

Any false and disparaging statement concerning one in his trade, occupation or calling is actionable in itself, and the person concerning whom such a statement is made, although he is unable to show that he has sustained damage or loss, is nevertheless entitled to recover.[84] Any statement calculated

[80] Brown v. Smith, 13 C. B. 599; Mott v. Comstock, 7 Cow. 654; Sewall v. Catlin, 3 Wend. 291; Nelson v. Borchenius, 52 Ill. 236. To call a drover a bankrupt is actionable. Lewis v. Hawley, 2 Day, 495, 2 Am. Dec. 121. The following cases relating to other callings illustrate the rule: Phillips v. Hœfer, 1 Pa. St. 62, 44 Am. Dec. 111; Burtch v. Nickerson, 17 Johns. 217, 8 Am. Dec. 390; Orr v. Skofield, 56 Me. 483; Fowles v. Bowen, 30 N. Y. 20.

[81] Terry v. Hooper, 1 Lev. 115.

[82] Young v. Macroe, 3 B. & S 264; Boynton v. Remington, 3 Allen, 397; Harman v. Delaney, 2 Stra. 898; Weiss v. Whittemore, 28 Mich. 266.

[83] Hubbuck & Sons v. Wilkinson, (1899) 1 Q. B. 86.

[84] Lovejoy v. Whitcomb, 174 Mass. 586, 55 N. E. 322; Gaither v. Advertiser Co., 102 Ala. 458, 14 So. 788; Holmes v. Clisby, 118 Ga. 820, 45 S. E. 684; Fred v. Traylor, 115 Ky. 94, 72 S. W. 768; Hankel v. Schaub, 94 Mich. 542, 54 N. W. 293; Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; Price v. Conway, 134 Pa. St. 340, 19 Atl. 687, 19 Am. St. Rep. 704, 8 L. R.

to injuriously affect the credit or financial standing of a merchant or person engaged in trade is actionable.[85] Such are charges that he is a bankrupt, or has assigned, or secured his bank, or given a chattel mortgage, or been attached.[86] So of a charge of fraud or dishonesty, spoken of one in connection with his business, whereby his character in such business may be injuriously affected.[87] So of a charge that one lacks business capacity.[88] So to charge a butcher with selling diseased meat,[90] or to charge that the wares of a manufacturer are a humbug and worthless.[91] A corporation may sue for defama

A. 193; Holland v. Flick, 212 Pa. St. 201; Cooley v. Galyon, 109 Tenn. 1, 70 S. W. 607, 97 Am. St. Rep. 823, 60 L. R. A. 139; Darling v. Clement, 69 Vt. 292, 37 Atl. 779; Robinson v. Eau Claire Book, etc., Co., 110 Wis. 369, 85 N. W. 983; Ratcliff v. Evans, (1892) 2 Q. B. 524.

[85] Simons v. Burnham, 102 Mich. 189, 60 N. W. 476; Brown v. Holton, 109 Ga. 431, 433, 34 S. E. 717.

[86] McKenzie v. Denver Times, 3 Colo. App. 554, 34 Pac. 577; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138; Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 663; Bee Pub. Co. v. World Pub. Co., 59 Neb. 713, 82 N. W. 28; Smith v. Bradstreet Co., 63 S. C. 525, 41 S. E. 763; Hayes v. Press Co., 127 Pa. St. 642, 18 Atl. 331, 14 Am. St. Rep. 874, 5 L. R. A. 643; Continental Nat. Bank v. Bowdre Bros., 92 Tenn. 723, 23 S. W. 131. But see School v Bradstreet Co., 85 Ia. 551, 52 N. W. 500. Compare Boynton v. Shaw, etc., Co., 146 Mass. 219, 15 N. E. 507; Steketee v. Kimm, 48 Mich. 322; Lovejoy v. Whitcomb, 174 Mass. 586, 55 N. E. 322; Woodruff v. Bradstreet Co., 116 N. Y 217, 22 N. E. 354, 5 L. R. A. 555.

[87] Orr v. Skofield, 56 Me. 483; Backus v. Richardson, 5 Johns. 476; Noeninger v. Vogt, 88 Mo. 589; International Fraternal Alliance v. Mallalien, 87 Md. 97, 39 Atl. 93; Holmes v. Jones, 121 N. Y. 461, 24 N. E. 701; Meas v. Johnson, 185 Pa. St. 12, 39 Atl. 562; Morse v. Times-Republican Print. Co., 124 Ia. 707, 100 N. W. 867; Ukman v. Daily Record Co., 189 Mo. 378, 88 S. W. 60.

[88] Gaither v. Advertiser Co., 102 Ala. 458, 14 So. 788. So of words imputing mental derangement to a bank teller. Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214.

[90] Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157; Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266; Leitz v. Hohman, 16 Pa. Supr. Ct. 276. So to charge a butcher with selling veal taken from an unborn calf. Singer v. Bender, 64 Wis. 169. But derogatory words as to quality of articles furnished by a caterer are not. Dooling v. Budget Pub. Co., 144 Mass. 258, 59 Am. Rep. 83.

[91] Inland Printer Co. v. Economical Half Tone Supply Co., 99 M.

tory statements calculated to injure its business.[92] A charge that half the ties in the plaintiff's roadbed are rotten, was held to be such a statement.[93]

The refusal of a bank to pay the plaintiff's check to a third party, though having sufficient funds of the plaintiff to meet it, is in the nature of a slander upon the plaintiff's credit and business, and renders the bank liable for substantial damages, when the plaintiff is engaged in trade or business, though no actual damages are proven.[94]

§ 110. **Words not actionable per se.** The fifth class of cases embraces all those in which the untruthful statement is not deemed in law to be necessarily of a damaging character, but which can be and is shown to have been damaging in the particular case, by reason of special circumstances which are set out in the declaration.[95] Thus, if one say of another: "He is a rogue," the law will not imply a resulting injury; but if it be shown that in consequence of the imputation he was discharged from an employment, or was refused employment, the special injury is thus made to appear.[96] So, although to say of a female that she is unchaste is generally held not actionable where unchastity is not made a punishable crime, yet if

[92] Morrison-Jewell Filtration Co. v. Lingane, 19 R. I. 316, 33 Atl. 452; Journal Printing Co. v. MacLean, 23 Ont. App. Rep. 324; South Hetton Coal Co. v. N. E. News Ass'n, (1894) 1 Q. B. 133; Brayton v. Cleveland, Special Police Co., 63 Ohio St. 83, 57 N. E. 1085, 52 L. R. A. 525.

[93] Ohio, etc., Ry. Co. v. Press Pub. Co., 48 Fed. 206.

[94] Schaffner v. Ehrman, 139 Ill. 109, 28 N. E. 917, 32 Am. St. Rep. 192, 15 L. R. A. 134; Schaffner v. Ehrman, 139 Ill. 670, 28 N. E. 917; Hann v. Drovers' Nat. Bank, 92 Ill. App. 611; Svendsen v. State Bank, 64 Minn. 40, 65 N. W. 1086, 58 Am. St. Rep. 522, 31 L. R. A. 552; Bank of Commerce v. Goos, 39 Neb. 437, 58 N. W. 84, 23 L. R. A 190; Patterson v. Marine Nat. Bank, 130 Pa. St. 419, 18 Atl. 632, 17 Am. St. Rep. 779; Callahan v. Bank, 69 S. C. 374, 48 S. E. 293; Wood v. Am. Nat. Bank, 100 Va. 306, 40 S. E. 931; Marzetti v. Williams, 1 B. & Ad. 415; Rolins v. Steward, 14 C. B. 595. See Roe v. Bank of Versailles, 167 Mo. 406, 67 S. W. 303; Eichner v. Bowery Bank, 24 App. Div. 63, 48 N. Y. S. 978.

[95] Ford v. Lamb, 116 Ga. 655, 42 S. E. 998; Mudd v. Rogers, 102 Ky. 280, 43 S. W. 255; Karger v. Rich, 81 Wis. 177, 51 N. W. 424.

[96] Oakley v. Farrington, 1 Johns. Cas. 129, 1 Am. Dec. 107. So where the terms "cheat and swindler" are used. Odiorne v. Bacon, 6 Cush. 185.

the woman can show that because of the imputation she lost a contemplated marriage, or suffered in any manner a pecuniary loss she is entitled to legal redress.[97] It is not necessary to attempt any enumeration of the cases in which such actions are sustained, as it could be to little purpose in illustrating a doctrine so general. The injury must be pecuniary in its nature, but it is immaterial whether it be great or small, except as the amount of recovery will depend upon it.[98] The special damage must be specifically set forth by means of facts alleged.[99] The general claim of damages in the *ad damnum* clause is not enough.[1]

§ 111. **Libel compared with slander.** The difference between slander and libel is sometimes said to be this: the one is oral defamation and the other is defamation propagated by printing, pictures, or other means open to the sight. There is, however, a difference in the substance of what shall constitute an actionable charge. It is perfectly reasonable to allow greater liberty of vocal speech than of writing or printing, for two very plain reasons: 1. Vocal utterance does not imply the same degree of deliberation; it is more likely to be the expression of momentary passion or excitement, and is not so open to the implication of settled malice. 2. An oral charge is merely heard, and the agency of the wrong-doer in inflicting injury is at an end when the utterance has died upon the ear. But the written or printed charge may pass from hand to hand indefinitely and for many years. It is an ever continuous defamation so long as that by means of which it is communicated remains in existence.

[97] Shepherd v. Wakeman, 1 Sid. 79; Reston v. Promfeict, Cro. Eliz. 639; Davis v. Gardiner, 4 Co. 16; Davies v. Solomon, L. R. 7 Q. B. 112; Moody v. Baker, 5 Cowen, 351; Olmstead v. Miller, 1 Wend. 510; Williams v. Hill, 19 Wend. 305; Pettibone v. Simpson, 66 Barb. 492; Underhill v. Welton, 32 Vt. 40.

[98] Beach v. Ranney, 2 Hill, 309; Bassil v. Elmore, 65 Barb. 627; S. C. 48 N. Y. 561, and the cases cited above.

[99] Bush v. McMann, 12 Colo. App. 504, 55 Pac. 956; Field v. Colson, 93 Ky. 347, 20 S. W. 264; Fellman v. Dreyfous, 47 La. Ann. 907, 17 So. 422; Waters v. Retail Clerks' Union, 120 Ga. 424, 47 S. E. 911.

[1] Waters v. Retail Clerks' Union, 120 Ga. 424, 47 S. E. 911.

These reasons are taken notice of in the law, and some charges are held to be *prima facie* actionable as libel that are not actionable as oral slander, unless there be averment and proof that actual injury has resulted.[2] In other words, injury is presumed to follow the apparently deliberate act of putting the charge in writing or print, or of suggesting it by means of picture or effigy, where a mere vocal utterance to the same effect might be disregarded as probably harmless. In some cases either slander or libel will lie, as where a letter is dictated to a stenographer who copies it out.[3]

§ 112. **What constitutes libel.** In libel, as in slander, defamatory publications are classified as publications actionable *per se*, and publications actionable on averment and proof of special damage. In the first class are embraced all cases of publications which would be actionble *per se* if made orally. These cases, therefore, require no further attention. It also embraces all other cases where the additional gravity imparted to the charge by the publication can fairly be supposed to make it damaging. Thus, to say of a man: "I look upon him as a rascal," is no slander, unless shown to be damaging; but if it be published of him in one of the public journals, the presumption that injury follows is reasonable and legitimate.[4] So, to call a man in print "an imp of the devil and cowardly snail," is libelous, though an oral imputation of the sort would be presumably harmless.[5] The general rule is stated thus:

[2] See Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051; Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864; Riley v. Lee, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358; Richmond v. Post, 69 Minn. 457, 72 N. W. 704; Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; Cole v. Neustadter, 22 Ore. 191, 29 Pac. 550; Thomas v. Bowen, 29 Ore. 258, 45 Pac. 768; Merchants' Ins. Co. v. Buckner, 98 Fed. 222, 39 C. C. A. 19; Ukman v. Daily Record Co., 189 Mo. 378, 88 S. W. 60.

[3] Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87. So where a message is sent by telephone and written out by the receiver. Peterson v. Western Union Tel. Co., 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661.

[4] Williams v. Karnes, 4 Humph. 9; Cropp v. Tilney, 3 Salk. 226; J'Anson v. Stewart, 1 T. R. 748. See Whitney v. Janesville Gazette, 5 Biss. 330.

[5] Price v. Whitely, 50 Mo. 439. See Atwill v. Mackintosh, 120 Mass. 177; Cary v. Allen, 39 Wis. 481.

Any false and malicious writing published of another is libelous *per se*, when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him.[6] Any words that tend to lower the plaintiff in the estimation of his friends[7] or in the common estimation of citizens,[8] or that tend to injure his social character or status,[9] or to destroy the confidence of his neighbors in his integrity, are libelous *per se*.[10]

It is libelous *per se* to write or print of one that he is a "liar,"[11] "a liar and a dead beat,"[12] "a gambler,"[13] "a sucker,"[14] "a eunuch,"[15] a "secret slanderer," or "scandal

[6] Lindley v. Horton, 27 Conn. 58, 61; Thomas v. Croswell, 7 Johns. 264, 5 Am. Dec. 269; Clark v. Binney, 2 Pick. 115; McCorkle v. Burriss, 5 Binn. 349; Price v. Whitely, 50 Mo. 439; Hand v. Winton, 38 N. J. L. 122; Donaghue v. Gaffy, 54 Conn. 257; Tillson v. Robbins, 68 Me. 295; Foster v. Scripps, 39 Mich. 376, 33 Am. Rep. 403; Bradley v. Cramer, 59 Wis. 309, 48 Am. Rep. 511; Schornberg v. Walker, 132 Cal. 224, 64 Pac. 290; Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051; Prosser v. Callis, 117 Ind. 105, 19 N. E. 735; Doan v. Kelley, 121 Ind. 413, 23 N. E. 266; Morse v. Times-Republican Print. Co., 124 Ia. 707, 100 N. W. 867; Riley v. Lee, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358; Randall v. Evening News Ass'n, 101 Mich. 561, 60 N. W. 301; Alwin v. Liesch, 86 Minn. 281, 90 N. W. 404; World Pub. Co. v. Mulden, 43 Neb. 126, 61 N. W. 108, 47 Am. St. Rep. 737; Triggs v. Sun Printing & Pub. Co., 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612; Cranfill v. Hayden, 97 Tex. 544, 80 S. W. 609; Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111; Pfitzinger v. Dubs, 64 Fed. 696, 12 C. C. A. 399. A libel is "any malicious publication, written, printed or painted, which by words or signs tends to expose a man to ridicule, contempt, hatred or degradation of character." Collins v. Dispatch Pub. Co., 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. Rep. 636.

[7] Jones v. Roberts, 73 Vt. 201, 50 Atl. 1071.

[8] Moss v. Harwood, 102 Va. 386, 46 S. E. 385.

[9] Wood v. Boyle, 177 Pa. St. 620, 35 Atl. 1131, 55 Am. St. Rep. 747.

[10] Montgomery v. Knox, 23 Fla. 595, 3 So. 211.

[11] Colvard v. Black, 110 Ga. 642, 36 N. E. 80; Riley v. Lee, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358; Allen v. Wortham, 89 Ky. 485, 13 S. W. 73.

[12] Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869.

[13] Ferguson v. Evening Chronicle Pub. Co., 72 Mo. App. 463.

[14] Willmann v. Press Pub. Co., 49 App. Div. 63, 63 N. Y. S. 515. This appellation is equivalent to scoundrel.

[15] Eckert v. Van Pelt, 69 Kan. 357, 76 Pac. 909, 66 L. R. A. 266.

monger,"[16] that he is "slippery,"[17] or that he is "a dangerous, able and seditious agitator,"[18] that he is an "anarchist,"[19] or that he "would be an anarchist if he thought it would pay."[20] So of words imputing dishonesty,[21] or charging the plaintiff with getting the property of his friend by means of fraud and deception,[22] or that plaintiff is a hypocrite and under the cloak of hypocrisy oppresses the widows and orphans;[23] or that a son has squandered the estate of his parents and left them in want;[24] or that plaintiff is said to have been in the work-house and to have a criminal record,[24a] or referring to a trade journal as a *fake* paper.[25] To charge a person with being a witch in a community where there are persons who still believe in witchcraft may be actionable *per se*.[26] To refer to the plaintiff, whose name was Buckstaff, as Bucksniff, was held libelous *per se*, as suggesting a likeness to Pecksniff, one of the most contemptible characters in Dickens.[27] So to make light and sport of a person's defects and deformities.[28] So to publish that a practicing dentist has committed suicide,[29] or to print an obituary notice of a living per-

[16] Patton v. Cruce, 72 Ark. 421, 81 S. W. 380, 105 Am. St. Rep. 46, 65 L. R. A. 937.

[17] Peterson v. Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; S. C. Peterson v. Western Union Tel. Co., 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; Peterson v. Western Union Tel. Co., 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581.

[18] Wilkes v. Shields, 62 Minn. 426, 64 N. W. 921.

[19] Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864.

[20] Lewis v. Daily News Co., 81 Md. 466, 32 Atl. 246, 29 L. R. A. 59.

[21] Wofford v. Meeks, 129 Ala. 349, 30 So. 625, 87 Am. St. Rep. 66, 55 L. R. A. 214; Hollenbeck v. Ristine, 105 Ia. 488, 75 N. W. 355, 67 Am. St. Rep. 306; McIntyre v. Weinert, 195 Pa. St. 52, 45 Atl. 666.

[22] Stewart v. Pierce, 93 Ia. 136, 61 N. W. 388.

[23] Jones v. Greeley, 25 Fla. 629, 6 So. 448.

[24] McDuff v. Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673.

[24a] Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921.

[25] Midland Pub. Co. v. Implement Trade Journal Co., 108 Mo. App. 223, 83 S. W. 298.

[26] Oles v. Pittsburg Times, 2 Pa. Supr. Ct. 130.

[27] Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111.

[28] Ibid.

[29] Cady v. Brooklyn Union Pub. Co., 23 Misc. 409, 51 N. Y. S. 198.

son.[30] In Louisiana it is libel to refer to white man as a negro.[31] So in South Carolina.[32] It is libel to publish a young lady's picture in connection with a questionable advertisement.[33] And so are words charging a man with improper relations with a woman.[34] And so of the following: A charge that plaintiff had "left the city with $8,500 of the Southern Bank's money;"[35] to say of one holding a position of trust in a corporation who had disappeared, that he had been located in Canada where he was living in luxury;[36] to hold one up as a literary freak;[37] to blacklist a person.[38] Since the belief that one is not in his right mind has a natural tendency to withdraw from him the association of his fellows, to publish of one that he is insane, and a fit person to be sent to the lunatic asylum, is libelous.[39] When libel is defined by statute, whatever is within the definition is libel *per se*.[40]

[30] McBride v. Ellis, 9 Rich. 313, 70 Am. Dec. 210.

[31] Upton v. Times-Democrat Pub. Co., 104 La. 141, 28 So. 970.

[32] Flood v. News & Courier Co., 71 S. C. 112, 50 S. E. 637; Eden v. Legare, 1 Bay, 171; Woods v. King, 1 Nott & McC. 184.

[33] Morrison v. Smith, 177 N. Y. 366, 69 N. E. 725.

[34] Morey v. Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621; Collins v. Dispatch Pub. Co., 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. Rep. 636.

[35] Turton v. N. Y. Recorder Co., 144 N. Y. 144, 38 N. E. 1009.

[36] McDonald v. Press Pub. Co., 55 Fed. 264; Press Pub. Co. v. McDonald, 63 Fed. 238, 11 C. C. A. 155. "It is a matter of common knowledge that those of our countrymen who expatriate themselves under such circumstances in Canada are fugitives from justice." 55 Fed. 264.

[37] Triggs v. Sun Printing & Pub. Co., 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612. See Triggs v. Sun Printing & Pub. Co., 91 App. Div. 259, 86 N. Y. S. 486.

[38] White v. Parks, 93 Ga. 633, 20 S E. 78; Western Union Tel. Co. v. Pritchett, 108 Ga. 411, 34 S. E. 216; Western v. Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915; Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86.

[39] Perkins v Mitchell, 31 Barb. 461; Lawson v. Morning Journal Ass'n, 32 App. Div. 71, 52 N. Y. S. 484; Seip v. Deshler, 170 Pa. St. 334, 32 Atl. 1032. It is libelous *per se* to publish of a man that he is "a skunk." Massuere v. Dickens, 70 Wis. 83, 35 N. W. 349. A "swine." Solverson v. Peterson, 64 Wis. 198, 54 Am. Rep. 607.

[40] Halley v. Gregg, 74 Ia. 563, 38 N. W. 416.

The following are not libelous *per se:* To charge one with doing what he has a lawful right to do, as trying to get a law passed that would relieve his property from a sewer assessment by making the cost a general charge.[41] To charge a hotel man with being a hog, because he sent away for his supplies instead of buying them at home;[42] that plaintiff caused her husband to commit suicide, as she might be the innocent cause;[43] that plaintiff is a labor agitator;[44] or a man "of more or less indifferent repute;"[45] or that he had owed a debt for years and that when sued he slunk behind that statute of limitations.[46] Some further cases of words held not actionable *per se* are added in the margin.[47]

Besides the publications mentioned, any untrue and malicious charge which is published in writing or print is libelous when damage is shown to have resulted as a natural and proximate consequence.[48]

§ 113. Meaning and construction of the words used—Questions for court and jury. If the words alleged to have been used, whether written or spoken, are not actionable *per se*, or if they do not name the plaintiff, or if they are ambiguous, or if their defamatory meaning depends upon a local or provincial use of a word or words, or if for any reason they require explanation by some extrinsic matter to make them actionable, such extrinsic facts must be alleged by way of in-

[41] Foot v. Pitt, 83 App. Div. 76, 82 N. Y. S. 464.

[42] Urban v. Helmick, 15 Wash. 155, 45 Pac. 747.

[43] Brown v. Tribune Ass'n, 74 App. Div. 359, 77 N. Y. S. 461.

[44] Wabash R. R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003.

[45] Crashley v. Press Pub. Co., 179 N. Y. 27, 71 N. E. 258.

[46] Hollenbeck v. Hall, 103 Ia. 214, 72 N. W. 518, 64 Am. St. Rep. 175, 39 L. R. A. 734.

[47] Waters v. Retail Clerks' Union, 120 Ga. 424, 47 S. E. 911; Quinn v. Prudential Ins. Co., 116 Ia. 522, 90 N. W. 349; Field v. Colson, 93 Ky. 347, 20 S. W. 264; Crawford v. Barnes, 118 N. C. 912, 24 S. E. 670; Dawson v. Baxter, 131 N. C. 65, 42 S. E. 456; Cole v. Neustadler, 22 Ore. 191, 29 Pac. 550; Fry v. McCord, 95 Tenn. 678, 33 S. W. 568; Hofflund v. Journal Co., 88 Wis. 369, 60 N. W. 263; People v. Jerome, 1 Mich. 142; Legg v. Dunlevy, 80 Mo. 558, 50 Am. Rep. 512.

[48] Quoted and held correct in Hollenbeck v. Ristine, 105 Ia. 488, 490, 75 N. W. 355, 67 Am. St. Rep. 306. But see Reid v. Providence Journal Co., 20 R. I. 120, 37 Atl. 637.

ducement, both in order to show that the words are defamatory and to render the charge intelligible and certain.[49] If the language is not actionable on its face and no extraneous facts are alleged, the action must fail.[50] It is immaterial how the imputation is conveyed, whether by a direct charge, or by insinuation or by means of some hidden or covert meaning in the words.[51] Even the truth may be so stated as to imply a criminal charge and render the author liable.[52]

In determining whether the words charged are libelous *per se*, they are to be taken in their plain and natural import according to the ideas they are calculated to convey to those to whom they are addressed, reference being had not only to the words themselves, but also to the circumstances under which they were used.[53] They should receive a fair and reasonable construction,[54] and will be presumed to have been used in the ordinary import attached to them in the community in which they were uttered or published.[55] In interpreting the language, it is not a question of the intent of the speaker

[49] Hearne v. De Young, 119 Cal. 670, 52 Pac. 150, 499; McLaughlin v. Fisher, 136 Ill. 111, 24 N. E. 60; Freeman v. Sanderson, 123 Ind. 264, 24 N. E. 239; Garrett v. Bissell Chilled Plow Works, 154 Ind. 319, 56 N. E. 667; Lyons v. Stratton, 102 Ky. 317, 43 S. W. 446; Traynor v. Sielaff, 62 Minn 420, 64 N. W. 915; Kingsbury v. Bradstreet Co., 116 N. Y. 211, 22 N. E. 365; Richmond v. Loeb, 19 R. I. 120, 32 Atl. 167; Clute v. Clute, 101 Wis. 137, 76 N. W. 1114. Words spoken in a foreign language should be pleaded as spoken, with a translation. Heeney v. Kilbane, 59 Ohio St. 499, 53 N. E. 262.

[50] Quinn v. Prudential Ins. Co., 116 Ia. 522, 90 N. W. 349.

[51] Republican Pub. Co. v. Miner, 3 Colo. App. 568, 34 Pac. 485; Covington v. Roberson, 111 La. 926, 35 So. 586; Hanchett v. Chiatovitch, 101 Fed. 742, 41 C. C. A. 648.

[52] Democrat Pub. Co. v. Jones, 83 Tex. 302, 306, 18 S. W. 652; Behre v. National Cash Register Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320. But see Haynes v. Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

[53] Stewart v. Pierce, 93 Ia. 136, 61 N. W. 388; Emerson v. Miller, 115 Ia. 315, 88 N. W. 803; Mudd v. Rogers, 102 Ky. 280, 43 S. W. 255; Boynton v. Shaw Stocking Co., 97 Mass. 219; Beneway v. Thorpe, 77 Mich. 181, 43 N. W. 863; Pokrok Zapader Pub. Co. v. Zizkovsky, 42 Neb. 64, 60 N. W. 358; Urban v. Helmick, 15 Wash 155, 45 Pac. 747; Pandow v. Eichsted, 90 Wis. 298, 63 N. W. 284.

[54] Walker v. Hawley, 56 Conn. 559, 16 Atl. 674.

[55] Reid v. Providence Journal Co., 20 R. I. 120, 37 Atl. 367,

or author, or even of the understanding of the plaintiff, but of the understanding of those to whom the words are addressed, and of the natural and probable effect of the words upon them.[56] It is no defense that no harm was intended or that the words were used in jest.[57] A person is presumed to intend the natural consequences of his acts and defamation consists solely in the effect produced upon the minds of third parties.[58]

If the language is plain and free from ambiguity it is solely a question for the court whether it is actionable.[59] Otherwise its construction and meaning is a question of fact for the jury.[60] The whole article or conversation is to be considered in determining whether any part is libelous.[61] Where a libel-

Harkness v. Chicago Daily News Co., 102 Ill. App. 162; Wilcox v. Moon, 63 Vt. 481, 22 Atl. 80; Herringer v. Ingberg, 91 Minn. 71, 97 N. W. 460.

[56] Arnott v. Standard Ass'n, 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69; Irlbeck v. Bierle, 84 Ia. 47, 50 N. W. 36; Ellis v. Whitehead, 95 Mich. 105, 54 N. W. 752; Barr v. Beikner, 44 Neb. 197, 62 N. W. 494; Goebeler v. Wilhelm, 17 Pa. Supr. Ct. 432; Wilcox v. Moon, 63 Vt. 481, 22 Atl. 80. In Lally v. Emery, 54 Hun, 517, 8 N. Y. S. 135, it is held that the defendant may testify as to his intent.

[57] Williams v. McKee, 98 Tenn. 139, 38 S. W. 730.

[58] Hamlin v. Fanti, 118 Wis. 594, 95 N. W. 955.

[59] Mosier v. Stoll, 119 Ind. 244, 20 N. E. 754; Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; Fry v. McCord Bros., 95 Tenn. 678, 33 S. W. 568; Colulla v. Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; Norton v. Livingston, 64 Vt. 473, 24 Atl. 247; Urban v. Helmick, 15 Wash. 155, 45 Pac. 747; Hamlin v. Fanti, 118 Wis. 594, 95 N. W. 955.

[60] Arnott v. Standard Ass'n, 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69; Rutherford v. Paddock, 180 Mass. 289, 62 N. E. 381, 91 Am. St. Rep. 282; Loranger v. Loranger, 115 Mich. 681, 74 N. W. 228; Zier v. Hofflin, 33 Minn. 66, 53 Am. Rep. 9; Colulla v. Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; Norton v. Livingston, 64 Vt. 473, 24 Atl. 247; Hanchett v. Chiatovitch, 101 Fed. 742, 41 C. C. A. 648; Morse v. Times-Republican Print. Co., 124 Ia. 707, 100 N. W. 867; Jensen v. Damm, 127 Ia. 555; Call v. Hayes, 169 Mass. 586, 48 N. E. 777; Ewing v. Ainger, 96 Mich. 587, 55 N. W. 996; McGinnis v. Knapp, 109 Mo. 131, 18 S. W. 1134; Warner v. Southall, 165 N. Y. 496, 59 N. E. 269.

[61] Searcy v. Sudhoff, 84 Ill. App. 148; Mosier v. Stoll, 119 Ind. 244, 20 N. E. 752; Kilgour v. Evening Star Co., 96 Md. 16, 53 Atl. 716; Norton v. Livingston, 64 Vt. 473, 24 Atl. 247; Kidd v. Ward, 91 Ia. 371, 377, 59 N. W. 279.

ous article does not name or identify the person referred to, it is proper to give in evidence all the surrounding circumstances and other extraneous facts which tend to show that the plaintiff was referred to or intended.[62] Whether witnesses who have read the article may state to whom they understood it to refer, is a question involved in some doubt.[63] Where the article names the person referred to and there are two persons of that name, of whom the plaintiff is one, it is a question of fact whether the words were spoken of and concerning the plaintiff and, if not, he has no cause of action, though he may suffer harm therefrom.[64] But in determining this question it is not simply a question of intent on the part of the defendant. If he intended the plaintiff, or if for want of due care and diligence in ascertaining the facts, the matter is put in such a way that it might be naturally and reasonably inferred that he was intended, then in either case he is liable.[65] Where the charge is against a family or class of persons, any one of the family or class may have an action if the jury find that the words have a personal application to him and that he is included in the class.[66]

§ 114. **The colloquium and innuendo.** "The colloquium is a statement of facts going to make language defamatory

[62] Colvard v. Black, 110 Ga. 642, 36 S. E. 80; Holmes v. Clisby, 118 Ga. 820, 45 S. E. 684; McLaughlin v. Schnellbacher, 65 Ill. App. 50; Van Ingen v. Mail & Express Pub. Co., 156 N. Y. 376, 50 N. E. 979; Palmer v. Bennett, 83 Hun, 220, 31 N. Y. S. 567; Houston Printing Co. v. Mouldin, 15 Tex. Civ. App. 574, 41 S. W. 381.

[63] Cases holding such evidence to be competent: Holmes v. Clisby, 118 Ga. 820, 45 S. E. 684; Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628; Enquirer Co. v. Johnston, 72 Fed. 443, 18 C. C. A. 628; Prosser v. Callis, 117 Ind. 105, 19 N. E. 735. *Contra*, Stokes v. Morning Journal Ass'n, 66 App. Div. 569, 73 N. Y. S. 245; Argabright v. Jones, 46 W. Va. 144, 32 S. E. 995.

[64] Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856.

[65] Clark v. North Am. Co., 203 Pa. St. 346, 53 Atl. 237; Hulbert v. New Nonpareil Co., 111 Ia. 490, 82 N. W. 928; Davis v. Marxhausen, 86 Mich. 281, 49 N. W. 50; Davis v. Marxhausen, 103 Mich. 315, 61 N. W. 504; Farley v. Evening Chronicle Pub. Co., 113 Mo. App. 216.

[66] Prosser v. Callis, 117 Ind. 105, 19 N. E. 735; Boehmer v. Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822, 34 Am. St. Rep. 318.

which in itself is either innocent or in its ordinary sense not clearly defamatory; while the innuendo serves to remove an obscurity, as by pointing the application of language shown by the colloquium to be defamatory or defamatory in its own terms."[67] The innuendo cannot be made to supply the place of a colloquium.[68] The innuendo cannot change, enlarge, extend or add to the sense or effect of the words declared on, or properly impute to them a meaning, which the publication, either in itself, or taken in connection with the facts stated in the inducement and colloquium, does not warrant or fairly imply.[69] If the words are incapable of a defamatory meaning, they cannot be made so by innuendo.[70] Whether the words are capable of the defamatory meaning ascribed to them in the innuendo, is a question of law for the court.[71] When the words in themselves are actionable *per se* no innuendo is needed,[72] and if the innuendo alleged is not borne out by the

[67] Odgers, Slander and Libel, p. 100, Bigelow's note; McLaughlin v. Fisher, 136 Ill. 111, 24 N. E. 60; Wood's Starkie on Slander, *349–*355; Townshend on Slander, p. 171.

[68] McLaughlin v. Fisher, 136 Ill. 111, 24 N. E. 60; Starkie on Slander, p. *355; Townshend on Slander, p. 161; Freeman v. Sanderson, 123 Ind. 264, 24 N. E. 239; Emig v. Daum, 1 Ind. App. 146.

[69] Gaither v. Advertiser Co., 102 Ala. 458, 14 So. 788; Central of Georgia Ry. Co. v. Sheftall, 118 Ga. 865, 45 S. E. 687; Quinn v. Prudential Ins. Co., 116 Ia. 522, 90 N. W. 349; Craig v. Pyles, 101 Ky. 593, 39 S. W. 33; Bearce v. Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; Lewis v. Daily News Co., 81 Md. 466, 32 Atl. 246, 29 L. R. A. 59; Kilgour v. Evening Star Co., 96 Md. 16, 53 Atl. 716; Herringer v. Ingberg, 91 Minn. 71, 97 N. W. 460; Cole v. Neustadter, 22 Ore. 191, 29 Pac. 550; Price v. Conway, 134 Pa. St. 340, 19 Atl. 687, 19 Am. St. Rep. 704, 8 L. R. A. 193; Naulty v. Bulletin Co., 206 Pa. St. 128, 55 Atl. 862; Hackett v Providence Tel. Pub. Co., 18 R. I. 589, 29 Atl. 143; Moss v. Harwood, 102 Va. 386, 46 S. E. 385.

[70] Walford v. Herald Printing & Pub. Co., 133 Ind. 372, 32 N. E. 929; Wallace v. Homestead Co., 117 Ia. 348, 90 N. W. 835; Vickers v. Stoneman, 73 Mich. 419, 41 N. W. 495.

[71] McDonald v. Lord, 27 Ill. App. 111; Herrick v. Tribune Co., 108 Ill. App. 244; Naulty v. Bulletin Co., 206 Pa. St. 128, 55 Atl. 862.

[72] Central of Georgia Ry. Co. v. Sheftall, 118 Ga. 865, 45 S. E. 687; Bourreseau v. Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320; Collins v. Dispatch Pub. Co., 152 Pa. St. 187, 25 Atl. 546, 34 Am. St Rep. 636.

words, it may be treated as surplusage and a recovery had on the words themselves.[73]

§ 115. **Truth as a defense.** The truth of the injurious charge is a defense to a civil action, though it is not always a defense to a criminal prosecution. But even in a civil suit it is necessary to plead it specially.[74] The law implies the falsehood of a damaging charge, and will not suffer it to be brought in question unless the plaintiff by the pleadings is apprised of the purpose to do so. Where the charge complained of imputes to the plaintiff criminal conduct, and the truth is relied upon as a justification, it is sufficient to support the plea by a preponderance of evidence; it is not necessary that the crime be made out beyond a reasonable doubt.[75]

[73] Haynes v. Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119; Morrison v. Smith, 177 N. Y. 366, 69 N. E. 725; Brown v. Tribune Ass'n, 74 App. Div. 359, 77 N. Y. S. 461; Martin v. Press Pub. Co., 93 App. Div. 531, 87 N. Y. S. 859; Collins v. Dispatch Pub. Co., 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. Rep. 636; Brown v. Providence Tel. Pub. Co., 25 R. I. 117, 54 Atl. 1061; Jones v. Roberts, 73 Vt. 201, 50 Atl. 1071; Payne v. Tancil, 98 Va. 262, 35 S. E. 725; Culmer v. Canby, 101 Fed. 195, 41 C. C. A. 302. For a qualification of the rule, see Hilder v. Brooklyn Daily Eagle, 45 Misc. 165, 91 N. Y. S. 983. In Herrick v. Tribune Co., 108 Ill. App. 244, it is held that the plaintiff cannot reject the meaning given in the innuendo and resort to another meaning without amendment.

[74] Porter v. Botkins, 59 Pa. St. 484; Barns v. Webb, 1 Tyler, 17; Hutchinson v. Wheeler, 35 Vt. 330; Thomas v. Dunaway, 30 Ill. 373; Wormouth v. Cramer, 3 Wend. 395, 20 Am. Dec. 706; Beardsley v. Bridgman, 17 Ia. 290; Huson v. Dale, 19 Mich. 17; Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156; Kelley v. Dillon, 5 Ind. 426; Knight v. Foster, 39 N. H. 576; Jarnigan v. Fleming, 43 Miss. 710, 5 Am. Rep. 514; Bourland v. Eidson, 8 Gratt. 27; Scott v. McKinnish, 15 Ala. 662; Donaghue v. Gaffy, 53 Conn. 43; Continental Nat. Bank v. Bowdre, 92 Tenn. 723, 23 S. W. 131. If, however, the communication was privileged, so as not to be actionable, in the absence of malice, the truth may be shown without being pleaded. Chapman v. Calder, 14 Pa. St. 365; Edwards v. Chandler, 14 Mich. 471, 90 Am. Dec. 249.

[75] Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204; Matthews v. Huntley, 9 N. H. 146; Kincade v. Bradshaw, 3 Hawks, 63; McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465; Riley v. Norton, 65 Ia. 306, overruling earlier cases in Iowa; Express, etc., Co. v. Copeland, 64

This is a general rule where the question of criminality is made an issue in a civil suit; it is sufficient to establish it by such evidence as would support any other fact involved in a civil controversy.[76] Some cases, however, dissent from this doctrine, and require the same strict proof of the charge that would be required if the party were on trial for the alleged crime; that is, of guilt beyond a reasonable doubt.[77] When the truth is relied upon as a defense, it must be proved substantially as laid.[78] The rule of the common law is, that an unsuccessful attempt to justify may be taken into account in aggravation of damages,[79] but this rule is abolished by statute in some states. It is no defense that the defendant believed in good faith that the charge was true and that he had reasonable and probable grounds for such belief.[80] "A per-

Tex. 354; Atlanta Journal v. Mayson, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104.

[76] Schmidt v. N. Y. Union Ins. Co., 1 Gray, 529; Gordon v. Parmelee, 15 Gray, 413; Scott v. Home Ins. Co., 1 Dill. 105; Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Washington Ins. Co. v. Wilson, 7 Wis. 169; Blaeser v. Milwaukee, etc., Ins. Co., 37 Wis. 31, 19 Am. Rep. 747; Knowles v. Scribner, 57 Me. 495; Marshall v. Thames, etc., Ins. Co., 43 Mo. 586; Rothschild v. Am. Cent. Ins. Co., 62 Mo. 356.

[77] Chalmers v. Shackell, 6 C. & P. 475; Thurtell v. Beaumont 1 Bing. 339; Willmett v. Hanner, 8 C. & D. 695; Fountain v. West, 23 Ia. 9. 92 Am. Dec. 405; Ellis v. Lindley, 38 Ia. 461; Tucker v. Call, 45 Ind. 31.

[78] Carpenter v. Bailey, 56 N. H. 283; Evarts v. Smith, 19 Mich. 55; Whittemore v. Weiss, 33 Mich. 348; Palmer v. Smith, 21 Minn. 419; Sheehey v. Cokley, 43 Ia. 183, 22 Am. Rep. 236.

[79] Root v. King, 7 Cow. 613; Gorman v. Sutton, 32 Pa. St. 247; Updegrove v. Zimmerman, 13 Pa. St. 619; Freeman v. Tinsley, 50 Ill. 497; Cavanaugh v. Austin, 42 Vt. 576; Westerfield v. Scripps, 119 Cal. 607, 51 Pac. 958; Coffin v. Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732.

[80] Cox v. Strickland, 101 Ga. 482, 28 S. E. 655; Blocker v. Schoff, 83 Ia. 265, 48 N. W. 1079; Lehrer v. Elmore, 100 Ky. 56, 37 S. W. 292; Louisville Press Co. v. Tennelly, 105 Ky. 365, 49 S. W. 15; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; Long v. Tribune Printing Co., 107 Mich. 207, 65 N. W. 108; Pokrok Zapader Pub. Co. v. Zizkowsky, 42 Neb. 64, 60 N. W. 358; Stuart v. News Pub. Co., 67 N. J. L. 317, 51 Atl. 709; Morey v. Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621; Patten v. Belo, 79 Tex. 41, 14 S. W. 1037.

son publishes libelous matter at his peril."[81] The defendant cannot justify the charge as a joke, for one jests at his peril with the reputation of another.[82] When the defendant pleads a justification he has the burden of proof and is entitled to the open and close.[83]

§ 116. Malice. The definitions of slander and libel usually include malice as one of the necessary ingredients. From what has already appeared, however, it is manifest that they must employ this word in some other than the ordinary sense. In many cases of aggravated injury, there is really no malice at all, and no intent to injure; at most, there is only thoughtlessness or negligence; as where one thoughtlessly repeats a rumor, or a newspaper publisher copies from some other paper an article concerning a stranger, which he supposes to be true, but which is not so in fact. Sometimes there is not even negligence; as where a publisher has taken all reasonable precautions to prevent untrue and injurious publications, and one nevertheless creeps in as the result of accidental circumstances. In all such cases the absence of malice may be important to protect one against exemplary damages; but it cannot bar the action. It seems misleading, therefore, to employ the terms malice, and malicious, in defining these wrongs; and, in a legal sense, as used they can only mean that the false and injurious publication has been made without legal excuse.[84] One may be excused in morals and yet not in law;

[81] Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97. The defendant published an item in its paper that plaintiff "was jailed last night on a charge of horse stealing." It was held that the defendant could only justify by proving the charge true, not by proving that it was made. Houston Printing Co. v. Dement, 18 Tex. Civ. App. 30, 44 S. W. 558.

[82] Triggs v. Sun Printing & Pub. Co., 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612

[83] Stallings v. Whittaker, 55 Ark. 494, 18 S. W. 829; Palmer v. Adams, 137 Ind. 72, 36 N. E. 695; Stith v. Fullinwider, 40 Kan. 73, 19 Pac. 314.

[84] Lewis v. Daily News Co., 81 Md. 466, 473, 32 Atl. 246, 29 L. R. A. 59. See also Long v. Tribune Printing Co., 107 Mich. 207, 65 N. W. 108. "Malice has always been divided into two kinds: implied malice, or malice in law, and express malice or malice in fact. The first is shown by mere proof of the unauthorized use of the defamatory words charged. The

it is the protection of the party injured the law aims at, not the punishment of bad motive instigating bad action in the party injuring him.[85] "Evidence of other or similar slanderous words, spoken at other times and places, is admissible to show that the words charged in the complaint were spoken with malice and ill-will."[86] So of repetitions of the slander charged by the defendant whether before or after the occasion sued for, or before or after suit commenced.[87]

§ 117. **Privilege in general.** The general doctrine of privilege, as applied to actions for libel and slander, is founded upon the reasonable view that in the intercourse between members of society, and in proceedings in legislative bodies and in courts of justice, occasions arise when it becomes neces-

second may be shown by the acts or conduct of the defendant immediately accompanying the utterance of the words or by the utterance at other times of other and similar defamatory words, having reference to the subject-matter of the words charged." Gambrill v. Schooley, 95 Md. 260, 289, 52 Atl. 500. That malice is implied from the falsity of the charge, see Hatch v. Potter, 7 Ill. 725, 43 Am. Dec. 88; Pennington v. Meeks, 46 Mo. 217; King v. Root, 4 Wend. 113, 21 Am. Dec. 102; Gaines v. Belding, 56 Ark. 100, 19 S. W. 236; Harris v. Zazone, 93 Cal. 59, 28 Pac. 845; Heintz v. Graupner, 138 Ill. 158, 27 N. E. 935; McDonald v. Nugent, 122 Ia 651, 98 N. W. 506; Evening Post Co. v. Richardson, 113 Ky. 641, 68 S. W. 655; Savoil v. Scanlan, 43 La. Ann. 967, 9 So. 916, 26 Am. St. Rep. 200; Thomas v. Bowen, 29 Ore. 258, 45 Pac. 768.

[85] "Malice, in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." Bayley, J., in Bromage v. Prosser, 4 B. & C. 255. Malice is alleged in the declaration, "rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose." Abbott, Ch. J., in Duncan v. Thwaites, 3 B. & C. 556, 585. See Moore v. Stevenson, 27 Conn. 14; Barr v. Moore, 87 Pa. St. 385, 30 Am. Rep. 367; Maclean v. Scripps, 52 Mich. 214.

[86] Casey v. Hulgan, 118 Ind. 590, 21 N. E. 322; Freeman v. Sanderson, 123 Ind. 264, 24 N. E. 239; Barker v. Prizer, 150 Ind. 4, 48 N. E. 4; Frederickson v. Johnson, 60 Minn. 337, 62 N. W. 388; Enos v. Enos, 135 N. Y. 609, 32 N. E. 123. See Gambrill v. Schooley, 95 Md. 260, 52 Atl. 500.

[87] Noeninger v. Vogt, 88 Mo. 589; Reitan v. Goebel, 33 Minn. 151; Ward v. Dick, 47 Conn. 300; Westerfield v. Scripps, 119 Cal. 607, 51 Pac. 958; Bailey v. Bailey, 94 Ia. 598, 63 N. W. 341; Conant v. Leslie, 85 Me. 257, 27 Atl. 147; Davis v. Starrett, 97 Me. 568, 55 Atl. 516; Gambrill v. Schooley, 95 Md. 260, 52 Atl. 500.

sary or proper that the character and acts of individuals should be considered and made the subject of statement or comment, and that, in the interests of society, a party making disparaging statements in respect to another on such a lawful occasion, should not be subject to civil responsibility in an action of this character, although such statements are untrue.[88] The doctrine of privilege, therefore, rests upon public policy.[89] A privileged communication is founded upon a privileged occasion, and, strictly speaking, it is the occasion that is privileged, rather than the communication.[90] The occasion affords the privilege of making the communication, and the same communication is privileged or not according to the occasion on which it is made. Privileged occasions are divided into two classes with reference to the extent of the privilege afforded, those absolutely privileged and those conditionally privileged.[91] The distinction between the two classes is well stated in the case last referred to, as follows: "The general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly and with express malice, impose no liability for damages recoverable in an action of slander; while such words spoken upon an occasion only conditionally privileged, impose such liability, if spoken with what is called express malice." [92]

§ 118. **Cases of absolute privilege—Judicial proceedings.** No action will lie against a witness in a judicial proceeding at the suit of the party injured by his false testimony, even though malice be charged; but he must be left to be dealt with by the criminal law.[93] The rule assumes, however, that he

[88] Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753.

[89] Wilson v. Sullivan, 81 Ga. 238, 7 S. E. 234; Abbott v. National Bank of Commerce, 20 Wash. 552, 56 Pac. 376.

[90] Atwater v. Morning News Co., 67 Conn. 504, 516, 34 Atl. 865.

[91] Blakeslee v. Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106.

[92] See Buisson v. Huard, 106 La. 768, 31 So. 293, 56 L. R. A. 296; Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775.

[93] Revis v. Smith, 18 C. B. 126; Henderson v. Broomhead, 4 H. & N. 569; Seaman v. Netherclift, 1 C. P. Div. 540; affirmed on appeal, 2 C. P. D. 53; Marsh v. Ellsworth, 50 N. Y. 309; Terry v. Fellows, 21 La. Ann. 375; Smith v. Howard, 28 Ia. 51; Liles v. Gaster, 42 Ohio St. 631; Hutchinson v. Lewis, 75 Ind. 55; Chambliss v. Blau, 127 Ala. 86, 28 So. 602; McDavitt

will not wander from the case in giving his testimony, and abuse his privilege by testifying to that which is impertinent and immaterial, and which has not been called out by questions of counsel.[94] The case of jurors speaking freely to their fellows in the consultations of the jury-room, concerning the proper subject-matter of their deliberations, is one of like protection.[95] So of remarks made by a justice of the peace while acting judicially.[96] The case of the party presenting

v. Boyer, 169 Ill. 475, 48 N. E. 317; Hunckel v. Voneiff, 69 Md. 179, 17 Atl. 1056, 9 Am. St. Rep. 413; Laing v. Mitten, 185 Mass. 233, 70 N. E. 128; Acre v. Starkweather, 118 Mich. 214, 76 N. W. 379; Cooper v. Phipps, 24 Ore. 357, 33 Pac. 985. What a witness says in testimony is privileged, even if the court attempted to stop him, provided he had a right to say it as an explanatory part of an answer he had made. Seaman v. Netherclift, 1 C. P. Div. 540; S. C. 18 Moak, 176. The privilege of the witness is held to extend to statements made to the party and his solicitor in preparing the case for trial. Watson v. McEwan, (1905) A. C. 480. Statements of a witness to the grand jury, or to the prosecuting attorney in his official capacity are privileged. Schultz v. Strauss, 127 Wis. 325.

[94] White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 504; Calkins v. Sumner, 13 Wis. 193, 80 Am. Dec. 738; Kidder v. Parkhurst, 3 Allen, 393; Smith v. Howard, 28 Ia. 51; Barnes v. McCrate, 32 Me. 442; Shadden v. McElwee, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821; Laing v. Mitten, 185 Mass. 233, 70 N. E. 128; Clemmons v. Danforth, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836. The words of a witness are *prima facie* privileged and the burden is on the plaintiff to show that they are not pertinent and were spoken maliciously. Cooper v. Phipps, 24 Ore. 357, 33 Pac. 985. Though impertinent, yet if spoken in good faith and without malice, then privileged. Shadden v. McElwee, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821. In Cricelius v. Bierman, 59 Mo. App. 513, it is held to be a question whether the witness had reasonable grounds to believe the matter pertinent and did so believe and that that is a question for the jury. In another case the test has been said to be whether they were spoken by the witness without being stopped by the court or counsel, and under the supposition that they were relevant. Steinecke v. Marx, 10 Mo. App. 580. In Hunckel v. Voneiff, 69 Md. 179, 17 Atl. 1056, 9 Am. St. Rep. 413, the testimony of a witness is held to be absolutely privileged, whether pertinent or responsive or not, and though false and malicious. The privilege in any case ceases as soon as the trial is over. McDavitt v. Boyer, 67 Ill. App. 452.

[95] Dunham v. Powers, 42 Vt. 1; Rector v. Smith, 11 Ia. 302.

[96] Law v. Llewellyn, (1906) 1 K. B. 487.

his case to court or jury, or of counsel standing in his place doing the same, is also one of absolute privilege.[97] The limit of this privilege, as said in one case is "that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the cases and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions."[98] The protection of the rule extends to evidence given before a military court of inquiry,[99] a legislative committee,[1] a referee,[2] and in other like proceedings.[3]

[97] Maulsby v. Reifsneider, 69 Md. 143, 14 Atl. 505; Sickles v. Kling, 60 App. Div. 515, 69 N. Y. S 944; Munster v. Lamb, 11 Q. B. D. 588. Communications between client and counsel are privileged. Wood v. Thornly, 58 Ill. 464. Where an attorney prepared questions which he intended to submit to a proposed witness and had them printed, it was held that they were privileged unless manifestly immaterial, and they were held privileged in this instance. Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265.

[98] Hoar v. Wood, 3 Met. 193. See, also, Brook v. Montague, Cro. Jac. 90; Hodgson v. Scarlett, 1 B. & Ald. 232; McMillan v. Birch, 1 Binn. 178, 2 Am. Dec. 426; Ring v. Wheeler, 7 Cow. 725; Hastings v. Lusk, 22 Wend. 410, 34 Am. Dec. 330; Mower v. Watson, 11 Vt. 536, 34 Am. Dec. 704; Lea v. White, 4 Sneed, 111, 67 Am. Dec. 579; Marshall v. Gunter, 6 Rich. 419; Ruohs v. Backer, 6 Heisk. 395, 19 Am. Rep. 598; Lester v. Thurmond, 51 Ga. 118; Jennings v. Paine, 4 Wis. 358; Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49; Brow v. Hathaway, 13 Allen, 239.

[99] Dawkins v. Lord Rokeby, L. R. 8 Q. B. 255. Same case, on appeal, 7 Eng. and Irish Appeal Cases, 744.

[1] Wright v. Lothrop, 149 Mass. 385, 21 N. E. 963; Sheppard v. Bryant, 191 Mass. 591; Goffin v. Donnelly, L. R. 6 Q. B. D. 307.

[2] Nissen v. Cramer, 104 N. C. 574, 10 S. E. 676, 6 Am. St. Rep. 780.

[3] Barratt v. Kearns, (1905) 1 K. B. 504. A court, in admitting attorneys to the bar, acts in a judicial capacity and a letter addressed to it and protesting against the admission of a candidate upon grounds which involve libelous charges, is absolutely privileged. Wilson v. Whitacre,

The pleadings and other papers filed by parties in the course of judicial proceedings, are privileged, so long as they do not wander from what is material to libel parties.[4] So are affidavits made for commencing proceedings before magistrates, and the preliminary proceedings and information taken or given for bringing supposed guilty parties to justice.[5] The general rule may be stated to be that pertinent matter in pleadings, motions, affidavits and other papers in any judicial proceeding, is absolutely privileged, though false and malicious, but that matter which is clearly impertinent and

4 Ohio C. C. 15. And where upon an inquiry as to whether a person should be committed as a dipsomaniac, an inebriate or insane, the certificate of two physicians was required, in addition to other evidence, it was held that the certificate was entitled to the same privilege as the testimony of a witness in court. Niven v. Boland, 177 Mass. 11, 58 N. E. 282, 52 L. R. A. 786. Testimony before a committee of a common council is conditionally privileged. Blakeslee v. Carroll, 64 Conn. 223, 239, 29 Atl. 473, 25 L. R. A. 106. And see Meteye v. Times Democrat Pub. Co., 47 La. Ann. 824, 17 So. 314; McLaughlin v. Charles, 60 Hun, 239, 14 N. Y. S. 608.

[4] Astley v. Younge, 1 Burr. 807; Henderson v. Broomhead, 4 H. & N. 570; Wyatt v. Buell, 47 Cal. 624; Vausse v. Lee, 1 Hill (S. C.), 197, 26 Am. Dec. 168; Lea v. White, 4 Sneed, 111; Garr v. Selden, 4 N. Y. 91; Hardin v. Cumstock, 2 A. K. Marsh. 480, 12 Am. Dec. 427; Strauss v. Meyer, 48 Ill. 385; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Vinas v. Merch., etc., Co., 33 La. Ann. 1265; McLaughlin v. Cowley, 127 Mass. 316; 131 Mass. 70; Prescott v. Tousey, 53 N. Y. Sup. Ct. 56; though the complaint is dismissed. Dada v. Piper, 41 Hun, 254. A petition alleging misconduct in office filed by a receiver against his co-receiver in the action in which they were appointed is privileged. Bartlett v. Reifsnider, 69 Md. 219, 14 Atl. 518. A bill in chancery prepared by counsel and sworn to, but never filed, is privileged. Burnham v. Roberts, 70 Ill. 19.

[5] Allen v. Crofoot, 2 Wend. 515, 20 Am. Dec. 647; Hartock v. Reddick, 6 Blackf. 255; Briggs v. Byrd, 12 Ired. 377. See Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736; Eames v. Whittaker, 123 Mass. 342; Burke v. Ryan, 36 La. Ann. 951; Graham v. Cass Circuit Judge, 108 Mich. 425, 66 N. W. 348. But see Kelly v. Lafitte, 28 La. Ann. 435. So an affidavit that a constable is unfit to select a jury. Rainbow v. Benson, 71 Ia. 301, 32 N. W. 352. In Pierce v. Sard, 23 Neb. 828, 37 N. W. 677, it is held that to render privileged statements made to a magistrate charging a crime they must be based on reasonable and probable cause.

irrelevant and also false and malicious, is actionable.[6] Whether matter is pertinent is a question for the court,[7] and, in determining the question, no strained, technical or close construction will be indulged in to deprive the defendant of the protection of privilege.[8] The rule extends to the pleadings in proceedings before the Interstate Commerce Commission.[9]

§ 119. Same—Legislative proceedings. A legislator has a protection which is even more complete and absolute, because, in his case, it is not permitted to question elsewhere what he may have said in speech or debate, except for the purposes of political redress in elections. It is customary in the American constitutions to declare this exemption from responsibility in positive terms; but it exists independent of such declaration as a necessary principle in free government; and this has been recognized ever since the case of the six members, whom an attempt was made to arrest and punish for their action in Parliament in the time of Charles the First.

[6] Harlow v. Carroll, 6 App. D. C. 128; Wilson v. Sullivan, 81 Ga. 238, 7 S. E. 234; Conley v. Key, 98 Ga. 115, 25 S. E. 914; Gaines v. Aetna Ins. Co., 104 Ky. 695, 47 S. W. 884; Ash v. Zwietusch, 159 Ill. 455, 42 N. E. 854; Hawk v. Evans, 76 Ia. 593, 41 N. W. 368, 14 Am. St. Rep. 247; Randall v. Hamilton, 45 La. Ann. 1184, 14 So. 73, 22 L. R. A. 649; Gardemal v. McWilliams, 43 La. Ann. 454, 9 So. 106, 26 Am. St. Rep. 195; Bartlett v. Christhilf, 69 Md 219, 14 Am. St. Rep. 518; Hartung v. Shaw, 130 Mich. 177, 89 N. W. 701; Sherwood v. Powell, 61 Minn. 479, 63 N. W. 1103, 52 Am. St. Rep. 614, 29 L. R. A. 153; Jones v. Brownlee, 161 Mo. 258, 61 S. W. 795, 53 L. R. A. 445; Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753; Crockett v. McLanahan, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914; Abbott v. National Bank of Commerce, 20 Wash. 552, 56 Pac. 376; Union Mut. Life Ins. Co. v. Thomas, 83 Fed. 803, 28 C. C. A 96; McGehee v. Insurance Co., 112 Fed. 853, 50 C. C. A. 551; and cases cited in last two notes Compare Randall v. Hamilton, 45 La. Ann. 1184, 14 So. 73, 22 L. R A. 649; Wimbish v. Hamilton, 47 La. Ann. 246, 16 So. 856.

[7] Jones v. Brownlee, 161 Mo 258, 61 S. W. 795, 53 L. R. A. 445.

[8] Gardemal v. McWilliams, 43 La. Ann. 454, 9 So. 106, 26 Am St. Rep. 195; Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 426, 25 N. E. 1048, 11 L. R. A 753. In Burdette v. Argile, 94 Ill App. 171, it is implied that if the defendant in good faith believes the matter material and pertinent there is no malice and consequently no liability.

[9] Duncan v. Atchison, R. Co., 72 Fed. 808, 19 202.

It is not permissible in the case of legislators, to raise the question whether what they may have said or written was or was not pertinent to what was before them for official action; it is enough that at the time they were acting as legislators, either at the sessions of the House of which they were members, or upon one of its committees.[10]

The proceedings of common councils, county boards and other like bodies are only conditionally privileged.[11] What is said by members of such bodies while in session, in good faith in reference to business or questions pending and under consideration, is privileged.[12] Remarks volunteered when no motion or other business is pending are held not to be privileged.[13] The passage of a resolution outside the duty or province of such a body is not privileged.[14] An unnecessary and libelous preamble attached to a proper resolution was held to render the members liable.[15] A veto message of a mayor to his city council was held absolutely privileged, as to all pertinent matter.[16] Proceedings at a town meeting are in the same category as those of councils, and the like. What is said at such meetings in reference to matters under consideration, is conditionally privileged.[17]

§ 120. Same—Executive acts. The executive of a nation and the governors of the several states are exempt from responsibility to individuals for their official utterances. So are all judges

[10] Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189; State v. Burnham, 9 N. H. 34; Perkins v. Mitchell, 31 Barb. 461.

[11] Blakeslee v. Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106; Henry v. Moberly, 6 Ind. App. 490, 33 N. E. 981; Buckstaff v. Hicks, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853; Pittard v. Oliver, (1891) 1 Q. B. 474; Royal Aquarium, etc., Soc. v. Parkinson, (1892) 1 Q. B. 431.

[12] Ibid.

[13] Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; McGaw v. Hamilton, 184 Pa. St. 108, 39 Atl. 4.

[14] Treffy v. Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961, 73 Am St. Rep. 330.

[15] Mauk v. Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477.

[16] Trebilcock v. Anderson, 117 Mich. 39, 75 N. W. 129. In Greenwood v. Colby, 26 Neb. 449, 42 N. W. 413, a communication by the mayor to the council is impliedly held to be only conditionally privileged.

[17] Bradford v. Clark, 90 Me. 298, 38 Atl. 229.

of courts and judicial officers, while acting within the limits of their jurisdiction.[18] In one case it is said that acts of state and acts done in the exercise of military and naval authority are absolutely privileged.[19]

§ 121. Qualified or conditional privilege. "Qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty; and embraces cases where the duty is not a legal one, but is of a moral or social character, of imperfect obligation."[20] A privileged communication may be defined as one made on a privileged occasion and within the scope of the privilege which the occasion creates or justifies.[21] If it goes beyond or outside the privilege and is defamatory in respect to such excess, then the excess is not protected by the privilege and an action will lie.[22] A privileged occasion is one where a person has a right or duty, recognized by law, to make a communication which, but for the occasion, would be actionable.[23] Such right or duty exists

[18] Townshend on Slander and Libel, § 227; Scott v. Stansfield, L. R. 3 Exch. 220. If an alleged libel is a part of a justice's return, it is privileged whether his motive was good or bad, if the return is made under a belief, though erroneous, that the matter was relevant. Aylesworth v. St. John, 25 Hun, 156.

[19] Blakeslee v. Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106.

[20] Pollasky v. Minchener, 81 Mich. 280, 283, 46 N. W. 5, 21 Am. St. Rep. 516, 9 L. R. A. 102.

[21] For definitions or statements of the doctrine of conditional privilege, see Traynor v. Sielaff, 62 Minn. 420, 424, 64 N. W. 915; Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 575, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. R. A. 280; Conroy v. Pittsburg Times, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep. 188, 11 L. R. A. 725; Hebner v. Great Northern Ry. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387; Atwater v. Morning News Co., 67 Conn. 504, 34 Atl. 865; Nichols v. Eaton, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483; Caldwell v. Story, 107 Ky. 10, 52 S. W. 850, 45 L. R. A. 735; McBride v. Ledoux, 111 La. 398, 35 So. 615, 100 Am. St. Rep. 491.

[22] Jones v. Forehand, 89 Ga. 520, 16 S. E. 262, 32 Am. St. Rep. 81; Sharp v. Bowler, 103 Ky. 282, 45 S. W. 90; Sullivan v. Strathan-Hutton-Evans Com. Co., 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859; Tillinghast v. McLeod, 17 R. I. 208, 21 Atl. 345; Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803.

[23] "When a person is so situated that it becomes right in the interests of society that he should

when the communication relates to a matter of public interest, or to a matter of private interest to one or both the parties to the communication. In the case of a private interest it must be one relating to the welfare of the individual and may be of a pecuniary nature or otherwise. Both parties to the communication may have such an interest, and in such case the privilege is clear.[24] If only one party has the interest, the communication may be made *by* such party, when necessary for the protection of that interest, as in seeking professional advice and it may be in other ways. But ordinarily the communication is made *to* the party having an interest, and the question arises under what circumstances a person is justified in making such communication. If the information is requested by the person having the interest, the right or duty to give it is clear.[25] And the better rule would seem to be that one may volunteer information to any person having an interest therein, as above explained, in any case where he would be justified in giving it on request.[26] But a person who

tell a third person certain facts, then if he, *bona fide* and without malice, does tell them, it is a privileged occasion." Blackburn, J., in Davis v. Sneed, L. R. 5 Q. B. 611. Approved in Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753. Also in Coogler v. Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170.

[24] Nichols v. Eaton, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483.

[25] Howland v. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656, and cases cited in notes, p. 239, *post*.

[26] McGarry v. Healey, 78 Conn. 365; Mott v. Dawson, 46 Ia. 533; Fresh v. Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; Konkle v. Haven, 140 Mich. 472; Rude v. Nass, 79 Wis. 321, 48 N. W. 555, 24 Am. St. Rep 717; Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280. In the last case the court says: "It seems to us that any person who upon reasonable grounds believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right in *good faith* to communicate such belief to that other, and he may make the communication with or without request, and whether he has or has not personally any interest in the subject matter of the communication." P 576. But see Samples v. Carnahan, 21 Ind. App. 55, 51 N. E 425, 69 Am. St. Rep. 340; Davis v Wells, 25 Tex. Civ. App. 155, 60 S. W. 566; Byam v. Collins, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129. "An occasion is privileged when the person who makes the communication has a moral duty

thus volunteers information must make sure at his peril that the person to whom he communicates it has the interest which will justify the communication.[27]

A communication privileged because made to one having a private and personal interest must be made in such a way as not to be unnecessarily published to other parties.[28] But this does not prevent the communication being made according to the ordinary course of business in similar cases. Thus, if a letter is privileged, the privilege covers the incidental publication to clerks who prepare the letter from dictation and make letter-press copies according to modern business methods.[29] In the case referred to, Collins, M. R., says: "Where one person has a duty to publish to another a communication containing libelous matter, so that the occasion is privileged, he is entitled to avail himself of the ordinary and reasonable means of sending; and if the adoption of these means involves the incidental publication of the communication to third persons, that publication will also be covered by the privilege."[30] In the case of a matter of public interest the communication may be made through the ordinary channels of reaching the public or that part of the public which is interested in the communication. If the matter is one of general public interest no difficulty can arise, for all are presumably interested and the communication can reach none who are not. But in matters of local public interest any communication made in the ordinary way, through the public prints may reach those who have no interest, either because they are not residents or taxpayers of the locality, or because they do not belong to the class concerned. The correct rule would seem to be that the

to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it." Pullman v. Hill, (1891) 1 Q. B. 524.

[27] Hobditch v. MacIlwaine, (1894) 2 Q. B. 54.

[28] See Toogood v. Spyring, 1 Crompton M. & R. 181; Padmore v. Lawrence, 11 A. & E. 380; Williamson v. Freer, L. R. 9 C. P. 393; Fahr v. Hayes, 50 N. J. L. 275, 13 Atl. 261; Beeler v. Jackson, 64 Md. 589.

[29] Edmondson v. John Birch & Co., 76 L. J. Rep. (C. A.) 346, K. B. 1907. To same effect: Lawless v. Anglo-Egyptian Cotton & Oil Co., L. R. 4 Q. B. 262.

[30] Edmondson v. John Birch & Co., 76 L. J. Rep. (C. A.) 346, K. B. 1907.

privilege extends not only to the right to make the communication but to the right to make it in the ordinary, usual and only practicable way. Thus where it was proper for the officers of a particular church to communicate certain matters to the members of the denomination at large, to which the church belonged, it was held that they might make use of the denominational papers for that purpose, and that the communication was privileged, though it thus reached those who were not members of the denomination.[31] But in Wisconsin it has been held that an article in a newspaper relating to a matter of municipal interest, which reflected on the official conduct of a state senator, was not privileged if the newspaper circulated outside the city and senatorial district.[32] And this case has been followed in Iowa.[33] Such a holding would seem to preclude the free discussion of matters of local interest either in the press or in public meetings.

If a communication is one of conditional privilege then no action lies unless it is false and malicious and the burden to establish this is on the plaintiff.[34] If the communication is defamatory it is presumed to be false as in other cases, but

[31] Redgate v. Roush, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236.

[32] Buckstaff v. Hicks, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853.

[33] State v. Haskins, 109 Ia. 656, 80 N. W. 1063, 77 Am. St. Rep. 560.

[34] Coogler v. Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; Nichols v. Eaton, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483; Sharp v. Bowlar, 103 Ky. 282, 45 S. W. 90; Gardemal v. McWilliams, 43 La. Ann. 454, 9 So. 106, 26 Am. St. Rep. 195; Fresh v. Cutler, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; Garn v. Lockard, 108 Mich. 196, 65 N. W. 764; Hebner v. Great Northern Ry. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387; Wagner v. Scott, 164 Mo. 289, 63 S. W. 1107; Fahr v. Hayes, 50 N. J. L. 275, 13 Atl. 261; Rothholz v. Dunkle, 53 N. J. L. 438, 22 Atl. 193, 13 L. R. A. 655; Byam v. Collins, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129; McGaw v. Hamilton, 184 Pa. St. 108, 39 Atl. 4; McIntyre v. Weinert, 195 Pa. St. 52, 45 Atl. 666; Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280; Cranfill v. Hayden, 97 Tex. 544, 80 S. W. 609; Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162; Nevill v. Fine Arts, etc., Ins. Co., (1895) 2 Q. B. 156. It is a question of an honest belief that the facts stated are true, not of reasonable ground for belief. Clark v. Molyneux, L. R. 3 Q. B. D. 237.

malice is not presumed from falsity alone.[35] The evidence to show malice may be intrinsic, consisting of the style, tone and manner of the communication itself, or extrinsic, consisting of the expression of a malicious intent, or that the defendant knew or had reason to believe that the statements were false, or other circumstances.[36] But whether the evidence is intrinsic or extrinsic the question is one for the jury.[37]

Whether an occasion is privileged is a question of law for the court,[38] but if the facts upon which the privilege depends are in dispute, it is a mixed question of law and fact to be submitted to the jury under proper instructions, that is, the court should instruct the jury what facts, if proved, would constitute a privileged occasion and for the jury to find whether the facts are established.[39] Privilege should be specially pleaded,[40] but in Tennessee it is held that the defense

[35] Coogler v. Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; Nichols v. Eaton, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483; Fresh v. Cutler, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; Howard v. Dickie, 120 Mich. 238, 79 N. W. 191; Hebner v. Great Northern Ry. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387; Rothholz v. Dunkle, 53 N. J. L. 438, 22 Atl. 193, 13 L. R. A. 655; Hemmens v. Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; Kent v. Bongartz, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870; Cranfill v. Hayden, 97 Tex. 544, 80 S. W. 609.

[36] Coogler v. Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; Howard v. Dickie, 120 Mich. 238, 79 N. W. 191; Wagner v. Scott, 164 Mo. 289, 63 S. W. 1107; Byrd v. Hudson, 113 N. C. 203, 18 S. E. 209; Conroy v. Pittsburg Times, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep. 188, 11 L. R. A. 725; Wallace v. Jameson, 179 Pa. St. 98, 36 Atl. 142; Nichols v. Eaton, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483.

[37] Ibid: Atwater v. Morning News Co., 67 Conn. 504, 34 Atl. 865.

[38] Nichols v. Eaton, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483; Garn v. Lockard, 108 Mich. 196, 65 N. W. 764; Sullivan v. Strathan-Hutton-Evans Com. Co., 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859; Byam v. Collins, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129; Norfolk & W. Steamboat Co. v. Davis, 12 App. D. C. 306; Mauk v. Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477; Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803.

[39] Carpenter v. Ashley, 148 Cal. 422; Parker v. Republican Co., 181 Mass. 392, 63 N. E. 931; Warner v. Press Pub. Co., 132 N. Y. 181, 30 N. E. 393; Post Publishing Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921.

[40] Stevenson v. Ward, 48 App. Div. 291, 62 N. Y. S. 717; Stuart

may be made either under the general issue or by special plea.[41]

§ 122. **Cases conditionally privileged—Examples.** A petition to the executive, or other appointing power, in favor of an applicant for an office, or a remonstrance against such an applicant, is a publication of this character. No action will lie for false statements contained in it, unless it be shown that it was both false and malicious.[42] And this rule will apply to petitions, applications and remonstrances of all sorts addressed by the citizen to any officer or official body, asking what such officer or body may lawfully grant, or remonstrating against anything which it might lawfully withhold. It is a necessary part of the right of petition that such papers, presented in good faith, should be protected.[43] And it is privileged while being circulated as well as after it is presented.[44] All official communications made by an officer in the discharge

v. Press Pub. Co., 83 App. Div. 467, 82 N. Y. S. 401; Gudger v. Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73.

[41] Cooley v. Galvon, 109 Tenn. 1, 70 S. W. 607, 97 Am St. Rep. 823, 60 L. R. A. 139.

[42] Thorn v. Blanchard, 5 Johns. 508; Bodwell v. Osgood, 3 Pick. 379, 15 Am. Dec. 229; Harris v. Huntington, 2 Tyler, 129, 4 Am. Dec. 728; Gray v. Pentland, 2 S. & R. 23; Larkin v. Noonan, 19 Wis. 82; Whitney v. Allen, 62 Ill. 472; Vanarsdale v. Laverty, 69 Pa. St. 103; Dennehy v. O'Connell, 66 Conn. 175, 33 Atl. 920; Coogler v. Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775; Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162.

[43] Lake v. King, 1 Lev. 240; Reid v. De Lorme, 2 Brev. 76; Thorn v. Blanchard, 5 Johns. 508; Vanarsdale v. Laverty, 69 Pa. St. 103; Howard v. Thompson, 21 Wend. 319, 34 Am. Dec. 238; Bradley v. Heath, 12 Pick. 163, 22 Am. Dec. 418; Finley v. Steele, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852; Kent v. Bongartz, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870. A complaint by a citizen to the board of health of the neglect of the garbage contractor to do his work falls in the same category. Southern Chemical, etc., Co. v. Wolf, 48 La. Ann. 631, 19 So. 558.

[44] Venderzee v. McGregor, 12 Wend. 545; Streety v. Wood, 15 Barb. 105. But it must be addressed to the authority having power to give the relief asked. Fairman v. Ives, 5 B. & Ald. 642; Hosmer v. Loveland, 19 Barb. 111. See Milam v. Burnsides, 1 Brev. 295. And a paper which assumes the form of a petition, but is never presented, or meant to be, has no protection. State v. Burnham, 9 N. H. 34.

of a public duty are under the like protection.[45] In some cases these latter communications are held to be absolutely privileged.[46] A report of a committee appointed by a town meeting is conditionally privileged.[47] So of information given to a magistrate or police officer concerning a crime or supposed crime committed.[48] So are all communications by members of corporate bodies, churches and other voluntary societies, addressed to the body or any official thereof and stating facts which if true, it is proper should be thus communicated.[49] So is an investigation of charges against a college president by a board of trustees.[50]

[45] De Arnaud v. Ainsworth, 24 App. Cas. D. C. 167; Billet v. Times-Democrat Pub. Co., 107 La. 751, 32 So. 17, 58 L. R. A. 62; Hemmens v. Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; Stevenson v. Ward, 48 App. Div. 291, 62 N. Y. S. 717; Maurice v. Warden, 52 Md. 283; Dewe v. Waterbury, 6 Can. S. C. R. 143; In re Inv. Comm., 16 R. I. 751, 11 Atl. 429.

[46] Catterton v. Secretary of State for India, (1895) 2 Q. B. 189; De Arnaud v. Ainsworth, 24 App. Cas. D. C. 167; Spaulding v. Vilas, 161 U. S. 483, 16 S. C. Rep. 631.

[47] Howland v. Flood, 160 Mass. 509, 36 N. E. 482.

[48] Garn v. Lockard, 108 Mich. 196, 65 N. W. 764; Shinglemeyer v. Wright, 124 Mich. 231, 82 N. W. 887, 50 L. R. A. 129; Pierce v. Oard, 23 Neb. 828, 37 N. W. 677; Eames v. Whittaker, 123 Mass. 342. But see Arnold v. Savings Co., 76 Mo. App. 159; Hancock v. Blackwell, 139 Mo. 440, 41 S. W. 205.

[49] Hershaw v. Bailey, 1 Exch. 743; Farnsworth v. Storrs, 5 Cush. 412; Chapman v. Calder, 14 Pa. St. 365; O'Donaghue v. McGovern, 23 Wend. 26; Haight v. Cornell, 15 Conn. 74; Servatius v. Pichel, 34 Wis. 292; Van Wyck v. Aspinwall, 17 N. Y. 190; Redgate v. Roush, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236; Howard v Dickie, 120 Mich. 238, 79 N. W. 191; Piper v. Woolman, 43 Neb. 280, 61 N. W. 588; Cranfill v. Hayden, 97 Tex. 544, 80 S. W. 609. That pertinent statements, made at a town meeting, are privileged, see Smith v. Higgins, 16 Gray, 251; Kirpatrick v. Eagle Lodge, 26 Kan. 384, 40 Am. Rep. 316. Communications between members of the same church in the course of church discipline are privileged. Jarvis v. Hathway, 3 Johns. 180, 3 Am. Dec. 473; Smith v. Youmans, 3 Hill (S. C.) 85; York v Pease, 2 Gray, 282; Lucas v. Case, 9 Bush, 297; Landis v. Campbell, 79 Mo. 433, 49 Am. Rep. 239; Over v. Hildebrand, 92 Ind. 19. As to what are privileged statements and communications in church discipline, see. Farnsworth v. Storrs, 5 Cush. 412; Servatius v Pichel, 34 Wis. 292.

[50] Gattis v. Kilgo, 140 N. C. 106

§ 123. **Cases privileged on individual reasons.** As an illustration of this class the case may be taken of the father who discusses with his daughter the character, habits, reputation and abilities of one who has sought her hand in marriage. In such a case it is plain that not only ought the discussion to be privileged, but that the father ought to be at liberty to speak not merely what he knows, but what he believes and suspects.[51] To require him at his peril to keep strictly within the limits of what he could prove to be true, would be to make no allowance for the confidence properly belonging to the relation, or for the agitation and alarm which paternal feelings would naturally experience when an alliance believed to be improper was proposed. The case suggested is one of a large class of cases in which the like privilege is allowed and in which it is necessary to show not only that the communication was false, but also that it was made with evil intent.[52] Confidential communication between a principal and his agent in any matter connected with the business, are shielded with the same protection.[53] And where confidential inquiries are made concerning the character and conduct of servants, or the responsibility of tradesmen, and the like, by one having an in-

[51] Todd v. Hawkins, 8 C. P. 88. See Joannes v. Bennett, 5 Allen, 170. Reports by one employed by a father to ascertain the standing of his daughter's husband, made to the father and mother, are privileged. Atwill v. Mackintosh, 120 Mass. 177; Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 922. There is no privilege to a stranger who interferes in negotiations of marriage, though there would be to a near relative. Joannes v. Bennett, 5 Allen, 170. Compare Coxhead v. Richards, 2 M. G. & S. 569; Bennett v. Deacon, Id. 628; Byam v. Collins, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129.

[52] See Boyssett v. Hire, 49 La. Ann. 904, 22 So. 44, 62 Am. St. Rep. 675.

[53] Washburn v. Cooke, 3 Denio, 110; Knowles v. Peck, 42 Conn. 386, 19 Am. Rep. 542; Nichols v. Eaton, 110 Ia. 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483. Communications by a bank to its correspondent come under this rule. Caldwell v. Story, 107 Ky. 10, 52 S. W. 850, 45 L. R. A. 735; Haft v. First Nat. Bank, 19 App. Div. 423, 46 N. Y. S. 481. So are those between a patron of a school and the trustees concerning the character of a teacher; Harwood v. Keech, 4 Hun, 389. And see Campbell v. Bannister, 79 Ky. 205; Lawler v. Earle, 5 Allen, 22; Knight v. Gibbs, 3 Nev. & Man. 469; Denver Public W. Co. v. Holloway, 34 Colo. 432.

terest in knowing, and of one who may be supposed to have had special opportunity in his own dealings or affairs to acquire the information, the answers are in like manner privileged.[54] If one makes it his business to furnish information concerning the character, habits, standing and responsibility of tradesmen, in response to inquiries from those who have a special interest in knowing these facts, his business is privileged.[55] But if he sends such information to all who engage his services, without regard to their special interest in any particular case, his business is not privileged, and he must justify his reports by the truth.[56] "The mercantile agency does not stand in such relation, either of interest or duty, with its subscribers generally, that communications from it to them generally are privileged. Exceptions exist in relation to those persons who are interested in obtaining the particular information, and to whom it is furnished, on special request. To this extent, and no further, are such communications protected by a qualified privilege."[57] A reply to a newspaper attack, if made without malice and in self-defense is privi-

[54] Pattison v. Jones, 8 B. & C. 578; Storey v. Challands, 8 C. & P. 234; Dunman v. Bigg, 1 Camp. 269, note; Amann v. Damm, 8 C. B. (N. S.) 597; Bradley v. Heath, 12 Pick. 163, 22 Am. Dec. 418; Elam v. Badger, 23 Ill. 498; White v. Nichols, 3 How. 266; Lewis v. Chapman, 16 N. Y. 375; Fowles v. Bowen, 30 N. Y. 20; Noonan v. Orton, 32 Wis. 106; Hatch v. Lane, 105 Mass. 394; Atwill v. Mackintosh, 120 Mass. 177; Fahr v. Hayes, 50 N. J. L. 275, 13 Atl. 761; Hebner v. Great Northern Ry. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387.

[55] Ormsby v. Douglass, 37 N. Y. 477; Trussell v. Scarlett, 18 Fed. 214; Erber v. Dun, 12 Fed. 526. See State v. Lonsdale, 48 Wis. 348; Locke v. Bradstreet Co., 22 Fed. 771. See, also, Kingsbury v. Bradstreet Co., 35 Hun, 212.

[56] Taylor v. Church, 8 N. Y. 452; Sunderlin v. Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322; Johnson v. Bradstreet Co., 77 Ga. 172, 4 Am. St. Rep. 77; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 762, 2 L. R. A. 405; Douglass v. Daisley, 114 Fed. 628, 52 C. C. A. 324; King v. Patterson, 49 N. J. L. 417, 9 Atl. 705.

[57] Pollaskey v. Minchener, 81 Mich. 280, 283, 284, 46 N. W. 5, 21 Am. St. Rep. 516, 9 L. R. A. 102; Fish v. St. Louis County Printing & Pub. Co., 102 Mo. App. 6, 74 S. W. 641; Myers v. Kaichen, 75 Mich. 272, 42 N. W. 820; Gattis v. Kilgo, 128 N. C. 402, 38 S. E. 931.

leged.[58] But if the reply consists of a general attack on the plaintiff's character to show him unworthy of belief it is not privileged.[59]

§ 124. Liberty of the press—Its privilege and responsibilities. The several state constitutions, like the federal constitution, have been careful to preserve the freedom of the press. They have not, however, undertaken to define it, and what is meant by it is not made very plain by the authorities. On one point all are agreed, namely, that the freedom of the press implies exemption from censorship, and a right in all persons to publish what they may see fit, being responsible for the abuse of the right.[60] But whether the conductor of a public journal has any privilege above others in publishing, is not so clear. The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be, to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public are concerned. With this end in view not only must freedom of discussion be permitted, but there must be exemption afterward from liability for any publication made in good faith, and in the belief in its truth, the making of which, if true, would be justified by the occasion.[61] There should consequently be freedom in discussing, in good faith, the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for a public office, either to the electors or to a board or officer having powers of appointment.[62] But a candidate for public office does not

[58] Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803; 6 Id. 474; Odgers on Libel, 225 and cases cited. And see Shepherd v. Baer, 96 Md. 152, 53 Atl. 970.

[59] Brewer v. Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397; Smurthwaite v. News Pub. Co., 124 Mich. 377, 83 N. W. 116.

[60] Story on Const. § 1889; 2 Kent, 17; Rawle on Const. ch. 10; Cooley, Const. Lim. 420; 4 Bl. Com. 151; Commonwealth v. Blanding, 3 Pick. 304.

[61] Bearce v. Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446.

[62] Lewis v. Few, 5 Johns. 1; King v. Root, 4 Wend. 113, 21 Am Dec. 102; Hunt v. Bennett, 4 E. D. Smith, 647; S. C. 19 N. Y. 173; Curtis v. Mussey, 6 Gray, 261; Aldrich v. Printing Co., 9 Minn. 133, 86 Am. Dec. 84; Mayrant v. Richardson, 1 N. & McC. 348, 9 Am. Dec. 707; Belknap v. Ball, 83

surrender his private character to the public and he has the same remedy for defamation as before.[63] And the publication of false and defamatory statements concerning him, whether relating to his private character or public acts is not privileged.[64] The same freedom of discussion should be allowed when the character and official conduct of one holding a public office is in question, as in case of candidates for office, and in all cases where the matter discussed is one of general public interest.[65] And the privilege is subject to like limitations.[66]

Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72; Duneback v. Tribune Printing Co., 108 Mich. 75, 65 N. W. 583; Martin v. Paine, 69 Minn. 482, 72 N. W. 450; Upton v. Hume, 24 Ore. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493; Wallace v. Jameson, 179 Pa. St. 98, 36 Atl. 142; Coates v. Wallace, 4 Pa. Supr. Ct. 253; Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233; Ross v. Ward, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746.

[63] Post Publishing Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921; Upton v. Hume, 24 Ore. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

[64] State v. Keenan, 111 Ia. 286, 82 N. W. 792; Wheaton v. Beecher, 66 Mich. 307, 33 N. W. 503; Belknap v. Ball, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72; Eikhoff v. Gilbert, 124 Mich. 353, 83 N. W. 110, 51 L. R. A. 451; Smurthwaite v. News Pub. Co., 124 Mich. 377, 83 N. W. 116; Martin v. Paine, 69 Minn. 482, 72 N. W. 450; Smith v. Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59; Wallace v. Jameson, 179 Pa. St. 98; Byrne v. Funk, 38 Wash. 506, 80 Pac. 772; Post Publishing Co. v. Hallam, 59 Fed. 530, 8 C. C. A. 201.

[65] Purcell v. Sowler, 1 C. P. Div. 781; Wason v. Walter, L. R. 4 Q. B. 73; Kelley v. Sherloch, L. R. 1 Q. B. 686; Kelley v. Tinling, L. R. 1 Q. B. 699; Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605; Miner v. Detroit, etc., Co., 49 Mich. 358; Vance v. Louisville Courier Journal Co., 95 Ky. 41, 23 S. W. 591; Herringer v. Ingberg, 91 Minn. 71, 97 N. W. 460; Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233; Ross v. Ward, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746; Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715; Neeb v. Hope, 111 Pa. St. 145, 56 Am. Rep. 274; Foster v. Scripps, 39 Mich. 376, 39 Am. Rep. 403; Hamilton v. Eno, 81 N. Y. 116.

[66] Atwater v. Morning News Co., 67 Conn. 504, 34 Atl. 865; Clifton v. Lange, 108 Ia. 472, 79 N. W. 276; Fitzpatrick v. Daily State Pub. Co., 48 La. Ann. 1116, 20 So. 173; Buckstaff v. Hicks, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853; McNally v. Burleigh, 91 Me. 22, 39 Atl. 285; Vance v. Louisville Courier-Journal Co., 95 Ky. 41, 23 N. W. 591; Bee Pub. Co. v. Shields, 68 Neb. 750; Weston v. Com'l. Advertiser Co., 184 N. Y. 479.

The public press is also allowed to give full reports of judicial trials and hearings, provided they are not *ex parte* merely, and are not indecent or blasphemous.[67] But such reports must be confined to the actual proceedings, and must contain no defamatory observations, headings or comments.[68] The reason why the publication of *ex parte* proceedings is not privileged, is, that it has a tendency "to prejudice those whom the law still presumes to be innocent, and to poison the source of justice."[69] In Rhode Island it is held that a full and fair report of a judicial proceeding, though preliminary and *ex parte*, is privileged.[70] And the English Court of Appeals, in a recent case, has held that the publication, without malice, of a fair and accurate report of the proceedings before a magistrate, upon an *ex parte* application for a summons for perjury, is privileged, and that public policy is opposed to the secrecy of judicial proceedings.[71] So in case of an *ex parte*

[67] Hoare v. Silverlock, 9 C. B. 20; Lewis v. Levy, El. B. & El. 537; Ryalls v. Leader, L. R. 1 Exch. 296; Terry v. Fellows, 21 La. Ann. 375; Gazette Co. v. Timberlake, 10 Ohio St. 548; Torrey v. Field, 10 Vt. 353; Saunders v. Baxter, 6 Heisk. 369; Storey v. Wallace, 60 Ill. 51; McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465; Connor v. Standard Pub. Co., 183 Mass. 474, 67 N. E. 596; Moore v. Dispatch Printing Co., 87 Minn. 450, 92 N. W. 396; Boogher v. Knapp, 97 Mo. 122, 11 S. W. 45; American Pub. Co. v. Gamble, 115 Tenn. 663. The privilege extends to proceedings in the nature of trials in voluntary associations; as, for example, a medical society. Barrows v. Bell, 7 Gray, 301, 66 Am. Dec. 479. Also to foreign judicial proceedings. Stuart v. Press Pub. Co., 83 App. Div. 467, 82 N. Y. S. 401.

[68] Styles v. Nokes, 7 East. 493; Delegal v. Highley, 3 Bing. N. C. 950; Thomas v. Croswell, 7 Johns. 264, 5 Am. Dec. 269; Pittock v. O'Neill, 63 Pa. St. 253, 3 Am. Rep. 544; Usher v. Severance, 20 Me. 9, 37 Am. Dec. 73; Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575; Story v. Wallace, 60 Ill. 51; Bathrick v. Detroit, etc., Co., 50 Mich. 629; Moore v. Dispatch Printing Co., 87 Minn. 450, 92 N. W. 396.

[69] Per Ellenborough, Ch. J., in Rex v. Fisher, 2 Camp. 563.

[70] Metcalf v. Times Pub. Co., 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900, an *ex parte* application for injunction. In Stuart v. Press Pub. Co., 83 App. Div. 467, 82 N. Y. S. 401, it is held that the privilege does not attach "until an application is made to a magistrate, judge or court for some judicial action," and by implication that it does then attach.

[71] Kimber v. Press Ass'n, (1893) 1 Q. B. 65.

application for an injunction.[71a] The supreme court of Kentucky has gone further and held that a complaint made to a magistrate for a criminal warrant, though the prosecution was dropped and the complaint was not signed or sworn to, was within the rule, and that a publication of a fair and impartial report of the same was privileged.[72] If the report of a judicial proceeding is not full and fair, the privilege is lost.[73] The publication of the pleadings and papers filed in a suit is not privileged until some judicial action is taken thereon.[74]

The publication of a fair and true report of legislative proceedings is privileged. [75] But a newspaper is not justified in publshing, as an item of news, a libelous resolution passed by a city council, which is without the scope of their power and duty.[76]

No privilege seems to be accorded to the publication of news;[77] but publishers will not be liable in exemplary damages for the appearance in their journals of false items of in-

[71a] American Pub. Co. v. Gamble, 115 Tenn. 663.

[72] Beiser v. Scripps-McRae Pub. Co., 113 Ky. 383, 68 S. W. 457. See Jastrzembski v. Marxhausen, 120 Mich. 677, 79 N. W. 935.

[73] Metcalf v. Times Pub. Co., 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900; Stevens v. Sampson, L. R. 5 Ex. D. 53.

[74] Barker v. St. Louis, etc., Co., 3 Mo. App. 377; Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318; Stuart v. Press Pub. Co., 83 App. Div. 467, 82 N. Y. S. 401; Wills v. Jones, 13 App. D. C. 482; Metcalf v. Times Pub. Co., 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900; Park v. Detroit Free Press Co., 72 Mich. 560, 568, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599. In Searles v. Scarlet, (1892) 2 Q. B. 56, it is held that the publication of court records to which the public have access, is privileged.

[75] Garby v. Bennett, 166 N. Y. 392, 59 N. E. 117. A member of a legislative body, it is said in England, is not privileged in publishing the words of a speech made by him to the House. Rex v. Lord Abingdon, 1 Esp. 226; Rex v. Creevy, 1 M. & S. 273. But in this country, where the publication of speeches and debates is made by authority of law, it would seem that the privilege to publish must be as broad as the privilege to speak. In Louisiana it is held that a newspaper is privileged in publishing the testimony taken before a Congressional committee. Terry v. Fellows, 21 La. Ann. 375.

[76] Trebby v. Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330.

[77] Barnes v. Campbell, 59 N. H. 128, 47 Am. Rep. 183; Pratt v. Pioneer Press Co., 30 Minn. 41; Mallory v. Same, 34 Minn. 521.

telligence without their personal knowledge, where they have been guilty of no negligence in the selection of the agents through whom the publication has been made, and have not been accustomed habitually to make their journals the vehicle of detraction and malice.[78] Liberty of the press is not license[79] and newspapers have no privilege to publish falsehoods,[80] or to defame under the guise of giving the news.[81] It is held that the press occupies no better position than private persons publishing the same matter, that it is subject to the law and, if it defames, it must answer for it.[82] "As a publisher of news and items of public importance the press should have the freest scope; but as a scandal-monger it should be held to the most rigid limitation."[83]

The fair and honest discussion of matters of public interest is always privileged.[83a] As to what are matters of public in-

See Bronson v. Bruce, 59 Mich. 467, 60 Am. Rep. 307; Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715.

[78] Daily Post Co. v. McArthur, 16 Mich. 447; Perrett v. New Orleans Times, 25 La. Ann. 170; Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575; Gibson v. Cincinnati Enquirer, 5 Cent. L. Jour. 380. In Crane v. Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722, it is held that the proprietor of a newspaper is responsible for all that appears in its columns, though the entire management is turned over to others and he lives abroad and has no knowledge of what is to be published, and that, as falsity implies malice, whoever is liable for the act of publication is liable also for punitive damages.

[79] Fitzpatrick v. Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173.

[80] Haynes v. Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; Belknap v. Ball, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72.

[81] Democrat Pub. Co. v. Jones, 83 Tex. 302, 18 S. W. 652.

[82] Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599; Upton v. Hume, 24 Ore. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493; Morse v. Times-Republican Print Co., 124 Ia. 707, 100 N. W. 867.

[83] Metcalf v. Times Pub. Co., 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900; Gilman v. McCatchy, 111 Cal. 606, 44 Pac. 241; Moore v Leader Pub. Co., 8 Pa. Supr. Ct 152.

[83a] Kinyon v. Palmer, 18 Ia. 377; Bearce v. Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446.

terest, the discussion of which in the newspapers, is privileged, no comprehensive definition can be given.[84] The sanitary condition of houses owned by the plaintiffs and housing two thousand persons is such a matter.[85] A clergyman is held to be a public man in such sense that public comment in a proper manner upon his sayings and doings in his public capacity is justified.[86] And where a person holds himself out as a teacher and advertises in order to attract youth to his school, he is held to become a *quasi*-public character, so that the printing of information about the man and his system is privileged.[87] But if the limits of fair comment are overstepped in any such case a liability attaches.[88]

Books and writings, when published to the world by their authors, become matters of public interest, and any person is privileged to indulge in the fair and reasonable criticism thereof through the public prints or otherwise.[89] The same rules apply to a picture or work of art.[90] The ideas, theories, and statements of an author may be treated with ridicule and sarcasm, so long as this treatment i confined to the produc-

[84] As to what is matter of public interest, see Purcell v. Sowler, L. R. 2 C. P. Div. 215, qualifying the decision in the court below. Also, Davis v. Duncan, L. R. 9 C. P. 396; S. C. 10 Moak, 228; Henwood v. Harrison, L. R. 7 C. P. 606; S. C. 3 Moak, 398. Matters held not to come within rule as to public interest. Atkinson v. Detroit, etc., Co., 46 Mich. 341; Tryon v. Evening News Ass'n, 39 Mich. 636.

[85] South Hetton Coal Co. v. N. E. News Ass'n, (1894) 1 Q. B. 133.

[86] Klos v. Zaharik, 113 Ia. 161, 84 N. W. 1046, 53 L. R. A. 235. Not so the trustee of a private corporation. Wilson v. Fitch, 41

[87] Press Co. v. Stewart, 119 Pa St. 584, 14 Atl. 51.

[88] Joynt v. Cycle Trade Pub. Co., (1904) 2 Q. B. 292.

[89] Dowling v. Livingstone, 108 Mich. 321, 66 N. W. 325, 62 Am. St. Rep. 702, 32 L. R. A. 104; Triggs v. Sun Printing & Pub. Co., 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612; Triggs v. Sun Printing & Pub. Co., 91 App. Div. 259, 86 N. Y. S. 486; McDonald v. Sun Printing & Pub. Co., 45 Misc. 441, 92 N. Y. S. 37; Browning v. Van Rensselaer, 8 Pa. Dist. Ct. 690; McQuire v. Western Morning News Co., (1903) 2 K. B. 100.

[90] Battersby v. Collier, 34 App Div. 347, 54 N. Y. S. 363.

tion itself,[91] but the occasion affords no privilege for statements which have no basis in the book or composition, or for false assertions regarding the author, or for an attack on his private character, or for making his private life and character the subject of public ridicule and contempt.[92]

The privilege of the press is not confined to those who publish newspapers and other serials, but extends to all who make use of it to place information before the public.[93]

§ 125. Repeating slanders and libels. There is no privilege in repeating defamatory publications. Therefore it is no defense that the defendant only repeated what had been told him by another whose name he gives, or copied into his newspaper a charge originating elsewhere, or published it as an advertisement or communication.[94] Sometimes the fact may mitigate damages, but it cannot excuse the publication.[95] Neither is it a defense that a report was current and gen-

[91] Dowling v. Livingstone, 108 Mich. 321, 66 N. W. 325, 62 Am. St. Rep. 702, 32 L. R. A. 104; Triggs v. Sun Printing & Pub. Co., 91 App. Div. 259, 86 N. Y. S. 486.

[92] McDonald v. Sun Printing & Pub. Co., 45 Misc. 441, 92 N. Y. S. 37; Triggs v. Sun Printing & Pub. Co., 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612; Thomas v. Bradbury, Agnew & Co., (1906) 2 K. B. 627.

[93] See Barrows v. Bell, 7 Gray, 301, 66 Am. Dec. 479. One who writes an article to a newspaper, which is changed so as to be libelous, is not liable, if his own article was not of that character. Klos v. Zaharik, 113 Ia. 161, 84 N. W. 1046, 53 L. R. A. 235.

[94] Spolek Denni Hlarated v. Hoffman, 204 Ill. 532, 68 N. E. 400; Blocker v. Schoff, 83 Ia. 265, 48 N. W. 1079; Nicholson v. Merritt, 109 Ky. 369, 59 S. W. 25; Harris v. Minvielle, 48 La. Ann. 908, 19 So. 925; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; Barr v. Beikner, 44 Neb. 197, 62 N. W. 494; Wallace v. Rodgers, 156 Pa. St. 395, 27 Atl. 163.

[95] Rex v. Newman, 1 El. & Bl. 268; Parker v. McQueen, 8 B. Mon. 16; Hampton v. Wilson, 4 Dev. 468; Keney v. McLaughlin, 5 Gray, 3; Evans v. Smith, 5 T. B. Mon. 363; Hotchkiss v. Oliphant, 2 Hill, 510; Sheahan v. Collins, 20 Ill. 325; Sans v. Joerris, 14 Wis. 663; Funk v. Beverly, 112 Ind. 190, 13 N. E. 573; Spolek Denni Hlarated v. Hoffman, 204 Ill. 532, 68 N. E. 400; Hoboken Printing & Pub. Co. v. Kahn, 58 N. J. L. 359, 33 Atl. 1060, 55 Am. St. Rep. 609; Wallace v. Rodgers, 156 Pa. St. 395, 27 Atl. 163; Branstetter v. Dorrough, 81 Ind. 527; Nicholson v. Merritt, 109 Ky. 369, 59 S. W. 25; Wallace v. Homestead Co., 117 Ia. 348, 90 N. W. 835. See

erally believed that the plaintiff was guilty of what was imputed to him,[96] or that the publication professed to give a rumor merely.[97] One is not liable for the unauthorized repetition of his words by others.[98]

§ 126. **Slander of property.** A person may be as seriously injured by misrepresentation of his property as by the slander of himself in respect to his business; and, indeed, the two often go together. But there may be misrepresentation in respect to particular articles of property not connected with one's business, and where the injury will concern the property alone. Such misrepresentation is actionable, provided it is malicious and damaging; but malice will not be presumed, and damage must be alleged and proved.[99] An action will not lie for libel of a business shown to be essentially fraudulent or illegal.[1]

§ 127. **Slander of title.** An action lies for maliciously slandering the title to the plaintiff's property; but here, as in slander of property, it is necessary to aver and prove both

Preston v. Frey, 91 Cal. 107, 27 Pac. 533.

[96] Moberly v. Preston, 8 Mo. 462; Knight v. Foster, 39 N. H. 576; Cade v. Redditt, 15 La. Ann. 492; Johnston v. Lance, 7 Ired. 448; Perrett v. Times Newspaper, 25 La. Ann. 170.

[97] Wheeler v. Shields, 3 Ill 348; Mason v. Mason, 4 N. H. 110. See Thompson v. Bowers, 1 Doug. (Mich.) 321; Treat v. Browning, 4 Conn. 408, 10 Am. Dec 156; State v. Butnam, 15 La. Ann. 16?; Haskins v. Lumsden, 10 Wis. 359; Knight v. Foster, 39 N. H. 576; Carpenter v. Bailey, 53 N. H. 590; Skinner v. Powers, 1 Wend. 451; Beardsley v. Bridgman, 17 Ia. 290. Giving with the publication the name of the author is no protection. Dole v. Lyon, 10 Johns 47, 6 Am. Dec. 316; Cases v. Kellogg, 9 Ind. 306; Haines v. Welling, 7 Ohio, 253; Fowler v. Chichester, 26 Ohio St. 9; Cummerford v. McAlvoy, 15 Ill. 311; Inman v. Foster, 8 Wend. 602.

[98] Elmer v. Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; Raines v. N. Y. Press Co., 92 Hun, 515, 37 N. Y. S. 45.

[99] Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322; Maglio v. N. Y. Herald Co., 93 App. Div., 546, 87 N. Y. S. 927; Holmes v. Clisby, 118 Ga. 820, 45 S. E. 684; Young v. Geiske, 209 Pa. St. 515, 58 Atl. 887; Browning v. Van Rensselaer, 8 Pa. Dist. Ct. 69); White v. Mellin, (1895) A. C. 154.

[1] Wettmer v. Bishop, 171 Mo. 110, 71 S. W. 167. If the falsity

malice and damage.[2] The action rests upon the general principle that when one injures another by any wrongful and malicious conduct, he is liable in an action on the special case.[3] It is of course never wrongful for one to assert a title in himself to property, or to seek to establish it by judicial proceedings, provided this is done in good faith,[4] and good faith must be presumed while the proceedings are pending; but we have seen that after they are disposed of, an action may lie, if malice and want of probable cause be made out.[5]

§ 128. **Damages.** The damages recoverable in actions of slander and libel are of two classes, (1) actual or compensatory damages, and (2) exemplary or punitive damages. Actual or compensatory damages may be general or special. General damages embrace loss of reputation, shame, mortification, injury to the feelings and the like and need not be alleged in detail and require no proof.[6] Special damages may be recovered as a branch of actual damages when actual pecuniary

of the representations is proved, and injury resulting therefrom, it is said malice is to be presumed. Swan v. Tappan, 5 Cush. 104.

[2] See generally Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; Chesebro v. Powers, 78 Mich. 472, 44 N. W. 290; Flint v. Hutchinson Smoke Burner Co., 110 Mo. 492, 19 S. W. 804, 33 Am. St. Rep. 476, 16 L. R. A. 243; Harriss v. Sneedem, 101 N. C. 273, 7 S. E. 801; Cardon v. McConnell, 120 N. C. 461, 27 S. E. 109; Moore v. Rowbotham, 19 Phila. 272; Hopkins v. Drowne, 21 R. I. 20, 41 Atl. 567.

[3] Malachy v. Soper, 3 Bing. (N. C.) 371. In this case and in Bigelow's notes thereto, Lead. Cas. 54–59, the authorities are fully collected. See also note in 13 L. R. A. 707.

[4] Duncan v. Griswold, 92 Ky. 546, 18 S. W. 354; Squires v. Wason Mfg. Co., 182 Mass. 137, 65 N. E. 32; Butts v. Long, 106 Mo. App. 313, 80 S. W. 312; Harriss v. Sneeden, 101 N. C. 273, 7 S. E. 801; Boulton v. Shields, 3 U. C. Rep. 21.

[5] *Ante*, § 95. The action is founded on malice. Walkley v. Bostwick, 49 Mich. 374; Meyrose v. Adams, 12 Mo. App. 329; Dodge v. Colby, 37 Hun, 515. An action for slander of title to letters patent will lie. Andrew v. Deshler, 45 N. J. L. 167; Meyrose v. Adams, 12 Mo. App. 329. And to a trademark. Hotchard v. Mege, L. R. 18 Q. B. D. 771. If the words are spoken by a stranger the law implies malice; otherwise if by one interested in it and for his own protection. Andrew v. Deshler, 45 N. J. L. 167.

[6] Childers v. Mercury Printing & Pub. Co., 105 Cal. 284, 38 Pac

loss has been sustained and the same is specially pleaded and proved.[7] As to punitive damages there is some difference of opinion as to whether they may be given in all cases where the publication is false and malicious, or whether there must be proof of express malice. As a general rule, if the words are actionable *per se*, the plaintiff is entitled to punitive damages.[8] The amount of general or punitive damages rests in the sound discretion of the jury.[9]

§ 129. Slander of the dead and other points. An action does not lie for the defamation of a deceased person.[10] Where a person was libeled in a will, it was held he could file a claim in the probate court against the estate, based on the libel and that the court had jurisdiction to adjudicate upon it.[11] Where an article contains several libelous expressions each one is held

903, 45 Am. St. Rep. 40; Stallings v. Whittaker, 55 Ark. 494, 18 S. W. 829; Cahill v. Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88; Turner v. Hearst, 115 Cal. 394, 47 Pac. 129; Republican Pub. Co. v. Mossman, 15 Colo. 399, 24 Pac. 1051; Lehrer v. Elmore, 100 Ky. 56, 37 S. W. 292; Louisville Press Co. v. Fennelly, 105 Ky. 365, 49 S. W. 15; Long v. Tribune Printing Co., 107 Mich. 207, 65 N. W. 108; Fenstermaker v. Tribune Pub. Co., 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 611; Kidder v. Bacon, 74 Vt. 263, 52 Atl. 322.

[7] Childers v. Mercury Printing & Pub. Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

[8] See Stallings v. Whittaker, 55 Ark. 494, 18 S. W. 829; St. Ores v. McGashen, 74 Cal. 148, 15 Pac. 452; Childers v. Mercury Printing & Pub. Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; Taylor v. Hearst, 118 Cal. 366, 50 Pac. 541; Osborne v. Troup, 60 Conn. 485, 23 Atl. 157; Heintz v. Graupner, 138 Ill. 158, 27 N. E. 935; Louisville Press Co. v. Fennelly, 105 Ky. 365, 49 S. W. 15; Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87.

[9] Bishop v. Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119; Fenstermaker v. Tribune Pub. Co., 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 611. As to mitigation of damages, see St. Ores v. McGashen, 74 Cal. 148, 15 Pac. 452; Hearne v. De Young, 132 Cal. 357, 64 Pac. 576; Jones v. Murray, 167 Mo. 25, 66 S. W. 981; Stuart v. News Pub. Co., 67 N. J. L. 317; Turton v. N. Y. Recorder Co., 144 N. Y. 144, 38 N. E. 1009; Democrat Pub. Co. v. Jones, 83 Tex. 302, 18 S. W. 652.

[10] Bradt v. New Nonpareil Co., 108 Ia. 449, 79 N. W. 122, 45 L. R. A. 681; Wellman v. Sun Printing & Pub. Co., 66 Hun, 331, 21 N. Y. S. 577; Sorenson v. Balaban, 11 App. Div. 164, 32 N. Y. S. 91.

[11] Gallagher's Estate, 10 Pa. Dist. Ct. 733.

to constitute a separate cause of action.[12] The action for slander or libel is transitory.[13] Equity will not restrain the publication of a libel against the person,[14] or against title,[15] but the publication of a libel upon property has been enjoined.[16]

[12] Candrian v. Miller, 98 Wis. 164, 73 N. W. 1004.

[13] Cassem v. Galvin, 53 Ill. App. 419; Crashley v. Press Pub. Co., 179 N. Y. 27, 71 N. E. 258.

[14] Everett Piano Co. v. Bent, 60 Ill. App. 372; Allegretti Chocolate Cream Co. v. Rubel, 83 Ill. App. 558; Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69; De Wick v. Dobson, 18 App. Div. 399, 46 N. Y. S. 390; Kidd v. Horry, 28 Fed. 773.

[15] Flint v. Hutchinson Smoke Burner Co., 110 Mo. 492, 19 S. W. 804, 33 Am. St. Rep. 476, 16 L. R. A. 243.

[16] Marlin Fire Arms Co. v. Shields, 68 App. Div. 88, 74 N. Y. S. 84.

CHAPTER VII.

INJURIES TO FAMILY RIGHTS.

§ 130. **The family, as such, has no rights.** The family as such has no distinct rights in the law. The father has a certain position in the family, and this he may defend against outside assailants; the wife has also a certain position in the family, and the children have their respective positions; but the act which destroys the family or takes away any of its component parts is not in law a family wrong, but only a wrong to individual members of the family. Thus this fundamental relation, which is older than civilization, and must always precede and always accompany it, and without which there can be neither social state in which morality or decency will be recognized, nor civil state with regulated liberty and order, is only indirectly recognized in the recognition of rights of its constituent members.

§ 131. **Wrongs to the husband.** If we direct attention to the remedies which, at the common law, the husband might have against third persons, for a violation of his rights as husband, we find them all grounded upon or permeated with the ideas which mark their origin in a rough and uncultivated society.

1. He might have redress against third persons for an injury suffered by him in respect to the property which the wife had brought him. But as such redress would rest upon principles which are common to other cases, it calls for no special comment here.

2. He might have a special action on the case against one who should seduce his wife or entice her away from him.[1] The

[1] Winsmore v. Greenbank, Willes, 577; Weedon v. Timbrell, 5 T. R. 357; Rabe v. Hanna, 5 Ohio, 530; Preston v. Bowers, 13 Ohio St. 1; Hadley v. Heywood, 121 Mass. 236; Barbee v. Armstead, 10 Ired. 530, 51 Am. Dec. 404; Crose v. Rutledge, 81 Ill. 266;

ground of such an action is the infliction upon the husband of some one or more of the following injuries: 1. Dishonor of the marriage bed. 2. Loss of the wife's affections.[2] 3. Loss of the comfort of the wife's society. 4. Total loss of the wife's services where she absconds from the husband, and probable diminished value of services where she does not. 5. The mortification and sense of shame that must usually accompany this most serious of domestic wrongs. The extent of the injury in any case must depend in great measure upon the previous relations of the parties,[3] and the measure of redress must be left largely to the discretion of the proper legal tribunal, which shall be at liberty to award much or little, according as they find that much or little has been lost by the complaining party.[4] The action for seducing the wife away from the husband is by no means confined to the case of improper and adul-

Conway v. Nicol, 34 Ia. 533; Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869; Long v. Booe, 106 Ala. 570, 17 So. 716; Adams v. Main, 2 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266; Christensen v. Thompson, 123 Ia. 717, 99 N. W. 591; Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006; Cornelius v. Hambay, 150 Pa. St. 359, 24 Atl. 515; Matheis v. Mazet, 164 Pa. St. 580, 30 Atl. 434. The fact that the defilement was forcible, and a crime does not bar the action. Egbert v. Greenwalt, 44 Mich. 245, 38 Am. Rep. 260. Nor does the wife's consent. Wales v. Miner, 89 Ind. 118; Bigaouette v. Paulet, 134 Mass. 123. But it may reduce damages. Ferguson v. Smethers, 70 Ind. 519, 13 Am. Rep. 186.

[2] Heermance v. James, 47 Barb. 120; Modisett v. McPike, 74 Mo. 636.

[3] Matheis v. Mazet, 164 Pa. St. 580, 30 Atl. 434; Morris v. Warwick, 42 Wash. 480.

[4] Norton v. Warner, 9 Conn. 172; Cross v. Grant, 62 N. H. 675; Hadley v. Heywood, 121 Mass. 236; Browning v. Jones, 52 Ill. App. 597. Punitive damages may be awarded. Cornelius v. Hambay, 150 Pa. St. 359, 24 Atl. 515; Matheis v. Mazet, 164 Pa. St. 580. The wife's letters or statements may be proved to show the previous state of their relations, and of her feelings towards her husband. Willis v. Bernard, 8 Bing. 376; Gilchrist v. Bale, 8 Watts, 355, 34 Am. Dec. 469; Palmer v. Crook, 7 Gray, 418; Holtz v. Dick, 42 Ohio St. 23. It is no defense to the action that the plaintiff has forgiven his wife, or that he has cohabited with her since the wrong. Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869; Sikes v. Tippins, 85 Ga. 231, 11 S. E. 662; Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006. But if the husband connives at the wife's adultery, his action is barred. Kohlhess v. Mobley, 102 Md. 199.

terous relations; but it extends to all cases of wrongful interference in the family affairs of others whereby the wife is induced to leave the husband, or to so conduct herself that the comfort of the married life is destroyed.[5] If, however, the interference is by the parents of the wife, on an assumption that the wife is ill-treated to an extent that justifies her in withdrawing from her husband's society and control, it may reasonably be presumed that they have acted with commendable motives, and a clear case of want of justification may be justly required to be shown before they should be held responsible.[6] One who merely harbors a wife, who, without his consent, has left her husband, and thereby encourages her in withholding from him the performance of marital duties, will be liable for so doing if she left without justification, but not otherwise.[7]

§ 132. Husband's remedy for injury to wife. For an injury to the wife, either intentionally or negligently caused, which deprives her of the ability to perform services, or lessens that ability, the husband may maintain an action for the loss of service, and also for any incidental loss or damage, such as moneys expended in care and medical treatment, and the like.[8]

[5] Rinehart v. Bills, 82 Mo. 534, 52 Am. Rep. 388.

[6] Hutcheson v. Peck, 5 Johns. 196; Bennett v. Smith, 21 Barb. 439; Campbell v. Carter, 3 Daly, 165; Holtz v. Dick, 42 Ohio St. 23, 5 Am. Rep. 791; Zimmerman v. Whiteley, 134 Mich. 39, 95 N. W. 989; Oakman v. Belden, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396; Smith v. Lyke, 13 Hun, 204 See *post*, § 134.

[7] Philip v. Squire, Peake, N. P. 82; Barnes v. Allen, 30 Barb. 663. A stranger may give a wife continued shelter and support her against her husband's will only when her husband's violence endangers her personal safety. Johnston v. Allen, 100 N. C. 131, 5 S. E. 666. And see Higham v. Vanosdol, 101 Ind. 160.

[8] Matteson v. N. Y. Cent. R. R. Co., 35 N. Y. 487; Hopkins v. Atlantic, etc., R. R. Co., 94 U. S. 11; Smith v. St. Joseph, 55 Mo. 456, 17 Am. Rep. 660; Fuller v. Naugatuck R. R. Co., 21 Conn. 557, 570; Mowry v. Chaney, 43 Ia. 609; Berger v. Jacobs, 21 Mich. 215; Matthew v. Centr. Pac. R. R. Co, 63 Cal. 450; Southern Ry. Co. v. Crowder, 135 Ala. 417, 33 So. 335; Martin v. Southern Pac. Co., 130 Cal. 285, 62 Pac. 515; Collins Park, etc., R. R. Co. v. Ware, 112 Ga. 663, 37 S. E. 975; Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936; Southern Kan. Ry. Co. v. Pavey, 57 Kan. 521, 46 Pac. 969; Kelley v. New York, etc., R. R. Co., 168 Mass. 308, 46 N. E. 1063, 60 Am. St. Rep. 397, 38 L. R. A. 631; Furnish v.

But if the injury resulted in her death, this cannot, at the common law, be taken into account, either as the ground of action or as an aggravation of damages, and the husband's recovery must be limited to the loss suffered intermediate the injury and death.[9]

A personal injury to the wife gives rise to two causes of action, one in favor of the wife to recover for the physical injury, the pain and suffering, expense, if any, paid from her own estate and loss of earning capacity, where she has a right to her earnings and is engaged in business or lábor on her own account, and one in favor of the husband to recover for loss of his wife's services, society, etc., and for any expense incurred.[10] The action by the husband will lie, though by statute the wife has full control of her separate property and earnings, the same right to labor and engage in business on her own account that he has and may sue alone for injuries to her person.[11]

§ 133. Wrongs to the wife. The right of the husband to inflict personal chastisement upon the wife has probably entirely passed away.[12] There are, indeed, some recognitions

Missouri Pac. Ry. Co., 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800; Riley v. Lidtke, 49 Neb. 139, 68 N. W. 356, 59 Am. St. Rep. 526; Baltimore, etc., Ry. Co. v. Glenn, 66 Ohio St. 395, 64 N. E. 438; Sellek v. Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691.

[9] Hyatt v. Adams, 16 Mich. 180. See Pack v. New York, 3 N. Y. 489.

[10] Denver Con. Tramway Co. v. Riley, 14 Colo. App. 132, 59 Pac. 476; Thompson v. Metropolitan St. Ry. Co., 135 Mo. 217, 36 S. W. 625; Omaha, etc., Ry. Co. v. Chollette, 41 Neb. 578, 59 N. W. 921; Fink v. Campbell, 70 Wis. 664, 17 N. W. 325; Holleman v. Harvard, 119 N. C. 150, 25 S. E. 972, 56 Am. St. Rep. 672, 34 L. R. A. 803; Hoard v. Peck, 56 Barb. 202. As to what is meant by *services* in this connection, see Long v. Booe, 106 Ala. 570, 17 So. 716; Denver Con. Tramway Co. v. Riley, 14 Colo. App. 132, 59 Pac. 476; Furnish v. Missouri Pac. Ry. Co., 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800; Riley v. Lidtke, 49 Neb. 139, 68 N. W. 356, 59 Am. St. Rep. 526; Sellek v. Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691.

[11] Southern Ry. Co. v. Crowder, 135 Ala. 417, 33 So. 335; Kelley v. New York, etc., R. R. Co., 168 Mass. 308, 56 N. E. 1063, 60 Am. St. Rep. 397, 38 L. R. A. 631; Birmingham Southern Ry. Co. v. Lintner, 141 Ala. 420.

[12] Peannan v. Peannan, 1 Swab. & Trist. 609; People v. Winters,

of it within a few years last past, but the spirit of the age rejects it as a reminiscence of barbarism.[13] It cannot be affirmed that an action can be sustained by the wife for an assault upon her by the husband, but such an assault would be taken notice of by the criminal law as an offense against the state.[14] And from any forcible restraint put upon the actions of the wife, and which would constitute an imprisonment, the wife might have relief on *habeas corpus*. But where, by statute, the wife is given full dominion and control of the property purchased or otherwise acquired by her, the marital relation would not protect the husband against an action for any unlawful interference with the property.[15] But even under these statutes the wife cannot maintain an action against her husband for a personal injury.[16] Even after divorce the wife cannot sue the husband for a personal tort committed by him upon her while the relation existed.[17]

For an injury suffered by the wife in her person, such as would give a right of action to any other person, a suit might be instituted in the joint name of the husband and wife.[18]

2 Park, C. R. 10; Commonwealth v. McAfee, 108 Mass. 458, 11 Am. Rep. 383. The husband has no right to compel his wife by force to obey his wishes. Carpenter v. Commonwealth, 92 Ky. 452, 18 S. W. 9.

[13] State v. Rhodes, 1 Phil. (N. C.) 453, 98 Am. Dec. 78; Poor v. Poor, 8 N. H. 307.

[14] Carpenter v. Commonwealth, 92 Ky. 452, 18 S. W. 9.

[15] Emerson v. Clayton, 32 Ill. 493; Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578; Chestnut v. Chestnut, 77 Ill. 346; Starkweather v. Smith, 6 Mich. 377; Larison v. Larison, 9 Ill. App. 27; Bruce v. Bruce, 95 Ala. 563, 11 So. 197; Cook v. Cook, 125 Ala. 583, 27 So. 918, 82 Am. St. Rep. 264; Gillespie v. Gillespie, 64 Minn. 381, 67 N. W. 20.

[16] Peters v. Peters, 42 Ia. 182; Longendyke v. Longendyke, 44 Barb. 366; Schultz v. Schultz, 89 N. Y. 644. And it seems the husband is still liable for the carrying on by the wife of an illegal business on her own account. Commonwealth v. Barry, 115 Mass. 146; S. C. 2 Green Cr. Rep. 285, and note.

[17] Longendyke v. Longendyke, 44 Barb. 366; Peters v. Peters, 42 Ia. 182; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27; Libby v. Berry, 74 Me. 286, 43 Am. Rep. 589; Nickerson v. Nickerson, 65 Tex. 281; Phillips v. Barnet, 1 Q. B. Div. 436; S. C. 17 Moak, 100; Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287, 72 Am. St. Rep. 550, 40 L. R. A. 757.

[18] McFadden v. Santa Ana, etc Ry. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Snashall v. Metropolitan R. R. Co., 8 Mackey, 399,

This suit would be distinct from that which the husband might institute for the loss of services and expenses, and would embrace damages for physical and mental suffering.[19] The damages recovered, however, would belong to the husband alone. This rule appears to be changed by the statutes of some states, which, in excluding the husband's common-law interest in the real and personal estate of the wife, are held to take from him the right to compensation for the torts suffered by her.[20] Under statutes permitting the wife to labor and trade on her own account, it is held in Massachusetts that she may recover on account of the impairment of her capacity to labor.[21] But in other states it is held that, notwithstanding such statutes, the wife's time presumptively belongs to the husband, and that she cannot recover such damages unless she is actually engaged in a business of her own.[22] A wife cannot recover damages on account of personal injuries to her husband whereby she sustains loss of support and of *consortium* and is compelled to care for him while sick[23]

10 L. R. A. 746; Wolf v. Banereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680. If the husband has abandoned the wife and abjured the realm, she may sue alone. Wolf v. Banereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680; Sanborn v. Sanborn, 104 Mich. 180, 62 N. W. 371. So in some cases if she is living separate from her husband. Baldwin v. Second St. Cable R. R. Co., 77 Cal. 390, 19 Pac. 641.

[19] Dengate v. Gardiner, 4 M. & W. 6; Hyatt v. Adams, 16 Mich. 180; Thompson v. Metropolitan St. Ry. Co., 135 Mo. 217, 36 S. W. 625; Omaha, etc., Ry. Co. v. Chollette, 41 Neb. 578, 59 N. W. 921; Fink v. Campbell, 70 Wis. 664, 17 N. W. 325.

[20] Stevenson v. Morris, 37 Ohio St. 10, 41 Am. Rep. 481; Matthew v. Centr. Pac. R. R. Co., 63 Cal. 450; Bloomington v. Annett, 16 Ill. App. 199; Mich. Cent. R. R. Co. v. Coleman, 28 Mich. 440; Musselman v. Galligher, 32 Ia. 383; Pancoast v. Burnell, 32 Ia. 394; Chicago, etc., R. R. Co. v. Dunn, 52 Ill. 260; Hayner v. Smith, 63 Ill. 430, 14 Am. Rep. 124; Hennies v. Vogel, 66 Ill. 401.

[21] Jordan v. Middlesex, etc., Co., 138 Mass. 425; Harmon v. Old Colony R. R. Co., 165 Mass. 100, 42 N. E. 505, 52 Am. St. Rep. 499, 30 L. R. A. 658. See also Atchison, etc., R. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac. 453.

[22] Dickens v. Des Moines, 74 Ia. 216, 37 N. W. 165; Uromsky v. Dry Dock, etc., R. R. Co., 118 N. Y. 304, 23 N. E. 451, 16 Am. St. Rep. 759; Richmond Ry. & Elec. Co. v. Bowles, 92 Va. 738, 24 S. E. 388; Atlantic, etc., R. R. Co. v. Ironmonger, 95 Va. 625, 29 S. E. 319.

[23] Goldman v. Cohen, 31 Misc. 36, 65 N. Y. S. 406.

§ 134. Action by wife for alienation of husband's affection. The authorities are now strongly in favor of the right to bring this action, some cases basing their conclusion upon common-law principles and some more or less upon the various enabling statutes in favor of married women, which have been passed in recent years.[24] The gist of the action is the

[24] Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847; Humphrey v. Pope, 1 Cal. App. 374; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829; Hart v. Knapp, 76 Conn. 135; Noxon v. Remington, 78 Conn. 296; Betser v. Betser, 186 Ill. 537, 58 N. E. 249, 78 Am. St. Rep. 303, 52 L. R. A. 630; Haynes v. Newlin, 129 Ind. 581, 29 N. E. 389, 28 Am. St. Rep. 213; Wolf v. Wolf, 130 Ind. 599, 30 N. E. 308; Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932; Postlewaite v. Postlewaite, 1 Ind. App. 473, 28 N. E. 99; Railsback v. Railsback, 12 Ind. App. 659, 40 N. E. 276, 1119; Price v. Price, 91 Ia. 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150; Ruth v. Zimbleman, 99 Ia. 641, 68 N. W. 895; Childs v. Muckler, 105 Ia. 279, 75 N. W. 100; Hardwick v. Hardwick, 130 Ia. 230; Deitzman v. Deitzman, 108 Ky. 610, 57 S. W. 247, 50 L. R. A 808, 94 Am. St. Rep. 390; Eagon v. Eagon, 60 Kan. 697, 57 Pac. 942; Nevins v. Nevins, 68 Kan. 410, 75 Pac. 492; Wolf v. Frank, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; Nolin v. Pearson, 191 Mass. 283; Warren v. Warren, 89 Mich. 123; Rice v. Rice, 104 Mich. 371; Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784; Clow v. Chapman, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468; Nichols v. Nichols, 134 Mo. 187, 35 S. W. 577; Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947; Hodgkinson v. Hodgkinson, 43 Neb. 269, 61 N. W. 577, 47 Am. St. Rep. 759, 27 L. R. A. 120; Seaver v. Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Manwarren v. Mason, 79 Hun, 592, 29 N. Y. S. 915; Van Olinda v. Hall, 88 Hun, 452, 34 N. Y. S. 777; Romaine v. Decker, 11 App. Div. 20, 32 N. Y. S. 66; Buchanan v. Foster, 23 App. Div. 542, 48 N. Y. S. 732; Whitman v. Egbert, 27 App. Div. 374, 50 N. Y. S. 3; Wilson v. Coulter, 29 App. Div. 85, 51 N. Y. S. 804; Kuhn v. Hernmann, 44 App. Div. 108, 59 N. Y. S. 341; King v. Hanson, 13 N. D. 85; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Gernerd v. Gernerd, 185 Pa. St. 233, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L. R. A. 549; Reading v. Gazzam, 200 Pa. St. 70, 49 Atl. 889; Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075; Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114; Stanley v. Stanley, 32 Wash. 489, 72 Pac. 596 The same thing is held by implication in the following cases: Tucker v. Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; Brown v. Brown, 124 N. C. 19, 32 S. E. 320, 70 Am St. Rep. 574; Sheriff v. Sheriff, 8 Okl. 124, 56 Pac. 960,

loss of *consortium*, which includes the husband's society, affection and aid.[25] The wife may have the action though she continues to live with her husband,[26] and it is held that she may maintain it after a divorce from him.[27] The action is frequently brought against the husband's parents or one of them and in such case it is necessary to show that the interference was malicious, or from bad motives and without reasonable foundation.[28]

§ 135. **Action by the parent.** The injury which one may suffer in the relation of parent seems, at the common law, to be limited to an action for the recovery of damages for being deprived of the child's services. The action is, therefore, planted rather upon a loss in the character of the master of a servant than in that of the head of a family. This sometimes leads to results which are extraordinary, for it seems to follow.

See also Warren v. Warren, 89 Mich. 123; Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114. *Contra*, Doe v. Doe, 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 833; Morgan v. Martin, 92 Me. 190, 42 Atl. 354; Neville v. Gile, 174 Mass. 305, 54 N. E. 841; Houghton v. Rice, 174 Mass. 366, 54 N. E. 843, 75 Am. St. Rep. 351, 47 L. R. A. 310; Hodge v. Wetzler, 69 N. J. L. 490, 55 Atl. 49 (Supreme Court); Smith v. Smith, 98 Penn. 101, 38 S. W. 439, 60 Am. St. Rep. 838; Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, 20 Am. St. Rep. 79, 8 L. R. A. 420; Lonstorf v. Lonstorf, 118 Wis. 159, 95 N. W. 961.

[25] Buchanan v. Foster, 23 App. Div. 542, 48 N. Y. S. 732; Reading v. Gazzam, 200 Pa. St. 70, 49 Atl. 889.

[26] Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829.

[27] Postlewaite v. Postlewaite, 1 Ind. App. 473, 28 N. E. 99; Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114.

[28] Reed v. Reed, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310. To same effect. Huling v. Huling, 32 Ill. App. 519; Eagon v. Eagon, 60 Kan. 697, 57 Pac. 942; Tucker v. Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; Pollock v. Pollock, 9 Misc. 82, 29 N. Y. S. 37; Brown v. Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; Sheriff v. Sheriff, 8 Okl. 124, 56 Pac. 960; Gernerd v. Gernerd, 185 Pa. St. 233, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L. R. A. 549. It follows that if the interference is wrongful, that is, not in good faith, and from improper motives, an action lies. Railsback v. Railsback, 12 Ind. App. 659, 40 N. E. 276, 1119; Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947.

as a necessary consequence, that if the child, from want of maturity or other cause, is incapable of rendering service, the parent can suffer no pecuniary injury, and therefore can maintain no action when the child is abducted or injured. Such have been the decisions.[29] Loss of service to the parent may be occasioned by enticing the child away,[30] by forcibly abducting the child,[31] by beating or otherwise purposely injuring the child,[32] by a negligent injury which disables the child from labor,[33] and in case of a female child, by seduction.[34] In some of these cases there may be two wrongs: One to the parent, in depriving him of the child's services; and one to the child, to his personal injury.[35] But the right of action in each, being

[29] Hall v. Hollander, 7 D. & Ry. 133; S. C. 4 B. & C. 660; Eager v. Grimwood, 1 W., H. & G. 61; Grinnell v. Wells, 7 M. & G. 1033; S. C. 8 Scott N. R. 741.

[30] And this, whether the child be male or female. Sherwood v. Hall, 3 Sumn. 127; Bundy v. Dodson, 28 Ind. 295; Everett v. Sherfey, 1 Ia. 356; Caughey v. Smith, 47 N. Y. 244; Plummer v. Webb, 4 Mason, 380; Stowe v. Heywood, 7 Allen, 118; Sargent v. Mathewson, 38 N. H. 54; Hare v. Dean, 90 Me. 308, 38 Atl. 227; Arnold v St. Louis, etc., R. R. Co., 100 Mo. App. 470, 74 S. W. 5; Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. 267, 27 Am. St. Rep. 521, 14 L. R. A. 700. So if one harbors a minor who has left home against the will of his parents. Arnold v. St. Louis, etc., R. R. Co., 100 Mo. App. 470, 74 S. W. 5.

[31] Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

[32] Hoover v. Heim, 7 Watts, 62; Hammer v. Pierce, 5 Harr. 171; Cowden v. Wright, 24 Wend. 429, 35 Am. Dec. 633; Whitney v. Hitchcock, 4 Denio, 461; Klingman v. Holmes, 54 Mo. 304.

[33] Dominick Pipe Works v. Wood, 139 Ala. 282, 35 So. 885; Augusta Factory v. Davis, 87 Ga. 648, 13 S. E. 577; Louisville, etc., Ry. Co. v. Goody Koontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013, 53 L. R. A. 789; Cuming v. Brooklyn City R. R. Co., 109 N. Y. 95, 16 N. E. 65; Forsythe v. Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731; Karr v. Parks, 44 Cal. 46.

[34] See *post*, § 260. As to action by the father for procuring the marriage of his daughter without his consent, see Hills v. Hobert, 2 Root, 48; Jones v. Tevis, 4 Litt. 25, (1823) 14 Am. Dec. 98; Hervey v. Moseley, 7 Gray, 479, 66 Am. Dec. 515. See, also, Goodwin v. Thompson, 2 Greene, (Ia.) 329; Holland v. Beard, 59 Miss. 161, 42 Am. Rep. 360.

[35] Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751; Forsyth v. Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731.

distinct rights, cannot be joined.[36] The right of action is in the father,[37] but in case of his desertion or death the mother may sue.[38] If the injury caused instant death there was no remedy at common law.[39]

§ 136. **Parent's action for seduction of daughter.** Where seduction of a daughter is the injury complained of, some of the anomalies of basing the right of recovery upon the loss of services are deserving of special notice. A statement of the conclusions of the judicial mind under different sets of circumstances will show what these anomalies are.

First—The father suing for this injury in the case of a daughter actually at the time being a member of his household, is entitled to recover in his capacity of actual master for a loss of services consequent upon any diminished ability in the daughter to render services. That an actual loss is suffered under such circumstances the law will conclusively presume, and evidence that the daughter was accustomed to render no service will not be received. And while this supposed loss will constitute the nominal ground of recovery, a substantial award of damages will be supported, based on the injury to the parental feelings and the shame and mortification which must follow from such a wrong. To this also may be added any pecuniary expense which the parent has been put to for care, medical attendance, etc.[40]

[36] Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483. The father may recover, notwithstanding the action in behalf of the child. Evansich v. G. C., etc., Ry. Co., 57 Tex. 123, 44 Am. Rep. 586; Welton v. Middlesex, etc., Co., 125 Mass. 130.

[37] Citizens' St. R. R. Co. v. Willoeby, 15 Ind. App. 312, 43 N. E. 1058.

[38] Horgan v. Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504; Kerr v. Pennsylvania R. R. Co., 169 Pa. St. 95, 32 Atl. 96.

[39] Bligh v. Biddeford, etc., R. R. Co., 94 Me. 499, 48 Atl. 112; Ohnmacht v. Mount Morris Elec. Lt. Co., 66 App. Div. 482, 73 N. Y. S. 296; Gulf, etc., Ry. Co. v. Beall, 91 Tex. 310, 42 S. W. 1054, 66 Am. St. Rep. 892, 41 L. R. A. 807; Clark v. London General Omnibus Co., (1906) 2 K. B. 648. Not even when the son has contracted to contribute a certain sum monthly to his father's support. Brink v. Wabash R. R. Co., 160 Mo. 87, 60 S. W. 1058, 83 Am. St. Rep. 459, 53 L. R. A. 811.

[40] Bennett v. Alcott, 2 T. R. 166; Manvell v. Thomson, 2 C. & P. 303; Thompson v. Ross, 5 H. & N. 16; Harris v. Butler, 2 M. & W. 539; Blaymire v. Haley, 6 M. & W. 55; Hedges v. Tagg, L. R. 7 Exch. 283; Clarke v. Fitch, 2

Second—If the daughter at the time was not actually a member of the father's household, yet if she were not in the actual service of another, and the father had a right to recall her to his own service, he may maintain the action the same as if she actually had been recalled or had returned.[41]

Third—But if the daughter was actually in the service of another, no action could be maintained by the parent, because the conditions which support it did not then exist.[42]

Wend. 459, 20 Am. Dec. 639; Hewitt v. Prime, 21 Wend. 79; Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338; Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Blanchard v. Ilsley, 120 Mass. 487, 21 Am. Rep. 535; McAulay v. Birkhead, 13 Ired. 28, 55 Am. Dec. 427; Vossel v. Cole, 10 Mo. 634, 47 Am. Dec. 136; Emery v. Gowen, 4 Me. 33, 16 Am. Dec. 233; Mighell v. Stone, 175 Ill. 261, 51 N. E. 906; Stowers v. Singer, 113 Ky. 584, 68 S. W. 637; Beaudette v. Gague, 87 Me. 534, 33 Atl. 23; Anderson v. Riggs, 64 N. J. L. 407, 45 Atl. 782; Scarlett v. Norwood, 115 N. C. 284, 20 S. E. 459; Ingwaldson v. Skrivseth, 7 N. D. 388, 75 N. W. 772; Milliken v. Long, 188 Pa. St. 411, 41 Atl. 540. It makes no difference whether the debauching was by artifice or force. Lawrence v. Spence, 99 N. Y. 669; Lavery v. Crooke, 52 Wis. 612, 38 Am. Rep. 768.

[41] Bolton v. Miller, 6 Ind. 265; Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338; Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288; Mulvehall v. Millward, 11 N. Y. 343; Hornketh v. Barr, 8 Serg. & R. 36, 11 Am. Dec. 561; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Van Horne v. Freeman, 6 N. J. L. 322; Mercer v. Walmsley, 5 H. & J. 27, 9 Am. Dec. 486; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Roberts v. Connelly, 14 Ala. 239; Blagge v. Ilsley, 127 Mass. 191; Ogborn v. Francis, 44 N. J. L. 441, 43 Am. Rep. 394; Terry v. Hutchinson, L. R. 3 Q. B. 599.

[42] Dean v. Peel, 5 East, 49; South v. Denniston, 2 Watts, 474; Nickleson v. Stryker, 10 Johns. 115; Dain v. Wycoff, 7 N. Y. 191. The fact that the daughter went home once a week and then assisted her father and mother will not suffice, if father not entitled to the service. Whitbourne v. Williams, (1901) 2 K. B. 722. The father may sue if he retains right to command the services of the child though she be at the time in another's service. Mohry v. Hoffman, 86 Pa. St. 358; Riddle v. McGinnis, 22 W. Va. 253; Lavery v. Crooke, 52 Wis. 612, 38 Am. Rep. 768; Simpson v. Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52. The action being grounded on loss of service, the fact that the daughter is of full age is immaterial. Keller v. Donnelly, 5 Md. 211; Greenwood v. Greenwood, 28 Md. 370; Vossel v. Cole, 10 Mo. 634, 47 Am. Dec. 136; Sutton v. Hoffman, 32 N. J. L. 58; Wert v. Strouse, 38 N. J. L. 184;

It has been well said in Pennsylvania that "proof of the relation of master and servant, and of the loss of service, by means of the wrongful act of the defendant, has relation only to the form of the remedy, and that the action being sustained in point of form by the introduction of these technical elements, the damages may be given as a compensation to the plaintiff, not only for the loss of service, but also 'for all that the plaintiff can feel from the nature of the injury.'"[43] Similar expressions are to be met with in the decisions of other courts.[44] The supreme court of Kansas has disregarded the fiction of service and held that in that state "a parent may maintain an action for the seduction of the daughter without averment or proof of services or expenses of sickness."[45] Many states now have statutes which allow suits for seduction

Stevenson v. Belknap, 6 Ia. 97, 71 Am. Dec. 392; Lipe v. Eisenlerd, 32 N. Y. 229; Bennett v. Allcott, 2 T. R. 166; Harper v. Luffkin, 7 B. & C. 387. If the daughter is above the age of 21, she must be actually a member of the family or the parent cannot sue. Clark v. Fitch, 2 Wend. 459, 20 Am. Dec. 639; McDaniel v. Edwards, 7 Ired. 408, 47 Am. Dec. 331; Lee v. Hodges, 13 Gratt. 726; Patterson v. Thompson, 24 Ark. 55; Kendrick v. McCrary, 11 Ga. 603; Sutton v. Hoffman, 32 N. J. L. 58; Wert v. Strouse, 38 N. J. L. 184. If she does live at home it is immaterial that she gives her services voluntarily and pays board. Lamb v. Taylor, 8 Atl. 760 (Pa.).

[43] Lewis, J., in Phelin v. Kenderdine, 20 Pa. St. 354, 361, quoting 2 Greenl. Ev. § 579.

[44] See particularly Lipe v. Eisenlerd, 32 N. Y. 229, 236, per Denio, Ch. J.; Clark v. Fitch, 2 Wend. 459, 20 Am. Dec. 639; Stiles v. Tilford, 10 Wend. 338; Pruitt v. Cox, 21 Ind. 15; Felkner v. Scarlet, 29 Ind. 154; Taylor v. Shelkett, 66 Ind 297; Phillips v. Hoyle, 4 Gray, 568; Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Kendrick v. McCrary, 11 Ga. 603; Ellington v. Ellington, 47 Miss. 329; Lunt v. Philbrick, 59 N. H. 59; Morgan v. Ross, 74 Mo. 318; Rollins v. Chalmers, 51 Vt. 592; Simpson v. Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52; Mighell v. Stone, 175 Ill. 261, 51 N. E. 906; Cook v. Bartlett, 179 Mass. 576, 61 N. E. 266; Middleton v. Nichols, 62 N. J. L. 636, 43 Atl. 575; Milliken v. Long, 188 Pa. St. 411, 41 Atl. 540. Previous unchastity may be shown in mitigation of damages. Simpson v. Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52; Stowers v. Singer, 113 Ky. 584, 68 S. W. 637.

[45] Anthony v. Norton, 60 Kan. 341, 56 Pac. 529, 72 Am. St. Rep. 360, 44 L. R. A. 757. And see Ellington v. Ellington, 47 Miss. 329, 351.

to be brought for the benefit of the woman herself, some near relative, or a guardian being suffered to bring it, and all allegations of loss of service being dispensed with.[46]

If the father is deceased, the mother may bring the action for this injury.[47] So if the father lives out of the state.[48] Wherever this action is permitted at the common law, it is assumed that the plaintiff is not in fault. If he was assenting to the seduction, or connived at it, or without objection permitted such improper action on the part of the defendant as might naturally, and in fact did, lead to it, these facts may be pleaded in bar of a recovery.[49]

As a general rule the cause of action accrues and the statute of limitations begins to run from the date of the seduction,

[46] See Updegraff v. Bennett, 8 Iowa. 72; Felkner v. Scarlet, 29 Ind. 154; Simons v. Busby, 119 Ind. 13, 21 N. E. 451; McCoy v. Trucks, 121 Ind. 292, 23 N. E. 93; Hawn v. Banghart, 76 Ia. 683, 39 N. W. 251, 14 Am. St. Rep. 261; Egan v. Murray, 80 Ia. 180, 45 N. W. 563; Rabeke v. Baer, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567. As to the effect of giving a statutory remedy upon the common law right, see Cross v. Goodman, 20 Up. Can., Q. B. 242; Watson v. Watson, 49 Mich. 540; Weiher v. Meyersham, 50 Mich. 602. There must be some false promise or artifice. Baird v. Boehner, 77 Ia. 622, 33 N. W. 694; Stowers v. Singer, 113 Ky. 584, 68 S. W. 637. To same effect. Hawn v. Banghart, 76 Ia. 683, 39 N. W. 251, 14 Am. St. Rep. 261; Egan v. Murray, 80 Ia. 180, 45 N. W. 563; Rabeke v. Baer, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567; Graham v. McReynolds, 90 Tenn. 673, 18 S. W. 272; Bradshaw v. Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655. When the seduced woman may sue in her own name, she may bring an action after as well as before a marriage to a third person. Dowling v. Crapo, 65 Ind. 209. When a woman marries her seducer and is then divorced, she cannot afterwards sue for the seduction. Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848. But she may if the marriage is annulled. Ibid.

[47] Coon v. Moffit, 3 N. J. L. 583, 4 Am. Dec. 392; Sargent v. ———, 5 Cow. 106; Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Gray v. Durland, 51 N. Y. 424; Felkner v. Scarlet, 29 Ind. 154. It must appear that the mother was actually entitled to the child's services. Hobson v. Fullerton, 9 Ill. App. 280; Ryan v. Fralick, 50 Mich. 483.

[48] Abbott v. Hancock, 123 N. C. 99, 31 S. E. 268.

[49] Reddie v. Scoolt, 1 Peake, 316; Seager v. Sligerland, 2 Caines, 219; Smith v. Mastin, 15 Wend. 270; Vossel v. Cole, 10 Mo. 634, 47 Am. Dec. 136.

though actual damage may not result until a later date.[49a] Where there are repeated acts of sexual intercourse, procured by the same or similar artifices on the part of the defendant, the whole may be treated as a single wrong and the action will not be barred until the lapse of the statutory period from the last act of intercourse.[49b]

§ 137. **Wrongs to a child.** For an injury suffered by the child in that relation no action will lie at the common law. The obligation of the parent to support him is only enforced by proceedings on behalf of the public, and not by suit in the name of or on behalf of the child. And no action will lie against a third person for depriving a child of his source of support by means of an injury to the parent. By statute, however, a remedy is given in a few cases which will be considered further on. Where the child is injured in his own property or person, redress has no necessary connection with the family relation. A minor child has no civil remedy against its parents, or either of them, for cruel and abusive treatment.[50]

§ 138. **Actions by guardians.** The guardian is either of the ward's person, or of his estate, or of both. The guardian of the estate may maintain all proper suits for its protection. The guardian of the ward's person may, in general, maintain suits for personal injuries to the ward when, under corresponding circumstances, the parent might maintain them.[51]

[49a] Davis v. Boyett, 120 Ga. 649, 48 S. E. 185; Dunlap v. Linton, 144 Pa. St. 335, 32 Atl. 819.

[49b] Gunder v. Tibbits, 153 Ind. 591, 55 N. E. 762; Hayman v. Saucer, 84 Ind. 3; Davis v. Young, 90 Tenn. 303, 16 S. W. 473; Ferguson v. Moore, 98 Tenn. 342.

[50] McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664, 102 Am. St. Rep. 787; Roller v. Roller, 37 Wash. 242, 79 Pac. 788, 107 Am. St. Rep. 708; Hewlett v Ragsdale, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682. In the last case the court says: "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand." P. 711. See *ante*, pp. 157, 159.

[51] Louisville, etc., Ry. Co. v. Goody-Koontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371.

It has been held that he may bring suit for the seduction of his female ward, the right being grounded on the legal control he has over the minor's services.[52] But the contrary has been held in Massachusetts, where he has no such control.[53]

§ 139. **Action for fraudulent marriage.** A very serious wrong may be accomplished by inducing one, through misrepresentation and fraud, to enter into an illegal marriage. It was decided in an early case, that where a married man, by falsely assuming to be single, succeeded in inducing a woman to marry him, she might, on discovering the deception, maintain an action against him for the injury.[54] This doctrine has been applied in New York to the case of one from whom his wife had procured a decree of divorce, leaving him incapacitated to marry again during her life time.[55] The tort in such a case consists in the fraud accomplished, to the woman's serious, and perhaps permanent, injury. Nor can it be essential that any false affirmations should have been made in words. The woman to whom marriage is offered by one she does not know to be married, is not bound, at her peril, to suspect him of intended crime, and to question him accordingly; but she may rightfully assume, as she commonly will, that he has lawful authority to do what he proposes, and his conduct in proposing is of itself a false affirmation if he has not.[56]

[52] Fernsler v. Moyer, 3 W. & S. 416.

[53] Blanchard v. Ilsley, 120 Mass. 487, 21 Am. Rep. 535.

[54] Anonymous, Skinner, 119. And so in the following: Cocke v. Greene, 180 Mass. 525, 62 N. E. 1053; Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; Payne's Appeal, 65 Conn. 397, 32 Atl. 948, 48 Am. St. Rep. 215, 33 L. R. A. 418.

[55] Blossom v. Barrett, 37 N. Y. 434. A similar action was brought in Maine, after the man's death, against his personal representative, and sustained. Withee v. Brooks, 65 Me. 14. In Pennsylvania, however, it was held the right of action did not survive. Grim v. Carr's Admr., 31 Pa. St. 533. In Higgins v. Breen, 9 Mo. 497, a woman who had been united in a void marriage with a married man, whom she believed to be single, was held entitled, after his death, to recover against his estate the value of her services. In Payne's Appeal, 65 Conn. 397, 32 Atl. 948, 48 Am. St. Rep. 215, 33 L. R. A. 418, where a man was fraudulently induced to marry a woman who already had a husband and lived with her until her death, it was held he could not recover for her support from her estate.

[56] G., a woman, was secretly

Known impotency on the part of the man, it would seem, must be a fraud on the marriage; and being with child by another man at the time of the marriage, and not disclosing the fact, would be a like fraud in the woman. For these the marriage might be annulled by a competent court,[57] but they afford no ground for an action at the common law. But in such a case an action for damages will lie against a third party who is a party to the fraud. Thus K. was a domestic in the employ of the defendant G. and became pregnant by him. K. and G. then conspired to bring about her marriage to the plaintiff by representing to him that K. was virtuous and respectable. Upon discovering the fraud the plaintiff sued K. and G. jointly and recovered a judgment for $2,000 against G., apparently no judgment being asked or taken against K.[58]

§ 140. **Burial rights, and rights in dead bodies.** In respect to the burial of the dead, if anywhere, shall we expect to find in the common law a recognition of legal rights in the family as an aggregate of persons. Even in that case, however, the

married to Dr. C. and the marriage was kept a secret for fear her father would cut off an allowance, if he knew of the fact. G. lived with the doctor under the guise of his housekeeper and assistant and went by the name of Mrs. G. She was introduced to the plaintiff, a lady patient of the doctor's, as Mrs. G. Later she left the doctor and the plaintiff was married to him. Upon discovering the fraud the plaintiff sued both the doctor and G. jointly. It was held that G. was not liable, that the failure of G. to tell the plaintiff of the true state of affairs was not a legal fraud. Cocke v. Greene, 180 Mass. 525, 62 N. E. 1053.

[57] Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 95 Am. St. Rep. 609; Scott v. Shufeldt, 5 Paige, 43; Reynolds v. Reynolds, 3 Allen, 605; Donovan v. Donovan, 9 Allen, 140; Morris v. Morris, Wright, (O.) 630; Ritter v. Ritter, 5 Blackf. 81. Ante nuptial incontinence in the woman is no ground whatever for annulling a marriage. Leavitt v. Leavitt, 13 Mich. 452; Varney v. Varney, 52 Wis. 120, 38 Am. Rep. 726. Where one of the parties to a marriage contract is insane the marriage is void and may be annulled. Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256; Pyott v. Pyott, 191 Ill. 280, 61 N. E. 88. So a marriage will be annulled if the husband falsely represents that he is free from venereal disease Crane v. Crane, 62 N. J. Eq. 21, 49 Atl. 734; Svenson v. Svenson, 178 N. Y. 54, 70 N. E. 120.

[58] Kujek v. Goldman, 150 N. Y 176, 44 N. E. 773, 55 Am. St. Rep 670, 34 L. R. A. 156.

recognition is very faint and uncertain. An unlawful interference with the buried dead of the family might probably be restrained by injunction on their joint application,[59] and the owner of the lot in which the body was deposited might maintain trespass *quare clausum* for its disinterment, and recover substantial damages, in awarding which, the injury to the feelings would be taken into consideration.[60] "The holder of a lot in a cemetery belonging to a municipality or religious society for burial purposes, whether his evidence of title be by deed, or certificate, or other means, does not acquire an absolute title to the land, but has the right, or license, exclusively of any and every other person, to bury the dead upon the subdivided plot assigned to him, and a license once acquired cannot be revoked so long as the ground continues to be used as a place of sepulchre."[61] The right is subject to the rules governing the cemetery when the lot was bought, and, if the privilege is limited to Catholics, one not a Catholic cannot be buried there.[62] And where the use of the ground for cemetery purposes is discontinued and the bodies are to be removed, the owners of lots, or of rights of burial therein, are held to be entitled to notice, if it is practicable to give it, and an opportunity to remove their own dead.[63] And in such case the owner may remove monuments as personal property. For an

[59] See Kincaid's Appeal, 66 Pa. St. 411, where burial rights are considered, and cases referred to.

[60] Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Feeley v. Andrews, 191 Mass. 313; Bessemer Land & Imp. Co. v. Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Gowen v. Bessey, 94 Me. 114, 46 Atl. 792; Pulsifer v. Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238. At the common law, the only remedy for the wrongful removal of the body buried in church grounds was by indictment. Regina v. Sharpe, Dears. & B. 160; S. C. 40 Eng L. & Eq. 581.

[61] Gowen v. Bessey, 94 Me. 114, 46 Atl. 792.

[62] Dwenger v. Gray, 113 Ind. 106, 14 N. E. 903.

[63] Bessemer Land & Imp. Co. v. Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26. The rights in burial lots descend to heirs. McWhirten v. Newell, 200 Ill. 583, 66 N. E. 345; Hook v. Joyce, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96. See further as to rights in burial lots, Donnelly v. Boston Catholic Cem. Ass'n, 146 Mass. 163, 15 N. E. 505; Gardiner v. Swan Point Cemetery, 20 R. I. 646, 40 Atl. 9[illegible], 78 Am. St. Rep. 897; Silverwood v. Latrobe, 68 Md. 620, 13 Atl. 161.

injury to a monument an action of trespass may be brought by the owner of the burial lot; or, if there was no private ownership in the lot, then by the party erecting it.[64] Where a father was buried in the lot of his daughter in accordance with his wish, it was held that his widow, a step-mother of the daughter, had a right to erect a monument on the lot to her husband, and it was also held that all the kin of the deceased were entitled to put flowers on the grave in such way as not to interfere with each other.[65]

The right to the custody, control and disposition of a dead body belongs to those most intimately and closely connected with the deceased by domestic ties and this is a right which the law will recognize and protect.[66] Accordingly the wife may recover damages for the unauthorized dissection of the husband's body.[67] So may a father recover for an unauthorized autopsy upon the body of his child.[68] And a son for the mutilation of the father's body, when the wife does not survive.[69] But an autopsy may be ordered by the coroner in a proper case, and in that event neither he nor those performing it, or otherwise concerned in it, will incur any liability.[70] In Indiana it has been said that "the bodies of the dead belong to the surviving relations, as property, and that they have a right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated."[71] But the common law recognized no such property, though it did recognize a property in the shroud or other

[64] Spooner v. Brewster, 3 Bing. 136; Partridge v. First Independent Church, 39 Md. 631; Hook v. Joyce, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96.

[65] Thompson v. Deeds, 93 Ia. 228, 61 N. W. 842, 35 L. R. A. 56.

[66] Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85; Pettigrew v. Pettigrew, 207 Pa. St. 313, 56 Atl. 878, 99 Am. St. Rep. 795, 64 L. R. A. 179.

[67] Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85; Foley v. Phelps, 1 App. Div. 551, 37 N. Y. S. 471.

[68] Burney v. Children's Hospital, 169 Mass. 57, 47 N. E. 401, 61 Am. St. Rep. 273, 38 L. R. A. 413.

[69] Koerber v. Patek, 123 Wis. 453, 102 N. W. 40.

[70] Young v. College of Physicians & Surgeons, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540.

[71] Bogert v. Indianapolis, 13 Ind. 134, 138, per Perkins, J.

apparel of the dead as belonging to the person who was at the charge of the funeral.[72]

The modern law in regard to the right of burial, removal and re-interment of dead bodies is very comprehensively summed up by the supreme court of Pennsylvania, as follows: "The result of a full examination of the subject is that there is no universal rule applicable alike to all cases, but each must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent and the rights and feelings of those entitled to be heard by reason of relationship or association. Subject to this general result it may be laid down first, that the paramount right is in the surviving husband or widow, and if the parties were living in the normal relations of marriage it will require a very strong case to justify a court in interfering with the wish of the survivor.[73] Secondly, if there be no surviving husband or wife, the right is in the next of kin in the order of their relation to the decedent, as children of proper age, parents, brothers and sisters, or more distant kin, modified it may be by circumstances of special intimacy or association with the decedent.[74] Thirdly, how far the desires of a decedent should prevail against those of a surviving husband or wife is an open question, but as against remoter connections, such wishes, if strongly and recently expressed, should usually prevail.[75] Fourthly, with regard to a re-interment in a different place, the same rules should apply, but with a presumption against

[72] 2 Bl. Com. 429; Matter of Brick Presb. Church, 3 Edw. Ch. 155, 168; Meagher v. Driscoll, 99 Mass. 281, 284; Pierce v. Proprietors, etc., 10 R. I. 227, 242.

[73] To same effect. Neighbors v. Neighbors, 112 Ky. 161, 65 S. W. 607; Pulsifer v. Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238; Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85; McEntee v. Bonacum, 66 Neb. 651, 92 N. W. 633, 60 L. R. A. 440; Foley v. Phelps, 1 App. Div. 551, 37 N. Y. S. 471; Matter of Richardson, 29 Misc. 367, 60 N. Y. S. 539; Smiley v. Bartlett, 6 Ohio C. C. 234. See as to right to custody of man's dead body as between a Catholic stepmother and a Protestant son. Butler v. Butler, 91 App. Div. 327, 86 N. Y. S. 586.

[74] Ibid.

[75] The wishes of the deceased held not necessarily controlling. McEntee v. Bonacum, 66 Neb. 651, 92 N. W. 633, 60 L. R. A. 440; Smiley v. Bartlett, 6 Ohio C. C. 234.

removal growing stronger with the remoteness of connection with the decedent, and reserving always the right of the court to require reasonable cause to be shown for it."[76]

§ 141. Master and servant. The wrongs which the master may sustain in that relation at the hands of others are substantially confined to being deprived of services. Connected with this, however, may be incidental damages, such as expenses in care and attention for the servant, medicines, etc., when the loss is occasioned by some violence to the servant, or injury to his health, so that his care devolves upon the master, and perhaps other incidental expenses in some cases. The principles which govern the recovery have been sufficiently indicated in speaking of parent and child.[77] The wrongs which a servant might suffer at the hands of third persons would be redressed, independent of the relation.

[76] Pettigrew v. Pettigrew, 207 Pa. St. 313, 56 Atl. 878, 99 Am. St. Rep. 795, 64 L. R. A. 179. In this case a removal of the husband's body was allowed at the instance of the widow as against the brothers and sisters of the deceased, who were his next of kin. The following also involve the right of removal and support the last point quoted from the Pennsylvania case: Thompson v. Deeds, 93 Ia. 228, 61 N. W. 842, 35 L. R. A. 56; Neighbors v. Neighbors, 112 Ky. 161, 65 S. W. 607; McEntee v. Bonacum, 66 Neb. 651, 92 N. W. 633, 60 L. R. A. 440; Smiley v. Bartlett, 6 Ohio C. C. 234; Pulsifer v. Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238; Wild v. Walker, 130 Mass. 422; Wynkoop v. Wynkoop, 42 Pa. St. 293, 82 Am. Dec. 506; Pierce v. Proprietors, etc., 10 R. I. 227, 14 Am. Rep. 667; Guthrie v. Weaver, 1 Mo. App. 136.

[77] Ames v. Union Ry. Co., 117 Mass. 541, 19 Am. Rep. 426. See Schouler Dom. Rel. 631, 632, and cases cited. Merely hiring a servant already hired to another held not actionable, when no malice, deception or fraud. Kline v. Eubanks, 109 La. 241, 33 So. 211.

CHAPTER VIII.

ACTION FOR DEATH BY WRONGFUL ACT.

§ 142. No action at common law for causing the death of a person. At the common law, no civil action would lie for causing the death of a human being.[1] Where the death of a person was caused by the wrongful act or neglect of another and the death was not instantaneous, any one entitled to the services of such person, such as his parent or master, might sue for the loss of services intermediate the injury and death and for expenses incurred for medical attendance, nursing and the like.[2] But if death was instantaneous in such cases and in all cases where the deceased owed no duty of service, no action whatever would lie at common law.

§ 143. Statutes giving an action for wrongful death. To remedy this defect in the common law, the British parliament in the year 1846 passed an act which is familiarly known as

[1] Hindry v. Holt, 24 Colo. 464, 51 Pac. 1002, 65 Am. St. Rep. 235, 39 L. R. A. 351; Broughel v. South New Eng. Tel. Co., 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404; Major v. Burlington, etc., Ry. Co., 115 Ill. 309; Jackson v. Pittsburg, etc., Ry Co., 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192; Seney v. Chicago, etc., Ry. Co., 125 Ia. 290, 101 N. W. 76; Eureka v. Merrifield, 53 Kan. 794, 37 Pac. 113; Nickerson v. Harriman, 28 Me. 279; Bligh v. Biddeford, etc., R. R. Co., 94 Me. 499, 48 Atl. 112; Grosso v. Delaware, etc., R. R. Co, 50 N. J. L. 317, 13 Atl. 233; Myers v. Holborn 58 N. J. L. 193, 33 Atl. 389, 55 Am. St. Rep. 606, 30 L. R. A. 345; Ohnmacht v. Mount Morris Elec. Lt. Co., 66 App. Div. 482, 73 N. Y. S. 296; Killian v. Southern Ry. Co., 128 N. C. 261, 38 S. E. 873; Gulf, etc., Ry. Co. v. Beall, 91 Tex. 310, 42 S. W. 1054, 66 Am. St. Rep. 892, 41 L. R. A. 807; Mobile Life Ins Co. v. Brame, 95 U. S. 756; The Harrisburg, 119 U. S. 199, 7 S. C. Rep. 140, 30 L. Ed. 358; Swift & Co. v. Johnson, 138 Fed. 867 (C. C. A.)

[2] See *ante*, §§ 135, 137; Osborn v. Gillett, L. R. 8 Exch. 88; Hyatt v. Adams, 16 Mich. 180; Covington, etc., R. R. Co. v. Packer, 9 Bush, 455; Sherman v. Johnson, 58 Vt. 40; Bell v. Centr. R. R. Co., 73 Ga. 520; Sullivan v. Un. Pac. R. R Co, 1 McCrary, 301

Lord Campbell's Act, by which it was provided "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"That every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury, by their verdict, shall direct."[3]

Statutes more or less similar to Lord Campbell's Act now exist in all or nearly all of the states of the American Union.[4]

§ 144. Construction of statutes generally. It is generally held that such statutes create a new cause of action.[5] But

[3] Stat. 9 and 10 Vic. c. 93, §§ 1 and 2.

[4] Tiffany, Death by Wrongful Act, pp. XVIII–XLV.

[5] Smith v. Louisville, etc., R. R. Co., 75 Ala. 449; Munro v. Pac. Coast D. & R. Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Chicago, etc., R. R. Co. v. Morris, 26 Ill. 400; Pittsburg, etc., Ry. Co. v. Hosea, 152 Ind. 412, 53 N. E. 412; Malott v. Skinner, 153 Ind. 35, 44, 54 N. E. 101, 74 Am. St. Rep. 278; McKay v. New Eng. Dredging Co., 92 Me. 454, 43 Atl. 29; Cooper v. Shore Elec. Co., 63 N. J. L. 558, 44 Atl. 633; Whitford v. Panama R. R. Co., 23 N. Y. 465; Hegerich v. Keddie, 99 N. Y. 258, 267; Fink v. Garman, 40 Pa. St. 95, 103; Mayo's Estate, 60 S. C. 401, 38 S. E. 684, 54 L. R. A. 660; Belding v. Black Hills, etc., R. R. Co., 3 S. D. 369, 53 N. W. 750; Mason v. Union Pac. Ry. Co., 7 Utah, 77, 82; Brown v. Chicago, etc., Ry. Co., 102 Wis. 137, 140, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579; Northern Pac. Ry. Co. v. Adams, 116 Fed. 324, 54 C. C. A. 196;

it is a cause of action springing out of the same injury and based upon the same right, as the action which would have accrued to the deceased if death had not ensued.[6] "The suit can only be maintained when the deceased, if he had lived, could have recovered damages for his injury, and the same evidence as to the cause of the injury is required in a suit by his representative, that would have been required had he survived and sued for the injury."[7] It has been held under some statutes that no action would lie where the death was instantaneous,[8] but the general rule is to the contrary.[10] In Maine

Chesapeake, etc., Ry. Co. v. Dixon, 179 U S. 131, 135, 21 S. C. Rep. 67, 45 L. Ed. 121. *Contra*, Hennessy v. Bavarian Brewing Co., 145 Mo. 104, 112, 46 S. W. 966, 68 Am. St. Rep. 554, 41 L. R. A. 385; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Blake v. Midland Ry. Co., 18 Q. B. 93; Read v. Great Eastern Ry. Co., L. R. 3 Q. B. 555.

[6] Hill v. Pennsylvania R. R. Co., 178 Pa. St. 223, 35 Atl. 997, 56 Am. St. Rep. 754, 35 L. R. A. 196; Brown v. Electric Ry. Co., 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666; Spira v. Osage C. & M. Co., 88 Mo. 68; Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Mara's Admr. v. Holbrcok, 20 Ohio St. 137, 146, 5 Am. Rep. 633; Neilson v. Brown, 13 R. I. 651, 655, 43 Am. Rep. 58; Scheffer v. Washington City, etc.. R. R. Co., 105 U. S. 249; Munro v. Pac. Coast D. & R. Co., 84 Cal 515, 24 Pac. 303, 18 Am. St. Rep. 248; Blake v. Midland Ry. Co., 18 Q. B. 93; Read v. Great Eastern Ry. Co., L. R. 3 Q. B. 555.

[7] Elliott v. St. Louis, etc , R. R Co., 67 Mo. 272, 274; Holton v. Daly, 106 Ill. 131, 137; Ohio, etc., R. R. Co. v. Tindall, 13 Ind. 366, 74 Am. Dec. 259; Mayo's Estate, 60 S. C. 401, 38 S. E. 684, 54 L. R A. 660; Tiffany, Death by Wrongful Act, §§ 363-368.

[8] Kearney v. Boston, etc., R. R. Co., 9 Cush. 108; Kennedy v Standard Sugar Refinery, 125 Mass. 90, 28 Am. Rep. 214; Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242; Mulchey v. Washburn, etc., Co., 145 Mass. 281, 14 N. E. 106; Womack v. Centr. R. R., etc., Co., 80 Ga. 132, 5 S. E. 63; Edgar v. Castello, 14 S. C. 20, 37 Am. Rep. 714; Grosso v. Del., etc., R. R. Co., 50 N. J. L. 317, 13 Atl. 233.

[10] Broughel v. Southern New Eng. Tel. Co., 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404; Perham v. Portland Elec. Co., 33 Ore. 451, 53 Pac. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799; Reed v. Northwestern R. R. Co., 37 S. C. 42, 16 S. E. 289; Murphy v. New York, etc., R. R. Co., 30 Conn. 184; Brown v. Buffalo, etc., R. R. Co., 22 N. Y. 191; Int. etc., Co. v. Kindred, 57 Tex. 491; Worden v. Humeston, etc., Co., 72 Ia. 201, 33 N. W. 629; Conners v. Burlington, etc., Co., 71 Ia. 490, 32 N. W. 465; Fowlkes v. Nashville, etc., R. R. Co., 9 Heisk. 829.

and Michigan it is held that an action lies under the statute *only* where death is instantaneous or immediate.[11] Such statutes are held by some courts to be in derogation of the common law and to be strictly construed,[12] and by others to be remedial and to be liberally construed.[13] Perhaps the correct rule may be that such statutes should receive a strict construction in determining the persons or classes of persons who are entitled to their benefit and a liberal construction in applying the statute in their favor.[14]

§ 145. **Whether remedy local.** In several states it has been held that the remedy is purely local and can only be brought in the state whose statutes give it and where the killing takes place.[15]

[11] Sawyer v. Perry, 88 Me. 42, 33 Atl. 660; Conley v. Portland Gas Lt. Co., 96 Me. 281, 52 Atl. 656; Dolson v. Lake Shore, etc., Ry. Co., 128 Mich. 444, 87 N. W. 629; Jones v. McMillan, 129 Mich. 86, 88 N. W. 206; Storrie v. Grand Trunk Elevator Co., 134 Mich. 297, 96 N. W. 569; Oliver v. Houghton County St. Ry. Co., 134 Mich. 367, 96 N. W. 434, 104 Am St. Rep. 607.

[12] Thornburg v. Am. Strawboard Co., 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334; McDonald v. Pittsburgh, etc., Ry. Co., 144 Ind. 459, 43 N. E. 447, 55 Am. St Rep. 185, 32 L. R. A. 309; Louisville, etc., R. R. Co. v. Bean, 94 Tenn. 388, 29 S. W. 370.

[13] Hayes v. Williams, 17 Colo. 165, 30 Pac. 352; Kearney Elec. Lt. Co. v. Laughlin, 45 Neb. 390, 63 N. W. 941.

[14] See Barrett v. Dolan, 130 Mass. 366, 30 Am. Rep 456; Green v. Hudson R. R. Co., 32 Barb. 25; Warren v. Englehart, 13 Neb. 283; Dickins v. N. Y. Cent. R. R. Co., 23 N. Y. 159; Houston, etc., Ry. Co. v. Bradley, 45 Tex. 171; Woodward v. Railway Co., 23 Wis. 400. Whether there may be two actions when death is not instantaneous, one to recover on behalf of the estate of the deceased, for the pain and suffering and loss of time up to the death, and one to recover on behalf of the beneficiaries named in the statute, for the death itself, see Davis v. Railway Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; Broughel v. Southern New Eng. Tel. Co., 72 Conn 617, 45 Atl. 435, 49 L. R. A. 404; McElligott v. Randolph, 61 Conn 157, 22 Atl. 1094, 29 Am. St. Rep. 181; Newport News, etc., Co. v. Dentzel, 91 Ky. 42, 14 S. W. 958; Hackett v. Louisville, etc., R. R. Co., 95 Ky. 236, 24 S. W. 871; Louisville, etc., R. R. Co. v. McElwain, 98 Ky. 700, 34 S. W. 236, 56 Am. St. Rep. 385, 34 L. R. A. 788; Ranney v. Railroad Co., 64 Vt. 277, 24 Atl. 1053; Hedrick v. Ilwaco Ry. & Nav. Co., 4 Wash. 400, 30 Pac. 714.

[15] Woodward v. Mich., etc., R. R. Co., 10 Ohio St. 121; Needham v. Grand Trunk, etc., Co., 38 Vt. 294; McCarthy v. Chicago, etc.,

The weight of authority is strongly to the effect that the action is transitory and that suit will lie under the statute of a foreign state or country when the statutes of the foreign state or country and of the forum evince the same general policy.[16] The action should be brought by the party in interest or by the personal representative as may be prescribed by the foreign statute.[17] An action was brought in the District

Co., 18 Kan. 46; State v. Pittsburgh, etc., Co., 45 Md. 41; Armstrong v. Beadle, 5 Sawy. 484; Ash v. Baltimore, etc., R. R. Co., 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461; Harn v. Mexican Nat. Ry. Co., 86 Tex. 68, 23 S. W. 381; Richardson v. New York Central R. R. Co., 98 Mass. 85.

[16] St. Louis, etc., Ry. Co. v. Haist, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65; Chicago, etc., R. R. Co. v. Rouse, 78 Ill. App. 286; Chicago Transit Co. v. Campbell, 110 Ill. App. 366; Burns v. Grand Rapids, etc., R. R. Co., 113 Ind. 169, 15 N. E. 230; Morris v. Chicago, etc., Co., 65 Ia. 727, 54 Am. Rep. 29; Hamilton v. Hannibal, etc., R. R. Co., 39 Kan. 56, 18 Pac. 57; Louisville, etc., R. R. Co. v. Whitlow, 114 Ky. 470, 43 S. W. 711; Myers v. Chicago, etc., Ry. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579; Chicago, etc., R. R. Co. v. Doyle, 60 Miss. 977; Leonard v. Columbia, etc., Co., 84 N. Y. 48, 38 Am. Rep. 491; Wooden v. Western N. Y., etc., R. R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458; Harrill v. South Carolina, etc., Ry. Co., 132 N. C. 655, 44 S. E. 109; Knight v. West Jersey R. R. Co., 108 Pa. St. 250, 56 Am. Rep. 200; Boulden v. Pennsylvania R. R. Co., 205 Pa. St. 264, 54 Atl. 906; Thorpe v. Union Pac. Coal Co., 24 Utah, 475, 68 Pac. 145; Utah Trust & Sav. Bank v. Diamond C. & C. Co., 26 Utah 299, 73 Pac. 524; Nelson v. Chesapeake, etc., R. R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583; Dennick v. Railroad Co., 103 U. S. 11; Stewart v. Baltimore, etc., R. R. Co., 168 U. S. 445, 18 S. C. 105, 42 L. Ed. 537 (overruling Stewart v. Baltimore, etc., R. R. Co., 6 App. D. C. 56); Boston, etc., R. R. Co. v. McDuffy, 79 Fed. 934, 25 C. C. A. 247; Dennis v. Railroad Co., 70 S. C. 254; Williams v. Camden Interstate Ry. Co., 138 Fed. 571 (C. C. A.); Vawter v. Missouri Pac. R. R. Co., 84 Mo. 679; Oates v Union Pac. R. R. Co., 104 Mo. 514; McGinnis v. Mo. Car., etc., Co., 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553.

[17] Lower v. Segel, 60 N. J. L. 99, 36 Atl. 777; Wooden v. Western N. Y., etc., R. R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458; Usher v. West Jersey R. R. Co., 126 Pa. St. 206, 17 Atl. 597, 12 Am. St. Rep. 863, 4 L. R. A. 261; Boulden v. Pennsylvania R. R. Co., 205 Pa. St. 264, 54 Atl. 906; Thorpe v. Union Pac. Coal Co., 24 Utah, 475, 68 Pac. 145; Boston, etc., R. R. Co. v. McDuffy, 79 Fed. 934, 25 C. C. A. 247.

of Columbia for a death in Maryland. The Maryland statute provided that an action for death should be prosecuted in the name of the state. The act of Congress for the District of Columbia provided that such an action should be prosecuted by the personal representative. A suit by the personal representative appointed in the District of Columbia was held proper, and was sustained.[18]

If the statute is penal in its nature, as where it provides for the recovery of a fixed sum irrespective of the actual damages, it will not be enforced in a foreign state.[19]

§ 146. Who liable. Where the action is given without any restriction as to the parties who shall be liable, it may be brought against not only natural persons, but corporations, public as well as private.[20] By some statutes, however, the remedy, or perhaps a special remedy, is given against railroad companies only, and of course the statute cannot be extended by construction. In Minnesota, and perhaps some other states, it may be brought against a steamboat by name to establish a liability against it.[21]

§ 147. The plaintiff. Most commonly the action is given to the executor or administrator of the person killed; and an administrator may be appointed for the purpose of bringing it, though there is no estate.[22] Under many of the statutes, however, some one or more of the parties to be benefited by

[18] Stewart v. Baltimore, etc., R. R. Co., 168 U. S. 445, 18 S. C. Rep. 105, 42 L. Ed. 537.

[19] Raisor v. Chicago, etc., Ry. Co., 215 Ill. 47, 74 N. E. 69; Dale v. Atchison, etc., R. R. Co., 57 Kan. 601, 47 Pac. 521; Matheson v. Kansas City, etc., R. R. Co., 61 Kan. 667, 60 Pac. 747; O'Reilly v. New York, etc., R. R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244.

[20] Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Chicago v. Starr, 42 Ill. 174; Southwestern R. R. Co. v. Paulk, 24 Ga. 356. Such acts apply to municipalities though when passed they were not liable for injuries from their defective roads. Merkle v. Bennington, 58 Mich. 156, 55 Am. Rep. 666. Corporations are of course responsible for the acts of their servants in these as in other cases. McAunich v. Mississippi, etc., R. R. Co., 20 Ia. 338; Sherman v. Western Stage Co., 24 Ia. 515.

[21] Boutiller v. The Milwaukee, 8 Minn. 97.

[22] Hartford, etc., R. R. Co. v. Andrews, 36 Conn. 213; Perry v. St. Joseph, etc., Co., 29 Kan. 420; Lake Erie, etc., R. R. Co. v. Charman, 161 Ind. 95, 67 N. E. 923.

the recovery may sue.[23] The statute usually designates the party or parties to sue and the action should be brought in compliance with the statute.[24] In Texas it is held that there may be separate suits, but that the defendant in any suit may, by proper plea, compel all persons interested to be made parties.[25] Also that the total recovery should be the same whether there is one suit for all or separate suits.[26] Where a widow brought suit and died pending suit, it was held that the suit abated.[27] Where there is a widow and next of kin, but no children, and the widow dies before or pending suit, the right of action is held not to pass to the next of kin, but to become extinguished.[28] But in some jurisdictions it is held that the death of the beneficiary pending suit does not abate the suit, but that the recovery will be limited to the loss sustained while such beneficiary lived.[29] In South Carolina it has been held that where the father of deceased was the sole beneficiary under the statute and died before trial the suit could be prosecuted for the benefit of the brothers and sisters of the deceased.[30]

§ 148. **The beneficiaries.** The purpose of these statutes is to make provision for members of the family of the deceased who might naturally have calculated on receiving support or assistance from the deceased had he survived. Thus, under the English statute the action is to be for the benefit of the wife, husband, parent, or child; it is clear that creditors can have no share in this, but the recovery must be a special fund,

[23] Stewart v. Louisville, etc., Co., 83 Ala. 493, 4 So. 373; Frank v. New Orleans, etc., R. R. Co., 20 La. Ann. 25; Walters v. Chicago, etc., R. R. Co., 36 Ia. 458.

[24] See generally as to the proper plaintiff, Belding v. Black Hills, etc., R. R. Co., 3 S. D. 369, 53 N. W. 750.

[25] Galveston, etc., Ry. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127.

[26] Nelson v. Galveston, etc., Ry. Co., 78 Tex. 621, 14 S. W. 1021, 22 Am. St. Rep. 81, 11 L. R. A. 391.

[27] Loague v. Railroad Co., 91 Tenn. 458, 19 S. W. 430; Schmidt v. Menasha Woodenware Co., 99 Wis. 300, 74 N. W. 797.

[28] Louisville, etc., R. R. Co., v. Bean, 94 Tenn. 388, 29 S. W. 370; Dillier v. Cleveland, etc., Ry. Co., 34 Ind. App. 52, 72 N. E. 271.

[29] Cooper v. Shore Elec. Co., 63 N. J. L. 558, 44 Atl. 633; Pitkin v. New York Central, etc., R. R. Co., 94 App. Div. 31, 87 N. Y. S. 906.

[30] Morris v. Spartenburg, etc., Co., 70 S. C. 279.

to be paid over by the personal representative to the person or persons for whom the statute intends it.[31] It is also obvious that there might be cases in which no action could be brought by an executor or administrator, because of there being no person in existence who would be entitled to the moneys. Thus, if the action be given for the benefit of the widow and children only, and there be neither, there can be no action;[32] and it seems to be necessary in some states to name in the declaration the person for whose benefit the suit is brought, and to show the relationship.[33] But where the recovery is to be distributed as the personal estate of an intestate would be, it must be assumed that kindred exist, and it need not be averred.[34]

In such a statute where the words "heir or heirs" were used to denote the beneficiaries, they were held to mean child or children.[35] The next of kin are those who would inherit under the statute of descent and distribution,[36] and are to be determined as of the date of the death sued for.[37] Non-resi-

[31] Chicago v. Major, 18 Ill. 349; Lyon's Admr. v. Cleveland, etc., R. R. Co., 7 Ohio St. 336; Andrews v. Hartford, etc., R. R. Co., 34 Conn. 57.

[32] Jordan v. Cincinnati, etc., R. R. Co., 89 Ky. 40, 11 S. W. 1013; Hackett v. Louisville, etc., R. R. Co., 95 Ky. 236, 24 S. W. 871. If parents and child are killed at once, there can be no action. Gibbs v. Hannibal, etc., Co., 82 Mo. 143.

[33] Chicago City Ry. Co. v. Hackendahl, 188 Ill. 300, 58 N. E. 930; Foster v. St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803; Topping v. St. Lawrence, 86 Wis. 526, 57 N. W. 365; Quincy Coal Co. v. Hood, 77 Ill. 68. In Indiana it is sufficient to aver that there are persons who would be entitled, but they need not be named. Jeffersonville, etc., R. R. Co. v. Hendricks, 41 Ind. 49. And see Woodward v. Chicago, etc., R. R. Co., 23 Wis. 400; Lucas v. N. Y. Cent. R. R. Co, 21 Barb 245.

[34] Alabama, etc., R. R. Co. v Waller, 48 Ala. 459. Where the statute makes the widow and next of kin the beneficiaries, the action may be maintained where there is a widow and no kindred, or where there is next of kin and no widow. Oldfield v. New York, etc., R. R. Co., 14 N. Y. 310; Haggerty v. Central R. R. Co., 31 N. J. L. 349; Lyons v. Cleveland, etc., R. R. Co., 7 Ohio St. 336.

[35] Hindry v. Holt, 24 Colo. 464, 51 Pac. 1002, 65 Am. St. Rep. 235, 39 L. R. A. 351; Jordan v. Cincinnati, etc., R. R. Co., 89 Ky. 40, 11 S. W. 1013.

[36] Atchison, etc., Ry. Co. v. Ryan, 62 Kan. 682, 64 Pac. 603; Steel v. Kurtz, 28 Ohio St. 191.

[37] Mundt v. Glokner, 26 App. Div. 123, 50 N. Y. S. 190.

dent aliens, though within the terms of the statute, have been held not to be entitled to its benefits.[38] But the contrary has also been held.[39] The next of kin of an adopted child are its relations by blood and not its parents by adoption.[40] If the benefit is given to a child or children only legitimate children are intended.[41] Illegitimate children cannot recover for the death of their father or mother.[42] Nor can the father or mother recover for the death of the illegitimate child.[43] A child may not recover for the death of its step-father.[44] Nor a father for the death of his step-child.[45] Where the action is given in favor of the widow and next of kin, the husband cannot sue for the death of his wife.[46]

§ 149. What is wrongful act, neglect, or default. In most cases the question of the right to recover is merely a question

[38] Deni v. Pennsylvania R. R. Co., 181 Pa. St. 525, 37 Atl. 558; McMillan v. Spider Lake, etc., Co., 115 Wis. 332, 91 N. W. 979, 95 Am. St. Rep. 947, 60 L. R. A. 589; Brannigan v. Union, etc., Co., 93 Fed. 164.

[39] Kellyville Coal Co. v. Petraytis, 195 Ill. 215, 63 N. E. 94; Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386; Vetatoro v. Perkins, 101 Fed. 393; Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Alfson v. Bush Co., 182 N. Y. 393, 75 N. E. 230.

[40] Citizens' St. Ry. Co. v. Willoeby, 15 Ind. App. 312, 43 N. E. 1058; Citizens' St. Ry. Co. v. Cooper, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319; Heidecamp v. Jersey City, etc., St. Ry. Co., 69 N. J. L. 284, 55 Atl. 239, 101 Am. St. Rep. 707.

[41] Dickinson v. N. E. Ry. Co., 2 H. & C. 735; Blake v. Midland Ry. Co., 10 L. & Eq. 437; Gibson v. Midland Ry. Co., 15 Am. & Eng. R. R. Cases, 507.

[42] Illinois Cent. R. R. Co. v. Johnson, 77 Miss. 727, 28 So. 753, 51 L. R. A. 827. In Muhl v. Southern, etc., R. R. Co., 10 Ohio St. 277, an illegitimate child was held entitled to recover for the death of her mother as her next of kin.

[43] Robinson v. Georgia R. R. & Banking Co., 117 Ga. 168, 43 S. E. 452, 97 Am. St. Rep. 156; Thornburg v. Am. Strawboard Co., 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334· McDonald v. Pittsburgh, etc., Ry. Co., 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 52 L. R. A. 309; Alabama, etc., Ry. Co. v. Williams, 78 Miss. 209, 28 So. 853, 84 Am. St. Rep. 624; McDonald v. Southern Ry. Co., 71 S. C. 352, 51 S. E. 138; Gibson v. Midland Ry. Co., 2 Ontario, 658.

[44] Marshall v. Macon, etc., Co., 103 Ga. 725, 30 S. E. 571, 68 Am. St. Rep. 140, 41 L. R. A. 211.

[45] Thornburg v. Am. Strawboard Co., 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334.

[46] Grosso v. Delaware, etc., R. R. Co., 50 N. J. L. 317, 13 Atl. 233.

of negligence, and is to be governed by the same principles and considerations as questions of negligence where the results were less serious. The reader is therefore referred to the chapter on negligent injuries for their discussion.[47] Where the act was one of intentional violence, the question that would arise if the right of recovery were disputed must be one of justification or excuse, and would be the same as in cases of trespass to the person.[48] This also, therefore, requires no special discussion here. The wrongful act, neglect, or default must have been the proximate cause of death.[49] But it is the proximate cause if it inflicts a fatal injury, though the death that would have resulted is anticipated by an unskillful surgical operation.[50]

§ 150. Defenses. In general the same defenses are available as though the deceased had survived the injury and had himself sued therefor.[51] If the injured party had compromised for the injury and accepted satisfaction therefor previous to his death, no action will lie under the statute.[52] So in case of

[47] *Post*, chap. 19.

[48] *Ante*, chap. 5.

[49] Rogers v. Hughes, 87 Ky. 185, 8 S. W. 16; Carrigan v. Stillwell, 97 Me. 247, 54 Atl. 389.

[50] Sauter v. N. Y. Cent., etc., R. R. Co., 66 N. Y. 50; Nagel v. Miss., etc., R. R. Co., 75 Mo. 653. See on proximate cause of death, Scheffer v. Railroad Co., 105 U. S. 249; Beauchamp v. Saginaw Mining Co. 50 Mich. 163, 45 Am. Rep. 30, and cases cited in sections 15 and 16.

[51] This follows from the nature of the action as already shown. See *ante*, § 144 and cases in following notes.

[52] Read v. Great Eastern R. Co., L. R. 3 Q. B. 555; Carey v. Berkshire R. R. Co., 1 Cush. 479; Kearney v. Boston, etc., R. R. Co., 9 Cush. 108; Bancroft v. Boston, etc., R. R. Co., 11 Allen, 34; Commonwealth v. Vermont, etc., R. R. Co., 108 Mass. 7, 11 Am. Rep. 301; Whitford v. Panama R. R. Co., 23 N. Y. 465; Littlewood v. Mayor, etc., 89 N. Y. 24, 42 Am. Rep. 271; Soule v New York, etc., R. R. Co., 24 Conn. 575; Murphy v. New York, etc., R. R. Co., 29 Conn. 496; Goodsell v. Hartford, etc., R. R. Co., 33 Conn. 51; Hecht v. Ohio, etc., Ry. Co., 132 Ind. 507, 52 N. E. 799; Price v. Richmond, etc., R. R. Co., 33 S. C. 556, 12 S. E. 413, 26 Am. St. Rep. 700; Brown v. Electric Ry. Co., 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666; Thompson v. Ft. Worth, etc., Ry. Co., 97 Tex. 590, 80 S. W. 990; Southern Bell T. & T. Co. v. Cassin 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694; Hill v. Pennsylvania R. R. Co., 178 Pa. St. 223, 35 Atl. 997, 56 Am. St. Rep 754, 35 L. R. A. 196; Tiffany, Death by Wrongful Act, § 124. *Contra.* Donahue

a recovery by the deceased in his life time.[53] If the deceased was guilty of negligence contributing to the injury causing death,[54] or if the injury was caused by the negligence of a fellow-servant,[55] no action will lie under the statute, unless the statute appears to give it in such a case.[56] But where the right of the deceased to sue for the injury was barred by the statute of limitations before his death, this was held not to prevent a suit by the administrator after his death.[57] Contributory negligence of the next of kin, for whose benefit the suit is brought, defeats the action.[58] But in a suit by an administrator for the death of a child, it was held that the con-

v. Drexler, 82 Ky. 187, 56 Am. Rep. 886.

[53] Hecht v. Ohio, etc., Ry. Co., 132 Ind. 507, 32 N. E. 302; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Tiffany, Death by Wrongful Act, § 124. And see Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Cafferty v. Pennsylvania R. R. Co., 193 Pa. St. 339, 44 Atl. 435, 74 Am. St. Rep. 690; Clare v. New York, etc., R. R. Co., 172 Mass. 211, 51 N. E. 1083.

[54] Senior v. Ward, 1 El. & El. 385, following Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266, and generally followed in this country. Cordell v. New York, etc., Co., 75 N. Y. 330; Corcoran v. Boston, etc., Co., 133 Mass. 507; Evansville, etc., R. R. Co. v. Lowdermilk, 15 Ind. 120; Ind., etc., Co. v. Greene, 106 Ind. 279; State v. Maine Centr. R. R. Co., 76 Me. 357, 49 Am. Rep. 622; Spira v. Osage C. & M. Co., 88 Mo. 68. Under some statutes contributory negligence is no defense, though it may go in mitigation of damages. See Nashville, etc., R. R. Co. v. Smith, 6 Heisk. 174. It is not a defense in Mass. Merrill v. Eastern R. R., 139 Mass. 252, 52 Am. Rep. 705; Com. v. Boston, etc., R. R. Co., 134 Mass. 211. If death results from an affray, the fact that deceased brought it on is no defense. Darling v. Williams, 35 Ohio St. 58; Besenecker v. Sale, 8 Mo. App. 211.

[55] Ohio, etc., R. R. Co. v. Tindall, 13 Ind. 366, 74 Am. Dec. 259.

[56] The Iowa statute is held to require that construction. Philo v. Ill. Cent. R. R. Co., 33 Ia. 47. See McDonald v. Eagle, etc., Co., 68 Ga. 839.

[57] Hoover v. Chesapeake, etc., Ry. Co., 46 W. Va. 268, 33 S. E. 224.

[58] St. Louis, etc., Ry. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46; Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; Ploof v. Burlington Traction Co., 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108. "The doctrine of imputed negligence has no application to the case, but the rule that the negligent father cannot recover is founded upon the fundamental principle that no one can acquire a right of action by his own negligence." Richmond, etc., R. R Co. v. Martin, 102 Va. 201, 45 S E. 894.

tributory negligence of the parents would not prevent a recovery, though they would share in the benefits.[59] A release by the next of kin executed before the employment of the deceased was held void as against public policy and therefore no defense to the action.[60] Where the deceased was a railroad employee and member of a railroad relief association and left a widow and one child it was held that the widow might elect between accepting the benefits of her husband's membership and prosecuting the action for death, that acceptance of the benefits barred her own right, but that she might still sue as administratrix for the benefit of the child.[61] The action accrues on the date of the death and the statute of limitations begins to run from that time.[62] Where the suit is for the benefit of the widow of the deceased her remarriage may not be shown, either as a defense to the action or in mitigation of damages.[63] In a suit by a father for the death of his infant

[59] Wymore v. Mahaska Co., 78 Ia. 396, 43 N. W. 264, 16 Am. St. Rep. 449, 6 L. R. A. 545.

[60] Tarbell v. Rutland R. R. Co., 73 Vt. 347, 51 Atl. 6, 87 Am. St. Rep. 734, 56 L. R. A. 656.

[61] Pittsburgh, etc., Ry. Co. v. Hosea, 152 Ind. 412, 53 N. E. 419.

[62] Western, etc., R. R. Co. v. Bass, 109 Ga. 390, 30 S. E. 874; Hanna v. Jeffersonville R. R. Co., 32 Ind. 113; Rodman v. Missouri Pac. Ry. Co., 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704; Carden v. Louisville, etc., R. R. Co., 101 Ky. 113, 39 S. W. 1027; Goodwin v. Bodcaw Lumber Co., 109 La. 1050, 34 So. 74; Kennedy v. Burrier, 36 Mo. 128; Louisville, etc., R. R. Co. v. Clarke, 152 U. S. 230, 14 S. C. Rep. 570, 38 L. Ed. 422. Some courts hold that the statute does not begin to run until an administrator is appointed. Andrews v. Hartford, etc., R. R. Co., 34 Conn. 57; Sherman v. Western Stage Co., 24 Ia. 515; Crapo v. Syracuse, 183 N. Y. 395. But see Best v. Kingston, 106 N. C. 205, 10 S. E. 997. In the following the statute was held to run from the injury: Fowlkes v. Nashville, etc., R. R. Co., 9 Heisk. 829; S. C. 5 Baxter, 663; Whaley v. Catlett, 103 Tenn. 347, 53 S. W. 131; Robinson v. Baltimore, etc., Co., 26 Wash. 484, 67 Pac. 274. The fact that the statute had run against the deceased in his lifetime was held not to bar a suit by his administrator under the statute. Hoover v. Chesapeake, etc., Ry. Co., 46 W. Va. 268, 33 S. E. 224.

[63] Chicago, etc., R. R. Co. v. Driscoll, 207 Ill. 9, 69 N. E. 620; Consolidated Stove Co. v. Morgan, 160 Ind. 241, 66 N. E. 696; Chicago, etc., Ry. Co. v. Lagerkrans, 65 Neb. 566, 95 N. W. 2; Philpot v. Pennsylvania R. R. Co., 175 Pa. St. 570, 34 Atl. 856; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

child, it is no defense that the child had lived with his grandparents since his birth with the father's consent.[64]

§ 151. **Damages recoverable.** The statutes vary greatly in their provisions as to damages and the statute should be consulted in interpreting and applying any decision. In England the rule is settled that the action will not be supported for the recovery of merely nominal damages.[65] The authorities are conflicting in this country.[66] Perhaps the correct view is that pecuniary loss will be presumed in some cases, but not in others. Thus it will be presumed to result to the widow and minor children from the death of the husband and father,[67]

[64] Elwood Elec. St. Ry. Co. v. Ross, 26 Ind. App. 258, 58 N. E. 535.

[65] Duckworth v. Johnson, 4 H. & N. 653; Boulter v. Webster, 13 W. R. 289; 11 L. T. (N. S.) 598.

[66] Nominal damages may be recovered. Alabama Mineral R. R. Co. v. Jones, 121 Ala. 113, 25 So. 814; Fordyce v. McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296; Burk v. Arcata, etc., R. R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52; North Chicago St. R. R. Co. v. Brodie, 156 Ill. 317, 40 N. E. 942; Atchison, etc., R. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; Cherokee, etc., Co. v. Limb, 47 Kan. 469, 28 Pac. 181; Mulcahey v. Washburn Car Wheel Co., 145 Mass. 281, 14 N. E. 106, 1 Am. St. Rep. 458; Barnum v. Chicago, etc., R. R. Co., 30 Minn. 461, 16 N. W. 364; Quin v. Moore, 15 N. Y. 433; Haug v. Gt. Northern Ry. Co., 8 N. D. 23, 77 N. W. 97, 73 Am. St. Rep. 727, 42 L. R. A. 664; Lyons v Cleveland, etc., R. R. Co., 7 Ohio St. 336; Anderson v. Chicago, etc., R. R. Co., 35 Neb. 95, 52 N. W. 840. But see Orgall v. Chicago, etc., R. R. Co., 46 Neb. 4, 64 N. W. 450. *Contra*, Hurst v. Detroit City Ry. Co., 84 Mich. 539, 48 N. W. 46; Rouse v. Detroit Elec. Ry. Co, 128 Mich. 149, 87 N. W. 68; Regan v. Chicago, etc., Ry. Co., 51 Wis. 599; McGown v. International, etc., Ry. Co., 85 Tex. 289, 20 S. W. 80; Lazalle v. Newfane, 70 Vt. 440, 41 Atl. 511; Pennsylvania R. R. Co. v. Vandever, 36 Pa. St. 298.

[67] Chicago, etc., R. R. Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701; Louisville, etc., Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520; Korrady v. Lake Shore, etc., Ry. Co., 131 Ind. 261, 29 N. E. 1069; Chicago, etc., R. R. Co. v. Thomas, 155 Ind. 634, 55 N. E. 861. In Haug v. Great Northern Ry. Co., 8 N. D. 23, 77 N. W. 97, 73 Am. St. Rep. 727, 42 L. R. A. 664, the court says: "When the party in whose interest the suit is brought sustained such relations to the deceased that he had the legal right to demand the services of the deceased, or demand support and maintenance at the hands of the deceased, then substantial pecuniary damages will be presumed; while if recovery is

and to parents from the death of minor children.[68] But there is no such presumption where the beneficiaries are brothers and sisters or other collateral kindred and in such cases there must be evidence of pecuniary loss.[69] So in case of adult children suing for the death of their mother.[70] Where the statute fixes a minimum of recovery, as some of those in this country do, there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss.[71] But in this country as well as in England, the ground of recovery must be something besides an injury to the feelings and affections, or a loss of the pleasure and comfort of the society of the person killed; there must be a loss to the claimant that

sought by a collateral relative, or one having no such legal claim, and who was not in fact dependent upon the deceased, the presumption of substantial damages may not be indulged." And see Chicago, etc., R. R. Co. v. Shannon, 43 Ill. 338; Chicago, etc., Ry. Co. v. Swett, 45 Ill. 197, 92 Am. Dec. 206.

[68] A verdict for $5,000 for the death of a boy of twelve was sustained in the following case, the father being dead and the mother and brothers and sisters being the next of kin, though there was no proof of pecuniary loss. Bradley v. Sattler, 156 Ill. 603, 41 N. E. 171. And so generally where suit is brought by parent for death of minor child. Tutwiler Coal Co. v. Enslen, 129 Ala. 336, 30 So. 600; Little Rock, etc., R. R. Co. v. Barker, 39 Ark. 491; Morgan v. Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71; Pierce v. Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279; Illinois Central R. R. Co. v. Reardon, 157 Ill. 372, 41 N. E. 871; Baltimore, etc., R. R. Co. v. Then, 159 Ill. 535, 42 N. E. 97; U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081; Louisville, etc., Ry. Co. v. Rush, 127 Ind. 545, 26 N. E. 1010; Gunderson v. N. W. Elevator Co., 47 Minn. 161, 49 N. W. 694; Parsons v. Missouri Pac. Ry. Co., 94 Mo. 286, 6 S. W. 464; Sharp v. Nat. Biscuit Co., 179 Mo. 553, 78 S. W. 787; Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; Beaman v. Martha W. Min. Co., 23 Utah, 139, 63 Pac. 631; Thompson v. Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298.

[69] Chicago, etc., R. R. Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701; Diebold v. Sharp, 19 Ind. App. 474, 49 N. E. 837; Wabash Ry. Co. v. Cregan, 23 Ind. App. 1, 54 N. E. 767; Cleveland, etc., Ry. Co. v. Drumm, 32 Ind. App. 547, 70 N. E. 286; Atchison, etc., R. R. Co. v. Ryan, 62 Kan. 682, 64 Pac. 603.

[70] Chicago, etc., R. R. Co. v. Ptacek, 171 Ill. 9, 49 N. E. 191.

[71] Lamphear v. Buckingham, 33 Conn. 237.

is capable of being measured by a pecuniary standard.[72] As a general rule and under most of the statutes the recovery is limited to the pecuniary loss sustained by the beneficiaries.[73]

The pecuniary loss cannot be ascertained with exactness.

[72] Franklin v. Southeastern R. Co., 3 H. & N. 211; Blake v. Midland R. Co., 18 Q. B. 93; Pym v. Great Nor. R. Co., 4 Best & S. 396; Mitchell v. N. Y. Cent., etc., R. R. Co., 2 Hun, 535; S. C. 5 N. Y. Sup. Ct. (T. & C.) 122; Chicago v Major, 18 Ill. 349; Chicago, etc., R. R. Co. v. Harwood, 80 Ill. 88; Rockford, etc., R. R. Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308; Needham v. Grand Trunk R. Co., 38 Vt. 294; Louisville, etc., R. R. Co. v. Case's Admr., 9 Bush, 728; Ohio, etc., R. R. Co. v. Tindall, 13 Ind. 366, 74 Am. Dec. 259; Ewen v. Chicago, etc., R. R. Co., 38 Wis. 614; Pennsylvania R. R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. R. Co. v. Henderson, 51 Pa. St. 315; Telfer v. Northern R. R. Co., 30 N. J. L. 188; Donaldson v. Mississippi, etc., R. R. Co., 18 Iowa, 280; Mynning v. Detroit, etc., R. R. Co., 59 Mich. 257; Holmes v. Oreg., etc., R. R. Co., 6 Sawy. 262; Galveston v. Barbour, 62 Tex. 172.

[73] Morgan v. Southern Pac. Co. 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71; Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972; Union Pac. Ry. Co. v. Jones, 21 Colo. 340, 40 Pac. 891; Denver, etc., R. R. Co. v. Spencer, 27 Colo. 313, 61 Pac. 606; Baltimore, etc., R. R. Co. v. Golway, 6 App. D. C. 143; Duval v. Hunt, 34 Fla., 85, 15 So. 876; Consolidated Coal Co. v. Maekl, 130 Ill. 551, 22 N. E. 715; North Chicago, St. R. R. Co. v. Brodie, 156 Ill. 317, 40 N. E. 942; Chicago, etc., R. R. Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701; Wabash Ry. Co. v. Cregan, 23 Ind. App. 1, 54 N. E. 767; Cherokee, etc., Min. Co. v. Limb, 47 Kan. 469, 28 Pac. 181; Atchison, etc., R. R. Co. v. Ryan, 62 Kan. 682, 64 Pac. 603; McKay v. New Eng. Dredging Co., 92 Me. 454, 43 Atl. 29; Charlevois v. Gogebic, etc., R. R. Co., 91 Mich. 59, 51 N. W. 812; Anderson v. Chicago, etc., R. R. Co., 35 Neb. 95, 52 N. W. 840; May v. West Jersey, etc., R. R. Co., 62 N. J. L. 63, 42 Atl. 163; May v. West Jersey, etc., R. R. Co., 62 N. J. L. 67, 42 Atl. 165; Cooper v. Shore Elec. Co, 63 N. J. L. 558, 44 Atl. 633; Cincinnati St. Ry. Co. v. Altemeier, 60 Ohio St. 10, 53 N. E. 300; Carlson v. Ore. Short Line, 21 Ore. 450, 28 Pac. 497; McHugh v. Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574; Schnable v. Providence Pub. Market, 24 R. I. 477, 53 Atl. 634; Proctor v. San Antonio St. Ry. Co., 26 Tex. Civ. App. 148, 62 S. W. 938. But see Nohrden v. Northeastern R. R. Co., 59 S. C. 87, 37 S. E. 228, 82 Am. St. Rep. 826; Stuckey v. Atlantic Coast Line R. R. Co., 60 S. C. 237, 38 S. E. 416, 85 Am. St. Rep. 842. The ground of recovery in Tennessee seems to be much broader than in most states, and is fully explained in Collins v East Tennessee, etc., R. R. Co., 9 Heisk. 841.

"Unlike ordinary questions of the legal measure of damages, this relates wholly to the future. There can never be knowledge. The conclusion arrived at must be based on probabilities instead of facts. The only facts that can be ascertained are those which occurred before or at the time of the death. From that data, what would probably have occurred had not the wrongful act or neglect of the defendant intervened, must be conjectured as carefully as possible. The circumstances of the deceased and of the beneficiaries are to be ascertained. The legal, family or other ties are to be considered. The age, capacity, health, means, occupation, temperament, habits and disposition of the deceased and of the beneficiaries are material to be known. There is some probability that these various circumstances shown to be existing at the time of the death would have continued in more or less degree had not the death occurred. They would be subject, however, to acceleration, retardation, interruption and even extinction by other circumstances which may possibly, or probably, or even surely occur after the death. These inevitable, probable, or even possible subsequent circumstances are therefor to be looked for and considered. Whatever result is arrived at must be reached from a careful balancing of the various probabilities." [74] In Tennessee it is said that "the assessment of damages in actions of this character does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion of the jury. The courts refuse to lay down any cast iron rules or mathematical formula by which such damages are to be ciphered out by juries. It is the duty of the court to point out the different elements proper to be considered in the assessment of damages, but it is erroneous to give the jury a rule by which to figure out the damages as they would a mathematical problem in cases like this, where the future earnings of the deceased and his expectation of life are mere probabilities." [75]

Exemplary damages may not be recovered, unless the stat-

[74] McKay v. New England Dredging Co., 92 Me. 454, 459, 460, 43 Atl. 29. See to same effect, Missouri Pac. Ry. Co. v. Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343.

[75] Railroad Co. v. Spence, 93 Tenn. 173, 23 S. W. 211, 42 Am. St.

ute expressly, or by implication, allows them, as in some instances it does.[76] Life or accident insurance received by the beneficiaries in consequence of the death of the deceased may not be shown in mitigation of damages.[77] Nor can the remar-

Rep. 907. And see Davidson Benedict Co. v. Severson, 109 Tenn. 572, 72 S. W. 967; Freeman v. Railroad Co., 107 Tenn. 340, 64 S. W. 1. On the elements and measure of damages generally, see Decatur Car Wheel & Mfg. Co. v. Mehaffey 128 Ala. 242, 29 So. 646; Railway Co. v. Davis, 55 Ark. 462, 18 S. W. 628; Railway Co. v. Sweet, 60 Ark. 550, 31 S. W. 571; Lange v. Schoettler, 115 Cal. 388, 47 Pac. 139; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019; Denver, etc., R. R. Co. v. Spencer, 27 Colo. 313, 61 Pac. 606; Clay v. Central R. R. & B. Co., 84 Ga. 345, 10 S. E. 967; Wheelan v. Chicago, etc., Ry. Co., 85 Ia. 167, 52 N. W. 119; Cooper v. Shore Elec. Co., 63 N. J. L. 558, 44 Atl. 633; Cincinnati St. Ry. Co. v. Altemeier, 60 Ohio St. 10, 53 N. E. 300; Mendenhall v. North Car. R. R. Co., 123 N. C. 275, 31 S. E. 480; McHugh v. Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574; Mansfield Coal Co. v. McEnery, 91 Pa. St. 185, 36 Am. Rep. 662; Houghkirk v. Del. & H. C. Co., 92 N. Y. 219, 44 Am. Rep. 370; Lawson v. Chicago, etc, Ry. Co., 64 Wis. 447, 54 Am. Rep. 634; Florida Cent. R. R. Co. v. Foxworthy, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149. "The sum given must be the present worth of the future pecuniary benefits of which the beneficiary has been deprived by the wrongful act, neglect or default of the defendant." Oakes v. Maine Central R. R. Co., 95 Me. 103, 106, 49 Atl. 418; Railway Co. v. Robbins, 57 Ark. 377, 21 S. W. 886; Central R. R. Co. v. Rouse, 77 Ga. 393, 3 S. E. 307; Ohio, etc., Ry. Co. v. Voight, 122 Ind. 288, 83 N. E. 774.

[76] Lange v Schoettler, 115 Cal. 388, 47 Pac. 139; McKay v. New Eng. Dredging Co., 92 Me. 454, 43 Atl. 29. In Kentucky punitory damages are allowed by the statute when the fatal neglect is willful. Jacobs v. Louisville, etc., R. R. Co., 10 Bush, 263. See Chiles v. Drake, 2 Met. (Ky.) 146, 74 Am. Dec. 406. As to what willful neglect is, see Lexington v. Lewis's Admr., 10 Bush, 677. As to exemplary damages under the Texas act, see Houston, etc., Co. v. Cowser, 57 Tex. 293. And see Haehl v. Wabash R. R. Co., 119 Mo. 325, 24 S. W. 737.

[77] Sherlock v. Alling, 44 Ind. 184; Carroll v. Miss. Pac. R. R. Co., 88 Mo. 239; Terry v. Jewett, 78 N. Y. 338; Illinois Central R. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435; Coulter v. Pine Tp. 164 Pa. St. 543, 30 Atl. 490; Tyler S. E. Ry. Co. v. Rasberry, 13 Tex. Civ. App. 185, 34 S. W. 794; Harding v. Townshend, 43 Vt. 536; Clune v. Ristine, 94 Fed. 745, 36 C. C. A. 450. See Kellogg v. New York, etc., Co., 79 N. Y. 72; Baltimore, etc., R. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep 384; North Penn. Co. v. Kirk, 90 Penn. St. 15.

riage of the widow, when the suit is for her benefit.[78] loss of a prospective inheritance is not a proper element damages.[79] Funeral expenses may constitute an element damages in some cases.[80]

[78] St. Louis, etc., Ry. Co. v. Cleere, 76 Ark. 377; Chicago, etc., R. R. Co. v. Driscoll, 207 Ill. 9, 69 N. E. 620; Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696; Chicago, etc., Ry. Co. v. Lagerkrans, 65 Neb. 566, 95 N. W. 2; Davis v. Guarnieri, 45 Ohio St. 470. 15 N. E. 350, 4 Am. St. Rep. 548. The probability of the widow's subsequent marriage should not be taken into account. Baltimore & Ohio R. R. Co. 33 Md. 542.

[79] Baltimore, etc., R. R. Co. Golway, 6 App. D. C. 143; Wiest v. Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666.

[80] Murphy v. New York, etc., R. R. Co., 88 N. Y. 445; Pennsylvania R. R. Co. v. Bantom, 54 Pa. St. 495; Cleveland, etc., R. R. Co. v. Rowan, 66 Pa. St. 393. But see Railway Co v. Sweet, 57 Ark. 287, 21 S. W. 587.

CHAPTER IX.

WRONGS IN RESPECT TO CERTAIN CIVIL AND POLITICAL RIGHTS.

§ 152. Right to form business relations—Preventing employment. Every person *sui juris* has a right to make use of his labor in any lawful employment on his own behalf, or to hire it out in the service of others.[1] Every man has a right to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern.[2] It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress. Thus, if one is prevented by the wrongful act of a third party from securing some employment he has sought, he suffers a legal wrong, provided he can show that the failure to employ him was the direct and natural consequence of the wrongful act.[3] As to what will be deemed a wrongful act in this connection, no general rule can be laid down. A count was held insufficient which alleged that the defendant from whose service the plaintiff had been discharged, prevented the plaintiff from getting employment with another railroad company, by calling the plaintiff, in answer to inquiries, a labor agitator.[4] An employee, upon his discharge or leaving the service, has no

[1] See Braceville Coal Co. v. People, 147 Ill. 66, 71, 35 N. E. 62; Bessette v. People, 193 Ill. 335, 62 N. E. 215; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 106 Am. St. Rep. 268.

[2] Brewster v. Miller's Sons, 19 Ky. L. R. 593, 597, 41 S. W. 301; Master Builders' Ass'n v. Domascio, 16 Colo. App. 25, 63 Pac. 782; Hundley v. Louisville, etc., R. R. Co., 105 Ky. 162, 48 S. W. 429, 88 Am. St. Rep. 298; New York, etc., R. R Co. v. Schaffer, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628.

[3] Hundley v. Louisville, etc., R. R. Co., 105 Ky. 162, 167, 48 S. W. 429, 88 Am. St. Rep. 298.

[4] Wabash R. R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003.

common-law right to a clearance card or certificate, showing the cause of his discharge or quittance, his length of service, capacity, etc., and no action lies for a refusal to give such clearance card or certificate, though it is alleged that thereby the plaintiff was prevented from getting employment elsewhere.[5] Such a right, therefore, could only be claimed by virtue of a statute, contract or custom, and the burden would be on the plaintiff to show the contract or custom.[6] Such a custom cannot be established by proof of one or two instances.[7] In the Ohio case cited it is held that if the defendant company combined with other companies in an agreement not to employ any person who did not furnish a statement of his record from his former employer, it would afford no basis for an action, unless the agreement was brought about by some illegal act of the defendant, but "if the defendant, by fraud, falsehood or force, had brought about a refusal to employ the plaintiff, it would have committed a positive wrong against the plaintiff, which would have been actionable."[8] In *Hundley v. Louisville, etc., R. R. Co.,* the declaration alleged that the plaintiff was discharged by the defendant company, which falsely listed him as discharged for neglect of duty; that the defendant had entered into a combination with other railroad companies not to employ those who had been discharged for a cause, and that by reason of these acts it was impossible for the plaintiff to obtain employment with any railroad in the United States. The declaration was held bad on demurrer, because it did not show a failure to obtain employment by reason of the facts alleged; but it was further held that it would have been good if the plaintiff had averred "that he had sought and been refused employment by reason of the alleged wrongful act."[9]

[5] Cleveland, etc., Ry. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811; New York, etc., R. R. Co. v. Schaffer, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628. And see McDonald v. Illinois Central R. R. Co., 187 Ill. 529, 58 N. E. 463

[6] Cleveland, etc., Ry. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811.

[7] Ibid.

[8] New York, etc., R. R. Co. v. Schaffer, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628.

[9] Hundley v. Louisville, etc., R. R. Co., 105 Ky. 162, 48 S. W. 429, 88 Am. St. Rep. 298.

§ 153. **Procuring discharge of employee.** One who maliciously and without justifiable cause, induces an employer to discharge an employee, by means of false statements, threats or putting in fear, or perhaps by means of malevolent advice and persuasion, is liable in an action of tort to the employee for the damages thereby sustained.[10] And it makes no difference whether the employment was for a fixed term not yet expired or is terminable at the will of the employer.[11] In the latter case the employer is not liable, as he has the right to terminate the contract for any reason or even without any reason.[12] If one makes false and malicious statements against an employee, whereby he is discharged, he will be liable,[13] but where one makes charges of uncivil conduct on the part of an employee toward himself or friends, whereby discharge results, he will not be liable if he acted in good faith and on reasonable grounds.[14] In one of the cases cited the plaintiff's discharge was procured in this wise: The plaintiff was in-

[10] Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367; London Guarantee & Acc. Co. v. Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185; Hollenbeck v. Ristine, 105 Ia. 488, 75 N. W. 355, 67 Am. St. Rep. 306; Hollenbeck v. Ristine, 114 Ia. 358, 86 N. W. 377; Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; Lucke v. Clothing Cutters & Trimmers' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408; Walker v. Cronin, 107 Mass. 555; Lombard v. Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; May v. Wood, 172 Mass. 11, 51 N. E. 191; Moran v. Dunphy, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. A. 115; Berry v. Donovan, 188 Mass. 353; Lally v. Cantwell, 30 Mo. App. 524; Lally v. Cantwell, 40 Mo. App. 44; Curran v. Galen, 2 Misc. 553, 22 N. Y. S. 826; Holder v. Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481; Dannerberg v. Ashley, 10 Ohio C. C. 558. See McDonald v. Edwards, 20 Misc. 523, 46 N. Y. S. 672.

[11] Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367; London Guarantee & Acc. Co. v. Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185; Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; Moran v. Dunphy, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115; Lally v. Cantwell, 30 Mo. App. 524; Dannerberg v. Ashley, 10 Ohio C. C. 558. But see Holder v. Cannon Mfg. Co., 138 N. C. 308.

[12] Henry v. Pittsburg, etc., R. R. Co., 139 Pa. St. 289, 21 Atl. 157.

[13] Hollenbeck v. Ristine, 105 Ia. 488, 75 N. W. 355, 67 Am. St. Rep. 306; Hollenbeck v. Ristine, 114 Ia. 358, 86 N. W. 377.

[14] Lancaster v. Hamburger, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856.

jured while in the employ of A, who was indemnified against liability by a policy in the defendant company. The latter threatened to procure the plaintiff's discharge unless he would settle his claim for $75, and, upon his refusal so to do did cause his discharge by threatening to cancel its policy with A, unless the plaintiff was discharged. The defendant was held liable.[15] In another case the defendant, as manager of a granite quarry made a contract with L, terminable at pleasure, to cut paving blocks in the quarry. The plaintiff was an employee of L, and, being disliked by the defendant, the latter threatened to terminate L's contract unless he discharged the plaintiff, which L did. It was held that the defendant was not liable, though he was actuated by malice towards the plaintiff, and that "when one exercises a legal right only, the motive which actuates him is immaterial."[16] In this case the defendant doubtless had a right to get rid of a person whose presence in his quarry was obnoxious to him and the case is quite different from one where the interference is without any interest or occasion, but is purely malicious.

§ 154. Action for inducing breach of contract. One who maliciously or without justifiable cause induces a person to break his contract with another will be liable to the latter for the damages resulting from such breach.[17] As to what will

[15] London Guarantee & Acc. Co. v. Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185.

[16] Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225.

[17] Dale v. Hall, 64 Ark. 221, 41 S. W. 761; Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353; Morehouse v. Terrill, 111 Ill. App. 460; Gore v. Condon, 87 Md. 368, 39 Atl. 1042, 67 Am. St. Rep. 352, 40 L. R. A. 382; Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Jones v. Stanley, 76 N. C. 355; Raymond v. Yarrington, 96 Tex. 443, 72 S.W. 580, 97 Am. St. Rep. 914; Brown Hardware Co. v. Indiana Stove Works, 96 Tex. 453, 73 S. W. 800, 62 L. R. A. 962; West Va. Trans. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; Angle v. Chicago, etc., Ry. Co., 151 U. S. 1, 14 S. C. Rep. 240, 38 L. Ed. 55; Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, L. R. 6 Q. B. D. 333; Glamorgan Coal Co. v. South Wales Miners' Federation, (1903) 2 K. B. 545; Giblan v. National Amalgamated Laborers' Union, (1903) 2 K. B. 600; Quinn v. Leathem, (1901) A. C.

constitute justifiable cause cannot be satisfactorily defined and must be left to the determination of the court in each case.[18] Some of the authorities hold that the action will not lie unless unlawful means are employed, such as fraud, deceit or intimidation.[19]

§ 155. Combinations to prevent or interfere with the employment of labor. Where two or more workmen combine to procure the discharge of other workmen or to prevent their employment by the exercise of unlawful means or without justifiable cause, and do thereby cause loss of employment, an action will lie for the damages sustained and either the workmen threatened or their employer may maintain a bill to restrain such unlawful interference.[20] The principle involved has been

495. Compare Glencoe Land & G. Co. v. Hudson Bros. Com. Co., 138 Mo. 439, 40 S. W. 93, 60 Am. St. Rep. 560, 36 L. R. A. 804; Kimball v. Harman, 34 Md. 507, 6 Am. Rep. 340.

[18] Ibid.; Glamorgan Coal Co. v. South Wales Miners' Federation, (1903) 2 K. B. 545.

[19] Boysen v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545; Boulier v. Macauley, 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550; Kline v. Eubanks, 109 La. 241, 33 So. 211; Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252.

[20] Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353; Lucke v. Clothing Cutters & Trimmers' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; Vegelahn v. Gunther, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 732; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339; Berry v. Donovan, 188 Mass. 353; Webber v. Barry, 66 Mich. 127, 33 N. W. 289; Davis v. Zimmerman, 91 Hun, 489, 36 N. Y. S. 303; Curran v. Galen, 2 Misc. 553, 22 N. Y. S. 826; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Davis Machine Co. v. Robinson, 41 Misc. 329, 84 N. Y. S. 837; Erdman v. Mitchell, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534; Quinn v. Leathem, (1901) A. C. 495; Read v. Friendly Society of Stonemasons, (1902) 2 K. B. 732. See Reynolds v. Everett, 67 Hun, 294, 22 N. Y. S. 306; Mills v. U. S. Printing Co., 99 App. Div. 605, 91 N. Y. S. 185; Coons v. Chrystie, 24 Misc. 296, 53 N. Y. S. 668; Marretta Casting Co. v. Hiestand Thuma, 28 Pa. Co. Ct. 248; Manufacturers' Outlet Co. v. Longley, 20 R. I. 86, 37 Atl. 535; Perrault v. Gauthier, 28 Sup. Ct. Canada, 241; Green v. Button, 2 C. M. & R. 707; Springfield Spinning Co. v. Riley, L. R. 6 Eq. Cas. 551; Old Dominion S. S. Co. v. McKenna, 30 Fed. 48; Hornby v.

thus stated by the Supreme Court of Massachusetts: "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria,* unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."[21] The subject has received very elaborate consideration in two recent cases in the English House of Lords, and the conclusion reached is thus stated in the syllabus to the later case: "A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers, or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable."[22]

Close, L. R. 2 Q. B. 153; Farrer v. Close, L. R. 4 Q. B. 602; Commonwealth v. Hunt, 4 Met. 111, 38 Am. Dec. 346; People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; Baker v. Met. Life Ins. Co., 23 Ky. L. R. 1174, 64 S. W. 913, 55 L. R. A. 271; Orr v. Home Mut. Ins. Co., 12 La. Ann. 255, 68 Am. Dec. 770.

[21] Walker v. Cronin, 107 Mass. 555, 564; Plant v. Woods, 176 Mass. 492, 498, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339.

[22] Allen v. Flood, (1898) A. C. 1; Quinn v. Leathem, (1901) A. C. 495. The former case has been much criticised in this country but the decision is explained or qualified in Quinn v. Leathem and the two cases must be studied together. In the later case Lord Macnaughten says: "In my opinion Allen v. Flood, (1898) A. C. 1, laid down no new law. It simply brushed aside certain dicta which in the opinion of the majority of this house were contrary to principle and unsupported by authority. Those dicta are first to be found in the judgment delivered by Lord Esher on behalf of himself and Lord Shelborne in Bowen v. Hall, L. R. 6 Q. B. D. 333. They were repeated by Lord Esher and Lopes, L. J., in Temperton v. Russell, (1893) 1 Q. B. 715; but they were not, I think, necessary for the decision in either case. They did form the ground of decision in Allen v. Flood in its earlier stages. But in the end the law was restored to the condition in which it was before Lord Esher's views in Bowen v. Hall and Temperton v. Russell were accepted by the court of appeal.

As above stated, if the interference is accomplished by unlawful means, the defendants are liable. The means usually employed are falsehood, fraud or intimidation, or all combined. The intimidation may consist in threats of violence to workmen or of harm to the employer's property or business.[23] Whether the threat of a strike by the defendants is the employment of unlawful means is open to question. In New York such a threat is held not to be unlawful, and if the object of the defendants is justifiable, as to get the work for themselves or otherwise to secure a benefit, no action will lie either for damages or prevention.[24] But in Pennsylvania, where the members of one union proposed to compel the members of another union to join the defendants' union by procuring their discharge from all jobs where both were working, by means of strikes by the defendants, it was held the defendants should be enjoined. The court says: "Trades unions may cease to work for reasons satisfactory to their members, but if they combine to prevent others from obtaining work by threats of a strike or combine to prevent an employer from employing others by threats of a strike, they combine to accomplish an unlawful purpose, a purpose as unlawful now as it ever was, though not punishable by indictment. Such combination is a despotic and tyrannical violation of the indefeasible right of labor to acquire property which courts are bound to restrain. It is utterly subversive of the letter and spirit of the declaration of rights. If such combination be in accord with the law of the trade union, then that law and the organic law of the people of a free commonwealth cannot stand together; one or the other must go down."[25]

The head note to Allen v. Flood might well have run in words used by Parke, B., in giving the judgment of an exceptionally strong court nearly half a century ago. (Stevenson v. Newnham, (1853) 13 C. B. 297.) 'An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.'"

[23] See cases cited in first note to this section.

[24] National Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135. And see Allen v. Flood, (1898) A. C. 1; Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367.

[25] Erdman v. Mitchell, 207 Pa. St. 79, 92, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534.

§ 156. Injury to trade or business. The same general rules apply to an interference with one's trade or business, as to interference with the employment of labor. Neither one person nor a combination of persons may interfere with one's business contracts by inducing the obligors to break such contracts and for any such interference an action will lie.[26] In one of the cases cited it appeared that the plaintiff had built up a profitable business by obtaining customers for laundry work, which she had done by others, with whom she had contracts. The defendants, members of the Chicago Laundryman's Association, procured these parties to break their contracts and procured other laundrymen not to make contracts with her, whereby her business was destroyed, all of which was done because the plaintiff refused to increase her prices to a schedule fixed by the association. The defendants were held liable and a judgment against them for $6,000 was sustained.[27] So an attempt to injure, or an injury to, a person's business by procuring others not to deal with him, or by getting away his customers, if unlawful means are employed, such as fraud or intimidation, or if done without justifiable cause, is an actionable wrong.[27a] Thus where the defendants, merchants and bankers of a town, without any purpose except to injure the plaintiff, who kept a hotel, combined to boycott the hotel by

[26] Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353; Doremus v. Hennessey, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A. 797; Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Raymond v. Yarrington, 96 Tex. 443, 72 S. W. 580, 97 Am. St. Rep. 914, 62 L. R. A. 962; Brown Hardware Co. v. Indiana Stove Works, 96 Tex. 453, 73 S. W. 800; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; Temperton v. Russell, (1893) 1 Q. B. 715; Glamorgan Coal Co. v. South Wales Miners' Federation, (1903) 2 K. B. 545; Giblan v. National Amalgamated Laborers' Union, (1903) 2 K. B. 600; *ante*, p. 292, n. 17. "No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any loss willfully caused by such interference will give the party injured a right of action for all damages sustained." Purington v. Hinchliff, 219 Ill. 159.

[27] Doremus v. Hennessey, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A. 797.

[27a] Southern Ry. Co. v. Chambers, 126 Ga. 404; Standard Oil Co. v. Doyle, 118 Ky. 662.

refusing to buy goods of drummers who stopped there, they being the chief source of patronage, and by persuading people not to stop at the hotel, they were held liable.[28] And generally where the defendants combine to refuse to deal with the plaintiff and to induce others to do the same, an action will lie if loss results, and in some cases the carrying out of the purpose may be enjoined.[29] "One man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him."[30]

A boycott is illegal, and damage caused thereby is actionable, and the prosecution or continuance of a boycott may be enjoined in proper cases.[31] "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby cause him, through fear

[28] Webb v. Drake, 52 La. Ann. 290, 26 So. 791.

[29] Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547; Hartnett v. Plumbers' Supply Ass'n, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194; Ertz v. Produce Exchange, 79 Minn. 140, 81 N. W. 737, 79 Am. St. Rep. 433, 48 L. R. A. 90; Ertz v. Produce Exchange, 82 Minn. 173, 84 N. W. 743, 83 Am. St. Rep. 419, 51 L. R. A. 825; Patch Mfg. Co. v. Protection Lodge, 77 Vt. 294; Temperton v. Russell, (1893) 1 Q. B. 715.

[30] Ertz v. Produce Exchange, 79 Minn. 140, 145, 81 N. W. 737, 79 Am. St. Rep. 433, 48 L. R. A. 90. See Guethler v. Altman, 26 Ind App. 587, 60 N. E. 355.

[31] Purington v. Hinchliff, 219 Ill. 159; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 1118, 103 Am. St. Rep. 477, 63 L. R. A. 753; Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl 881. See Park & Sons Co. v. National Wholesale Druggists' Ass'n, 30 App. Div. 508, 52 N. Y. S. 475; Park & Sons Co. v. Hubbard, 30 App. Div. 517, 52 N. Y. S. 481; Loewe v. Cal. State Federation of Labor, 139 Fed. 71.

of resulting injury, to submit to dictation in the management of his affairs." [82]

In the case just referred to, the plaintiffs were electrical contractors in Minneapolis, and the defendant council was composed of representatives from the different labor unions of that city, and controlled the action of such unions and of their members. The plaintiffs ran an "open shop," and the defendant proposed to boycott the plaintiffs as "unfair," and had threatened prospective customers with loss, strikes and trouble if they gave work to the plaintiffs. It was held that the defendant should be enjoined from interfering with the business of the plaintiffs by threats or intimidation directed to their customers or prospective customers, also from interfering with such customers or prospective customers by threats of any kind. It was further held that they should not be enjoined from notifying such customers that plaintiffs were "unfair," the word not being shown to have any particular meaning, nor from requesting union men on jobs where plaintiffs were at work to quit.

A combination to injure a person in his business or to drive him out of business or to coerce him in the conduct of his business is unlawful, and the injured party may recover the damages sustained or enjoin the consummation of the purpose.[83]

[82] Gray v. Building Trades Council, 91 Minn. 171, 179, 97 N. W. 663, 1118, 103 Am. St. Rep. 477, 63 L. R. A. 753.

[83] Purvis v. United Brotherhood, 214 Pa. St. 348; Everett Waddey Co. v. Richmond Typographical Union, 105 Va. 188; State v. Huegin, 110 Wis. 189, 85 N. W. 1046; Hawarden v. Youghiogheny L. & C. Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828. In the earlier Wisconsin case the members of the combination were held liable for a criminal conspiracy. In the later the court says: "The allegation is distinct and clear that one of the purposes and objects of this agreement was to drive the plaintiff out of business. This was an ulterior and unlawful purpose, and constitutes malice in contemplation of law. Therefore, under the allegation of the complaint, it is clear that the combination here formed was formed for the malicious purpose of doing an injury to another, and that such injury has resulted, and hence that a cause of action at law for damages is stated." P. 551. See, also, Vegelahn v. Gunther, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722; Mapstrick v. Ramage, 9 Neb. 390, 2 N. W. 739, 31 Am. Rep. 415; Hopkins v. Oxley Stave Co., 83 Fed.

So if a person breaks up the business of his rival by circulating false reports as to his honesty, solvency, etc., he will be liable.[34] As one person may refuse to have business relations with another, so two or more may combine or agree together not to deal with a particular person for any reason they see fit, and no action will lie either to prevent the carrying out of this agreement or for damages consequent upon its performance.[35] But if the agreement includes the influencing of parties outside the combination not to deal with the plaintiff, then it is illegal.[36] So if the members of the combination are subject to coercion, as by the infliction of penalties.[37] *Martell v. White* [38] is an instructive case. The defendants were members of an association composed of manufacturers, quarriers and workers of granite in and about Quincy. A by-law of the association imposed a penalty of from $1 to $500 upon any member dealing with a non-member. The plaintiff was a non-member and was engaged in quarrying granite and selling it to cutters and polishers. By reason of the by-law members of the association refused to deal with the plaintiff and his business was broken up. In a suit for damages, it was held to be a case for the jury, that in the case of such combinations both the object sought must be lawful and the means used to accomplish it, and that in this case the means were not of this character. On the other hand, where members of an association procured wholesalers not to sell supplies to a non-mem-

912, 28 C. C. A. 99; Rourke v. Elk Drug Co., 75 App. Div. 45, 77 N. Y. S. 373.

[34] Brown v. Am. Freehold Land Mgt. Co., 97 Tex. 599, 80 S. W. 985.

[35] Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337; Brewster v. Miller's Sons, 19 Ky. L. R. 593, 41 S. W. 301; Delz v. Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755; Schulten v. Bavarian Brewing Co., 96 Ky. 224, 28 S. W. 504; Baker v. Met. Life Ins. Co., 23 Ky. L. R. 1174, 64 S. W. 913, 55 L. R. A. 271; Orr v. Home Mut. Ins. Co., 12 La. Ann. 255, 68 Am. Dec. 770.

[36] Delz v. Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755.

[37] Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 24 L. R. A. 469; Martell v. White, 185 Mass. 255, 69 N. E. 1085, 102 Am. St. Rep. 341, 64 L. R. A. 260; Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306; Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803.

[38] Martell v. White, 185 Mass 255, 69 N. E. 1085, 102 Am. St. Rep. 341, 65 L. R. A. 260.

ber by refusing to deal with those who did so, whereby the business of the non-member was damaged and threatened with destruction, it was held that both the object sought and the means employed were lawful and that the injured party had no remedy. The court recognizes the rule that the defendants were not at liberty to employ coercive measures in order to induce parties not to deal with the plaintiff, and hold that the threat to withdraw trade was not coercive. On this point the court says: "It was perfectly competent for members of the association, in the legitimate exercise of their own business, to bestow their patronage on whomsoever they chose, and to annex any condition to the bestowal which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members of the association more than that of the non-members, they would doubtless comply; otherwise they would not." [39]

Where the defendant, in order to injure the plaintiff, refuses to employ or continue in his service men who trade at the latter's store, whereby the plaintiff's trade is injured, he may have an action for the damage. In such a case the object sought is not a lawful one, and, therefore, the interference with the plaintiff's trade is without just cause or excuse.[40] Where the lessee of land had the right to remove the timber therefrom within a limited time and the defendant, a subsequent purchaser, by means of threats of prosecution and the like, caused the lessee's servants to leave, and prevented others

[39] Macauley Bros. v. Tierney, 19 R. I. 255, 261, 33 Atl. 1, 61 Am. St. Rep. 770, 37 L. R. A. 455. Master Builders' Ass'n v. Domascio, 16 Colo. App. 25, 63 Pac. 782, is a somewhat similar case in which the same conclusion was reached. See also Buckley v. Mulville, 102 Ia. 602, 70 N. W. 107, 63 Am. St. Rep. 479; Cote v. Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135; Buchanan v. Kerr, 159 Pa. St. 433, 28 Atl. 195.

[40] Graham v. St. Charles St. R. R. Co., 47 La. Ann. 214, 16 So. 806, 49 Am. St. Rep. 366, 27 L. R. A. 416; Graham v. St. Charles St. R. R. Co., 47 La. Ann. 1656, 18 So. 707, 49 Am. St. Rep. 436. The contrary is held in Payne v. Railroad Co., 13 Lea, 507. Threatening not to employ a man who remains a tenant of a certain landlord gives the latter no right of action against the employer. Heywood v. Tillson, 75 Me. 225.

from entering his employ until after the time had expired, the defendant was held liable for the damages, which would be the value of the timber, less the cost of removal.[41]

One may advertise and sell the goods of a manufacturer at less than wholesale prices, though the purpose be to inflict loss on the manufacturer, and the latter has no remedy, for a person may sell or offer his property at any price he pleases,[42] and it is held to make no difference that the defendant did not have the goods on hand at the time he advertised them for sale.[43]

In regard to the right of competition, it has been said: "One may, without liability, induce the customers of another to withdraw their custom from him, in the race of competition, in order that the former may himself get the custom, there being no contract; and it is no matter that such person is injured, and it is no matter that the other party was moved by express intent to injure him, motive being immaterial where the act is not unlawful. But where the act is not done under the right of competition or the cover of friendly, neighborly counsel, but wantonly or maliciously with intent to injure another, it is actionable, if loss ensue. Nor is it material in the latter case that there was no binding contract between the business man and his customers. He cannot interfere, even for his own benefit if there is a contract." [44] Where vessel owners formed an association for the purpose of securing to themselves a monopoly of a certain carrying trade, agreed upon a division of cargoes and on freights to be charged, allowed a rebate of five per cent. to all shippers who used the vessels of the members exclusively, prohibited their agents from acting for competing lines on pain of dismissal, notified shippers that the benefit of the rebate would be withdrawn from any who shipped by rival vessels, and underbid competing lines so that they carried at a loss,

[41] Crane v. Patton, 57 Ark. 340, 21 S. W. 466.

[42] Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed. 163, 44 C. C. A. 426; Ajello v. Worsley, (1898) 1 Ch. 274.

[43] Ajello v. Worsley, (1898) 1 Ch. 274.

[44] West Va. Trans. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804. And see Brown v. American Freehold Land Mortgage Co., 97 Tex. 599, 80 S. W. 985.

it was held that the object sought and means employed were legitimate and justified by the principle of competition.[45]

It has often been said in cases relating to trade and the employment of labor that what one may lawfully do, two or more may combine to do. The supreme court of Massachusetts makes the following observations upon this point: "To what extent combination may be allowed in competition is a matter about which there is yet much conflict, but it is possible that in a more advanced stage of the discussion the day may come when it will be more clearly seen and will more distinctly appear in the adjudications of the courts than as yet has been the case, that the proposition that what one man lawfully can do any number of men acting together by combined agreement lawfully may do, is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and the difference between the power of individuals acting each according to his own preference, and that of an organized and extensive combination, may be so great in its effect upon public and private interests as to cease to be one simply in degree and to reach the dignity of a difference in kind."[46]

§ 157. Right to the service of common carriers and to other quasi-public services. The business of common carriers is a *quasi*-public business; a term which we employ, because it is often made use of, and because it indicates that the public have some rights in respect to the business which do not exist in the case of business of a purely private character. No man becomes a common carrier except with his own consent;

[45] Mogul S. S. Co. v. McGregor, (1892) A. C. 25; Mogul S. S. Co. v. McGregor, 23 Q. B. D. 598.

[46] Martell v. White, 185 Mass. 255, 69 N. E. 1085, 102 Am. St. Rep. 341, 64 L. R. A. 260. In Hawarden v. Youghiogheny L. & C. Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828, the court says: "One person may, through malicious motives, attract to himself another's customers, and thus ruin the business of such other without redress, but when a number of persons, acting wholly or in part from such malicious motives, combine together, the injury to such other is actionable." P. 550. And see Gatzow v. Buening, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475.

but when he does so, he must conform to those principles of the common law under which the business has grown up, and which have always required of the common carrier impartiality in his business as between individuals; he must carry for all, and he must carry under impartial regulations.[47] Whether a person is acting as a common carrier is a mixed question of law and fact, which should be submitted to the jury under proper instructions.[48] The common carrier is under a common-law obligation to give the same rates, facilities, and accommodations to all under substantially the same circumstances and conditions.[49] Telegraph and telephone companies are common carriers and subject to the same rule.[50] Carriers are at liberty to make rules and regulations for the control and management of their business, subject to the restriction that the rules and regulations must not be unreasonable, and that they must not conflict with any which may lawfully be prescribed by competent legislative authority.[51] To such rules the public

[47] 2 Kent, Com. 451; Redf. on Railw. Vol. 2; Introd. Angell on Carriers.

[48] Schloss v. Wood, 11 Colo. 287, 17 Pac. 910.

[49] State v. Atlantic Coast Line, 51 Fla. 543; Louisville, etc., R. R. Co., v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; Cumberland Tel. & Tel. Co. v. Tex. & Pac. Ry. Co., 52 La. Ann. 1850, 28 So. 284; Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674; Hilton L. Co. v. Railroad Co. 141 N. C. 171; Lake Shore, etc., Ry. Co. v. Scofield, 2 Ohio C. C. 305; Hoover v. Pennsylvania R. R. Co., 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 203; Avinger v. South Carolina Ry. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716; Memphis News Pub. Co. v. Southern Ry. Co., 110 Tenn. 684, 75 S. W. 941; Union Pac. Ry. Co. v. Goodridge, 149 U. S. 680, 13 S. C. Rep. 970, 37 L. Ed. 896. A railroad company was held liable for refusing to carry a blind person who was competent to look out for himself. Illinois Cent. R. R. Co. v. Smith, 85 Miss. 349, 37 So. 643, 107 Am. St. Rep. 245.

[50] State v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139; Gwynn v. Citizens' Telephone Co., 69 S. C. 434, 48 S. E. 460; Commercial Union Tel. Co. v. New Eng. Tel. & Tel. Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161; State v. Cumberland Tel. & Tel. Co., 114 Tenn. 194. So of companies supplying a messenger service. White v. Postal Tel. Cable Co., 25 App. D. C. 364.

[51] Day v. Owen, 5 Mich 520, 72 Am. Dec. 62; Westchester, etc., R. R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744; State v. Overton, 24 N. J. 435, 61 Am. Dec. 671.

must conform and no action lies for inconvenience or damage resulting from their enforcement.[52] Among the regulations often established by carriers of passengers is one setting aside certain carriages for the exclusive use of women and their escorts. Such a regulation violates the right of no one who is excluded, and for whom accommodations are elsewhere provided.[53] Another, not so plainly justifiable, is a rule setting aside certain carriages within which alone will persons of color be received and carried. Such a regulation has been sustained where the accommodations furnished were equal to those supplied for other passengers,[54] but has been held invalid where no such impartial accommodations had been provided.[55]

The same rules in general apply to all persons and companies engaged in a public service, such as gas companies, water companies, light companies and the like, and they must serve the public with impartiality and an action will lie on the part of one who is denied the service on the terms accorded to others or who is otherwise discriminated against to his damage.[56]

[52] Florida Southern Ry. Co. v. Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631; Baltimore, etc., R. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052; Northern Central Ry. Co. v. O'Connor, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449; Phillips v. Southern Ry. Co., 124 N. C. 123, 32 S. E. 388; Poole v. Northern Pac. R. R. Co., 16 Ore. 261, 19 Pac. 107, 8 Am. St. Rep. 289.

[53] Chicago, etc., R. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641. A colored woman cannot be excluded from such car because of her color. Gray v. Cincinnati, etc., Co., 11 Fed. Rep. 683; Logwood v. Memphis, etc., R. R. Co., 23 Fed. Rep. 318. Nor can a prostitute unless her conduct is offensive. Brown v. Memphis, etc., Co., 5 Fed. Rep. 499.

[54] Westchester, etc., R. R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744; Ohio Valley Ry. Co. v. Lander, 104 Ky. 431, 47 S. W. 344; *Ex parte* Plessy, 45 La. Ann. 80, 11 So. 948; Chilton v. St. Louis, etc., R. R. Co., 114 Mo. 88, 21 S. W. 457; Louisville, etc., Ry. Co. v. State, 66 Miss. 670, 6 So. 203; Railroad Co. v. Wells, 85 Tenn. 614, 4 S. W. 5; Louisville, etc., R. R. Co. v. Mississippi, 133 U. S. 587; Hart v. State, 100 Md. 595.

[55] Chicago, etc., R. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641; The Sue, 22 Fed. Rep. 843.

[56] Shepard v. Milwaukee Gas Lt. Co., 6 Wis. 539, 70 Am. Dec. 479; Williams v. Mutual Gas Co., 52 Mich. 499, 50 Am. Rep. 266; New

§ 158. **Right to the privileges and accommodations of inns, theaters, restaurants and the like—Civil rights acts.** At the common law an inn-keeper is bound to furnish accommodations to anyone who applies and tenders the usual price, unless there is some reasonable objection to the applicant, such as his being intoxicated, affected with a contagious disease, or the like, and an action will lie if accommodations are refused.[57] Probably this rule does not apply to any other private occupation which consists in providing accommodations, entertainment or amusement for the public, and the proprietors of places designed for that purpose, may, in the absence of any statute to the contrary, deny the privileges of their establishments to whom they please, without being liable to an action.[58] The supreme court of Washington appears to take a different view. A railroad company maintained a park to which the public were invited, and the plaintiff, having gone there as one of the public, was ordered out by the servants of the company as a disreputable woman. It was held to be an actionable wrong for which she was entitled to damages, including compensation for the mental suffering and indig-

Orleans Gas Lt. Co. v. Paulding, 12 Rob. La. 378; Gas Lt. Co. v. Colliday, 25 Md. 1; People v. Manhattan Gas Lt. Co., 45 Barb. 136; Rushville v. Rushville Nat. Gas Co., 132 Ind. 575, 28 N. E. 853; Portland Nat. Gas Co. v. State, 135 Ind. 54, 34 N. E. 818; Fleming v. Montgomery Lt. Co., 100 Ala. 657, 13 So. 618; McCrary v. Beaudry, 67 Cal. 120; Lumbard v. Stearns, 4 Cush. 60; Olmstead v. Morris Aqueduct, 47 N. J. L. 311; Price v. Riverside L. & I. Co., 56 Cal. 431; Haugen v. Albina L. & W. Co., 21 Ore. 411, 28 Pac. 244.

[57] 16 Am. & Eng. Encly. 524; *post.* § 323.

[58] State v. Maryland Institute, 87 Md. 643, 41 Atl. 126; Cecil v. Green, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566; Bowlin v. Lyon, 67 Ia. 536, 56 Am. Rep. 355; Rhone v. Loomis, 74 Minn. 200, 77 N. W. 31; Burks v. Bosso, 180 N. Y. 341, 73 N. E. 858, 105 Am. St. Rep. 762; Kellar v. Koerber, 61 Ohio St. 388, 55 N. E. 1002. The proprietor of a theater or other similar place of amusement may refuse admission or refuse to sell tickets of admission to whom he pleases and the general rule is that a ticket of admission is only a revocable license and that a ticket holder may be excluded without incurring any other liability than to refund the price paid for the ticket. McCrea v. Marsh, 12 Gray, 211, 71 Am. Dec. 745; Wood v. Leadbitter, 13 M. & W. 838. But see Drew v. Peer, 93 Pa. St 234.

nity. The decision is not put on the ground of defamation, but on the right of the plaintiff to visit the park and remain as long as she chose and conducted herself in a proper manner, free from molestation by anyone.[59]

The law, however, has been changed in territory under the jurisdiction of the United States and in many of the states by the enactment of laws known as Civil Rights Acts, the object of which is to secure to all the full and equal enjoyment of public accommodations such as are above referred to, without distinction as to race, color or previous condition of servitude. It is not within the scope of this work to follow out the construction and application of these stautes, but some decisions thereunder are referred to in the margin.[60]

[59] Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209. The court says: "Every person not belonging to a prescribed class has a right to go to any public place, or visit a resort where the public generally are invited, and to remain there, during all proper hours, free from molestation by anyone, so long as he conducts himself in a decorous and orderly manner. This right to freedom from molestation extends not only to freedom from actual violence, but to freedom from insult, personal indignities, or acts which subject him to humiliation and disgrace, and anyone guilty of violating any of these rights is liable in all cases for the actual damages suffered therefrom by the injured person. It matters not whether the wrong be one of pure negligence, or a wanton and willful wrong, an action will lie for the actual damages suffered." P. 207. And see Fergusonn v. Gies, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589, where the civil rights act was held to be only declaratory of the common law.

[60] Baylies v. Curry, 128 Ill. 287, 21 N. E. 595; Cecil v. Green, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566; People v. Mayor, etc., of Alton, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95; Coger v. N. W. Union Packet Co., 37 Ia. 145; State v. Hall, 72 Ia. 525, 34 N. W. 315; Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274; De Cuir v. Benson, 27 La. Ann. 1; Commonwealth v. Sylvester, 13 Allen, 247; Ferguson v. Gies, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589; Rhone v. Loomis, 74 Minn. 200, 77 N. W. 31; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375; Messenger v. State, 25 Neb. 674, 41 N. W. 638; People v. King, 110 N. Y. 418, 18 N. E. 245, 6 Am. St. Rep. 389, 1 L. R. A. 293; Burks v. Bosso, 180 N. Y. 341, 73 N. E. 858, 105 Am. St. Rep. 762; Cremore v. Huber, 18 App. Div. 231, 45 N. Y. S. 947; Kellar v. Koerber, 61 Ohio St. 388, 55 N. E. 1002; Bryan v. Adler, 97 Wis. 124,

§ 159. Right to instruction in the public schools. So long as slavery existed, it was customary, in establishing and providing for the support of schools, to discriminate in the advantages given, throwing open some schools to children generally, but denying admission to colored children. The right to do this was affirmed in Massachusetts, upon the broad ground that the state had undoubted right to select the objects of its bounty,[61] and was generally conceded elsewhere.[62] Since then the fourteenth amendment to the federal Constitution has been adopted, and it is now held that when the provision is made for education, it must be impartial. The provision gives to the whole people certain rights, and to single out a certain portion by the arbitrary standard of color, and say that these shall not have rights which are possessed by others is said to deny to them "the equal protection of the laws" and is consequently forbidden.[62a] But no right is violated when colored pupils are merely placed in different schools, provided the schools are equal and the same measure of privilege and justice is given in each.[63] But it has been

72 N. W. 368, 65 Am. St. Rep. 99, 41 L. R A. 658; Hall v. DeCuir, 95 U. S. 485; Plessy v. Ferguson, 163 U. S. 537, 16 S. C. Rep. 1138.

[61] Roberts v. Boston, 5 Cush. 198.

[62] Lewis v. Henley, 2 Ind. 332; Van Camp v. Board of Education, 9 Ohio St. 406.

[62a] Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405. See People v. Board of Education, 18 Mich. 400; Clark v. Board of Directors, 24 Iowa, 266; Smith v. Keokuk, 40 Iowa, 518; Dove v. School District, 41 Iowa, 689. Children of Chinese parents who were born and have always lived in this country must be admitted. Tape v. Harley, 66 Cal. 473; Bertonneau v. Directors, 3 Woods, 177; U. S. v. Buntin, 10 Fed. Rep. 730; People v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232. So an act providing that whites in a city shall be taxed for white schools, and blacks for black schools, which results in gross inequality of school privileges, is unconstitutional. Claybrook v. Owensboro, 16 Fed. Rep. 297.

[63] County Court v. Robinson, 27 Ark. 116; Maddon v. Neal, 45 Ark. 121, 55 Am. Rep. 540; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; Corey v. Carter, 48 Ind. 327, 17 Am. Rep. 738; Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274; State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713; People v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; State v. McCann, 21 Ohio St. 198; Eubank v. Boughton, 98 Va. 488, 36 S. E. 529. See Pierce v. Union District Trustees, 46 N. J. L. 76; Kaine v. Commonwealth, 110 Pa. St. 490.

held that such separation must be authorized by law and cannot be made on the initiative of the local school authorities.[64]

A teacher may violate the right to instruction in the public schools by refusing to instruct those who lawfully come. Whether an action would lie against the teacher for such refusal, or whether the remedy would not be confined to an appeal to the governing board, is left in doubt on the authorities. It would seem, however, that the refusal was a plain violation of an individual right, and, as such, was actionable.[65] The teacher might also violate the right to instruction by inflicting punishment for something not within his jurisdiction,[66] or by arbitrarily subjecting the pupil to ridicule and disgrace; or by excluding him from school without justification. The

[64] People v. Board of Education, 101 Ill. 308, 40 Am. Rep. 196; People v. Board of Education, 127 Ill. 613, 21 N. E. 187; People v. Alton, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95; Clark v. Board of Directors, 24 Ia. 266; Board of Education v. Tiernan, 26 Kan. 1. See Potts v. School Directors, 167 Ill. 67, 47 N. E. 81, 59 Am. St. Rep. 262.

[65] In Spear v. Cummings, 23 Pick. 224, 34 Am. Dec. 53, it was decided that no action would lie against a teacher by the parent whose child the former refused to receive into the school and instruct. His remedy, it was said, was to appeal to the school committee. It is intimated in the same case that no action would lie against the committee if the teacher were acting under their orders, their powers being judicial. To the same effect is Donahue v. Richards, 38 Me. 376, 61 Am. Dec. 256. And see Learock v. Putnam, 111 Mass. 499. In Roe v. Deming, 21 Ohio St. 666, it is held that such an action by the father will lie; but in Stephenson v. Hall, 14 Barb. 222, it is said it should be brought by the child himself.

[66] In Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471, the Supreme Court of Wisconsin declares that where a child attending school is directed by his father to pursue certain studies only, which are taught in the school, and the teacher punishes him because he will not take up others also, this is a criminal assault; and that the duty of the child under the circumstances is to obey his father. This is good sense. See Sewell v. Board of Education, 29 Ohio St. 89, in which it was decided that instruction in elocution might be made compulsory in schools, and a pupil expelled for failing to be prepared with a rhetorical exercise at a time designated; and State v. Weber, 108 Ind. 31, 58 Am. Rep. 30, where a similar rule is laid down as to the study of music.

teacher, as is said elsewhere,[67] is vested with judicial discretion in the management of his school, but he must not abuse this, or exceed his powers. He is a judge with limited authority, not an autocrat.

School committees or trustees may also deprive individuals of their rights in schools, through regulations which demand things in themselves unreasonable.[68] Under the general authority usually conferred upon these boards to prescribe the rules and laws for the control of schools, their powers are no doubt very extensive, but in the nature of things there are some limits. The general principles of constitutional law undoubtedly govern their action, as they do the action of higher authorities; and whatever would violate those principles would be an excess of power on their part.

§ 160. The right of suffrage. The chief political right is that of suffrage. The ways in which this may be invaded are numerous, and while all of them are wrongs to the political society, and are or may be made punishable under the penal laws, only a portion of them can support a private right of action. The individual's right of suffrage may be violated in the following ways: 1. Where the elector, by force or threats, is kept away from the polls. 2. Where the officers, by wrongful decisions concerning his qualifications to vote, deprive him of the right. 3. Where officers or others wrongfully invade his right to secrecy. In the second of these cases it will be shown, in a subsequent chapter, under what circumstances an individual remedy may be had.[69] In the first, if force is employed, there is an aggravated trespass, and if it was not employed, the right of action, we take it, would be plain, if the terror excited by the threats were such that a reasonable man

[67] Anderson v. State, 3 Head, 455; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156.

[68] Such reasonable rules must not be unreasonably enforced. Here as to tardiness. Fertich v. Michener, 111 Ind. 472. Such rules cease to operate after parental control is resumed after school hours. Here a rule forbidding attending parties. State v. Osborne, 24 Mo. App. 309. A regulation requiring children to be vaccinated and excluding those who fail to comply is valid. Viemeister v. White, 179 N. Y. 235, 72 N. E. 97.

[69] *Post*, § 215.

would have been deterred from the exercise of his right. In the third there would be more room for controversy.

An elector in this country has not only a right to vote, but he has a right to exclude others from a knowledge of how he votes. The purpose in establishing voting by ballot is to give him this right, in order that, in his action, he may be perfectly free, uninfluenced either by the fear of giving offense, or by the desire to please. His right is therefore invaded when his secrecy is uncovered.[70] But there are no cases in which it has judicially been determined what facts make out such an invasion, or at precisely what point the rude indulgence of one's curiosity, which is always an impertinece and an incivility, becomes also an illegal act. To look over one's shoulder while he is preparing his ballot might be thought a rudeness merely, as would be a like act when one is writing a private letter. Besides, at this stage, the act is incomplete: the elector may change his ballot entirely; and if one only discovers how the elector at one time has contemplated voting, his right to a secret ballot, afterward exercised, is not invaded at all. But where judges of election when the ballot is received by them for deposit in the box, proceed first to open and inspect it, the violation of right is manifest, and the same law which gives an action for a mere nominal trespass on lands would doubtless give one here.

[70] People v. Pease, 27 N. Y. 45; People v. Cicott, 16 Mich. 283, 97 Am. Dec. 141; State v. Hilmantel, 13 Wis. 422; Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97; McCrary's Law of Elections, §§ 194, 195.

CHAPTER X.

INJURIES TO REAL PROPERTY.

§ 161. Scope of chapter. The ownership of lands is complete or partial; it is of present title or future title; it is several or joint. In this country most persons own their estate by absolute or fee simple title, corresponding to the old allodial titles, which were free from any feudal tenure. The characteristics are, that the owner has complete dominion, and may sell it as he would a chattel, and if he does not make a disposition of it to take effect in his lifetime, he may do so by testamentary conveyance, or leave it to pass to his heirs-at-law. His dominion is indeed subject to certain powers in the state, which pertain to sovereignty, and which consist in a right to appropriate it to the public use whenever it shall be found needful, and a right to regulate its enjoyment, so as to prevent needless or unreasonable interference with the rights of others. It is also, or may be, subject to certain easements and servitudes in favor of other parties, some of which are incident to ownership, while others, when they exist, arise from contract, express or implied. In this chapter, by real property is meant the land itself. Injuries to rights and easements pertaining to the land will be considered in a subsequent chapter.[1]

§ 162. Unlawful entry upon land—Trespass. Every unauthorized entry upon the land of another is a trespass.[2] Some damage is presumed from every such entry, though none be proven.[3] It is a trespass if one projects any part of his person, as his arm, across the boundary line between his own land and his neighbor's,[4] or erects his house or other building

[1] *Post*, chap. XII.

[2] McCall v. Capehart, 20 Ala. 521; Hatch v. Donnell, 74 Me. 163; Brown v. Manter, 22 N. H. 468; Guille v. Swan, 19 Johns. 381; Dougherty v. Stepp, 1 Dev. & Bat. 371.

[3] Brown v. Manter, 22 N. H. 468; Dougherty v. Stepp, 1 Dev. & Bat. 371.

[4] Hannabalson v. Sessions, 116 Ia. 457, 90 N. W. 93, 93 Am. St. Rep. 250.

so that any part of it rests upon or extends over his neighbor's land.[5] So if one permits his cattle to stray upon the land of another,[6] or casts or places any inanimate object thereon.[7] In New York, where the defendant, by means of wells and pumps on its own land, drew the subterranean water from surrounding lands and thereby greatly impaired their value for agricultural purposes, the injury was held to be a trespass.[8] But the correctness of the decision upon this point may well be doubted. There is no doubt but what any intrusion upon one's domain below the surface is a trespass as much as an entry upon the surface itself. So, doubtless, it would be a trespass to pass through the atmosphere in a balloon or by other means of aerial travel so near the surface as to deprive the owner of privacy or alarm one's domestic animals or in any way interfere with one's enjoyment of his property. So to send projectiles through the atmosphere over one's land so near the surface as to endanger life or cause alarm. Whether the same rules would apply to the upper strata of the atmosphere may be doubted.[9]

Trespass is an injury to the possession[10] and the action must be brought, and can only be brought, by the party in actual possession, or, if there is no actual possession, then by the party who has constructive possession.[11] Possession by a servant or tenant at will is possession by the owner.[12]

[5] Smith v. Smith, 110 Mass. 302. But see Garraty v. Duffy, 7 R. I. 476.

[6] *Post*, chap. XI.

[7] *Post*, § 165.

[8] Forbell v. New York, 164 N. Y. 522, 58 N. E. 644, 79 Am. St. Rep. 666, 51 L. R. A. 695. See *post*, p. 316, n. 29.

[9] See Pollock on Torts, p. 341.

[10] Halligan v. Chicago, etc., R. R. Co., 15 Ill. 558; Chandler v. Walker, 21 N. H. 282, 53 Am. Dec. 202; Brown v. Manter, 22 N. H. 468; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62.

[11] Ibid.; Walden v. Conn, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204; Bartlett v. Perkin, 13 Me. 87; Dearborn v. Willman, 130 Mass. 238; Bascom v. Dempsey, 143 Mass. 409, 9 N. E. 744; Roussin v. Benton, 6 Mo. 592; More v. Perry, 61 Mo. 174; Zeitinger v. Hackworth, 117 Mo. 505, 23 S. W. 763; Lane v. Thompson, 43 N. H. 320; Campbell v. Arnold, 1 Johns. 511; Holmes v. Selley, 19 Wend. 507; Davis v. Clancy, 3 McCord, 422; Wilkinson v. Connell, 158 Pa. St. 126, 27 Atl. 870.

[12] Curtis v. Hoyt, 19 Conn. 154; Davis v. Nash, 32 Me. 411; Starr v. Jackson, 11 Mass. 519; Hing-

§ 163. Trespasses in hunting. The very general acquiescence of owners of lands in the pursuit by others of wild beasts and game upon them establishes no law, and is to be looked upon rather as a waiver of a right to complain of a trespass than as a license to make use of their lands for this purpose. And whenever one goes upon the premises of another with dogs, and the dogs worry the domestic animals of the land owner, or do him other damage, the trespasser is responsible without evidence of his knowledge of vicious propensities in his dogs, for it is his own trespass, and the mischief done by the dogs is only matter of aggravation.[13] A state license to hunt and fish confers no right to commit a trespass.[14]

§ 164. Trespasses in fishing. The right to take fish in the small fresh-water streams of the country belongs to the owners of the soil under them, to the exclusion of the public.[15]

ham v. Sprague, 15 Pick. 102. But see Campbell v. Arnold, 1 Johns. 511; Tobey v. Webster, 3 Johns. 468; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62.

[13] Diana Shooting Club v. Lamoreaux, 114 Wis. 44, 89 N. E. 880, 91 Am. St. Rep. 898; Beckwith v. Shordike, 4 Burr. 2092; Van Leuven v. Lyke, 1 N. Y. 515, 49 Am. Dec. 346. One has no legal right when he starts game, to follow it upon another man's land. Deane v. Clayton, 7 Taunt. 489. Fox hunting with dogs and horses is a trespass. Paul v. Summerhayes, L. R. 4 Q. B. D. 9. When parties go together hunting, and commit a trespass in so doing, each is responsible for the whole damage. Hume v. Oldacre, 1 Stark. 351. One who owns the fee of soil covered by navigable fresh water, over which the public has the right to pass has the exclusive right to shoot wild fowl over the water. Shooting is not a public right appurtenant to the right to navigate. Sterling v. Jackson, 69 Mich. 488, 37 N. W. 845.

[14] Diana Shooting Club v. Lamoreux, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898.

[15] Browne v. Kennedy, 5 H. & J. 195; Waters v. Lilly, 4 Pick. 145, 16 Am. Dec. 333; Cottrill v. Myrick, 12 Me. 222; Adams v. Pease, 2 Conn. 481; People v. Platt, 17 Johns. 195, 8 Am. Dec. 382; Hooker v. Cummings, 20 Johns. 90, 11 Am. Dec. 249; Trustee, etc., v. Strong, 60 N. Y. 56; Ingram v. Threadgill, 3 Dev. 59; Williams v. Buchanan, 1 Ired. 535, 35 Am. Dec. 760; Beckman v. Kreamer, 43 Ill. 447; Cobb v. Davenport, 32 N. J. L. 369; Same v. Same, 33 N. J. L. 223, 97 Am. Dec. 718; Beach v. Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692; Griffith v. Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178; Diana

The same rule applies to small lakes and ponds.[16] In tide-waters the right to take fish belongs to the public, and presumptively is common to all.[17] The same rule would apply to the large streams and lakes, the title to which is in the public.[18] In Massachusetts the towns have been allowed to appropriate the right to take fish within their limits;[19] and

Shooting Club. v. Lamoreux, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898. But see Burroughs v. Whitman, 59 Mich. 279. The right is, of course, not inseparable from ownership, but may be acquired distinct therefrom by a grant of the owner, or by prescription. Cobb v. Davenport, 32 N. J. L. 369; 34 N. J. L. 223. But *prima facie* ownership in the bed of a stream determines the right to fish in it. Mayor, etc., v. Graham, L. R. 4 Exch. 361; Trustees, etc., v. Strong, 60 N. Y. 56. That the right to fish follows the stream where the latter gradually shifts its bed, see Foster v. Wright, L. R. 4 C. P. D. 438. In trespass for taking fish the damages are limited to the trespass and nothing can be recovered for the value of the fish, as they are *ferae naturae*. Beach v. Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692. A custom to fish on the lands of others is not recognized by the law and cannot be shown, and the fact that the stream has been stocked by the fish commissioner confers no right to fish on the land of others. Ibid.

[16] Cobb v. Davenport, 32 N. J. L. 369; S. C. 33 N. J. L. 223, 97 Am. Dec. 718. This case examines the general subject very fully and carefully. See State v. Roberts, 59 N. H. 484; Reynolds v. Com., 93 Penn. St. 458.

[17] Crosby v. Wadsworth, 6 East. 603; Bagott v. Orr, 2 B. & P. 472; Martin v. Waddell, 16 Pet. 367; Lay v. King, 5 Day, 72; Parker v. Cutler Mill Dam Co., 20 Me. 353, 37 Am. Dec. 56; Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57; Preble v. Brown, 47 Me. 284; Cooledge v. Williams, 4 Mass. 140; Weston v. Sampson, 8 Cush. 347, 45 Am. Dec. 764; Trustees, etc., v. Strong, 60 N. Y. 56; Proctor v. Wells, 103 Mass. 216; Brown v DeGroff, 14 Atl. Rep. 219 (N. J.). So in tidal-river. Pearce v. Scotcher, L. R. 9 Q. B. D. 162. Or creek wholly within a man's farm. Parsons v. Clark, 76 Me. 476. But the tide must ebb or flow at the spot ordinarily, not occasionally, in times of high tides below. Reece v. Miller, L. R. 8 Q. B. D. 626. Where upland owner has qualified ownership of the flats, the public may dig shell fish there or fish with the line. Weston v. Sampson, 8 Cush, 347; Packard v. Ryder, 144 Mass. 440, 51 Am. Rep. 101; Matthews v. Treat, 75 Me. 594.

[18] Wilson v. Forbes, 2 Dev. 30; Collins v. Benbury, 3 Ired. 277, 38 Am. Dec. 722; S. C. 5 Ired. 118; State v. Glen, 7 Jones, (N. C.) 321; Willow River Club v. Ward 100 Wis. 86, 76 N. W. 273, 42 L R. A. 305.

[19] Cooledge v. Williams, 4 Mass. 140.

private grants may be made by the state itself to individuals, and individuals may also obtain exclusive rights by prescription.[20] The right of individuals to plant oyster-beds, and to be protected in the enjoyment of them, has been very generally recognized.[21] But the right of fishery in tide-waters is always subordinate to the public right of regulation and improvement for the benefit of navigation, and therefore a structure in front of one's premises bordering on tide-water, erected by state authority for the benefit of navigation, violates no right of the owner of the shore so long as his access to the water for the purposes of a highway is not obstructed.[22] Indeed, in all waters navigable in fact, the right of navigation is the paramount right,[23] but those engaged in navigation must respect rights of fishery, and they will be liable for any negligent injuries which their vessels may cause to seines, oyster-beds, etc.[24]

§ 165. **Trespass by means of inanimate objects.** It is a trespass to cast inanimate objects upon the land of another, or to throw water upon it, or to cut trees so that they will fall upon it, and this whether the result was intended or not. It has accordingly been held that, if where one is blasting rock,

[20] Chalker v. Dickinson, 1 Conn. 382, 6 Am. Dec. 250; Gould v. James, 6 Cow. 369; State v. Sutton, 2 R. I. 434; State v. Medbury, 3 R. I. 138; Paul v. Hazleton, 37 N. J. L. 106; Bennett v. Boggs, Baldw. 60. See Eastham v. Anderson, 119 Mass. 526; Trustees, etc., v. Strong, 60 N. Y. 56; Neill v. Duke of Devonshire, L. R. 8 App. Cas. 158; Malcolmson v. O'Dea, 10 H. L. C. 593.

[21] Fleet v. Hegeman, 14 Wend. 42; Hand v. Newton, 92 N. Y. 88; Power v. Tazewells, 25 Gratt. 786; State v. Taylor, 27 N. J. L. 117; Haney v. Compton, 36 N. J. L. 507; Metzger v. Post, 44 N. J. L. 74, 43 Am. Rep. 341; Birdsall v. Rose, 46 N. J. L. 361; Compare Brinkerhoff v. Starkins, 11 Barb. 248. There are statutes in some states for the protection of fishing rights acquired by improvement. See above cases. Also, Commonwealth v. Weatherhead, 110 Mass. 175. One may not take oysters planted by another and staked out in public water, although such planting is a public nuisance. Grace v. Willets, 50 N. J. L. 414, 14 Atl. 559.

[22] Tinicum Fishing Co. v. Carter, 61 Penn. St. 21, 100 Am. Dec. 597; Lincoln v. Davis, 53 Mich., 375, 51 Am. Rep. 116.

[23] Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57.

[24] Marshall v. Steam Nav. Co., 3 B. & S. 732; Cobb v. Bennett, 75 Penn. St. 326, 15 Am. Rep. 752.

the fragments are thrown upon the land of another, this is an actionable trespass, and it is no defense that the party was guilty of no negligence.[25] So, if one, in cutting down trees, causes one to fall, though without meaning to do so, on the land of his neighbor.[26] So, if one, in improving his own premises, casts materials upon another's land,[27] or if one throw snow upon his neighbor's estate,[28] or cause water to be discharged thereon.[29] If one pile rubbish or material upon his own land so that it falls upon the adjoining premises it is a trespass,[30] but not if it is carried thereon by the elements.[31]

§ 166. **Possession and the right of possession.** Land, the ownership of which has passed from the sovereignty, in contemplation of law, is always in the possession of some one. The possession may be rightful or wrongful, and if rightful, it may be by one who has only a temporary interest therein, as tenant for years or at will, or it may be by one having a freehold estate. Where one has actual possession, he does not lose it by temporary absences for pleasure or business, but the possession will be kept for him by servants, if any remain, or by his domestic animals or his goods. If one occupies part of a known description of land, but has color of title to the whole and claims the whole, he has constructively possession of the whole provided no one else is occupying any portion thereof.[32] Where the owner of the legal title is in possession

[25] Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Tremain v. Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; St. Peter v. Denison, 58 N. Y. 416; Georgetown, etc., R. R. Co. v. Eagles, 9 Colo. 544, 13 Pac. 696. See Beauchamp v. Saginaw Min. Co., 50 Mich. 163, 45 Am. Rep. 30.

[26] Newsom v. Anderson, 2 Ired. 42.

[27] Mairs v. Manhattan R. E. Ass'n, 89 N. Y. 498.

[28] Barry v. Peterson, 48 Mich. 263.

[29] The inundation of premises by a defective sewer is a trespass. Seifert v. Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664. Defendants in blasting for the New York subway broke a water pipe and flooded the plaintiff's premises. Held a trespass. Wheeler v. Norton, 92 App. Div. 368, 86 N. Y. S. 1095. So in discharging roof water by spouts on to the plaintiff. Conner v. Woodfill, 126 Ind. 85, 25 N. E. 876, 22 Am. St. Rep. 568.

[30] Gregory v. Piper, 9 B. & C. 591.

[31] Knight v. Dunbar, 83 Me. 359, 22 Atl. 216.

[32] Achey v. Hull, 7 Mich. 423; Dodds v. Gullidge, 4 Dev. & Bat. 68; Barber v. Trustees of Schools,

of part of a tract and the owner of color of title to the same tract is in possession of part, it is held that the owner of the legal title is deemed to be in possession of the whole tract, except the part actually occupied under the color of title.[33] If there is no *pedis possessio* of any part of the land, the real owner has constructive possession, and may sue an intruder for the disturbance of his possession, and will recover if he makes out his title.[34] If possession has been taken from the owner, his method of recovering will depend upon the circumstances. At the common law he might have retaken it by force, but as this often led to serious breaches of the public peace the statute, 5 Rich. II., C. 7, was enacted, which declared that "none may henceforth make entry into any lands and tenements but in cases where entry is given by the law, and in that case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner." This statute has been re-enacted in the several American states, or recognized as a part of the American common law. If, notwithstanding its prohibition, one shall forcibly seize possession of lands, or if

51 Ill. 396. See Collins v. Benbury, 5 Ired. 118; Ruggles v. Sands, 40 Mich. 559; Moore v. Douglas, 14 W. Va. 708; Parker v. Wallis, 60 Md. 15, 45 Am. Rep. 703. The claim must be made before the trespass is committed. Hosford v. Whitcomb, 56 Vt. 651. In Wisconsin, where an injury is to the possession and not a permanent one to the freehold, plaintiff may maintain action if he shows good title to a part and possession of the whole. Boyington v. Squires, 71 Wis. 276, 37 N. W. 227. Otherwise if the injury is to the freehold and he fails to show good title. Winchester v. Stevens' Point, 58 Wis. 350; Reed v. Chicago, etc., Co., 71 Wis. 399, 37 N. W. 225.

[33] Schlossnagle v. Kolb, 97 Md. 285, 54 Atl. 1006. And see Ault v. Meager, 112 Ga. 148, 37 S. E. 185.

[34] Miller v. Miller, 41 Md. 623; Griffin v. Creppin, 60 Me. 270; Tolles v. Duncombe, 34 Mich. 101; Appleby v. Obert, 1 Harr. 336; Gunsolus v. Lormer, 54 Wis. 630; Stores v. Feick, 24 W. Va. 606; Taylor v. State, 65 Ark. 595, 47 S. W. 1055; Bonham v. Loeb, 107 Ala. 604; Louisville, etc., R. R. Co. v. Hall, 131 Ala. 161, 32 So. 603; Waterbury Clock Co. v. Trion, 71 Conn. 254, 41 Atl. 827; Yellow River R. R. Co. v. Harris, 35 Fla. 385, 17 So. 568; Schlossnagle v. Kolb, 97 Md. 285, 54 Atl. 1006; Avitt v. Farrell, 68 Mo. App. 665. See Whiddon v. Williams Lumber Co., 98 Ga. 700, 25 S. E. 770; Casey v. Mason, 8 Okl. 665, 59 Pac. 252.

after having in any manner unlawfully obtained possession, he shall forcibly detain the same against the owner, summary statutory remedies are given by means of which the party forcibly expelled or wrongfully excluded by force, may regain possession. And title is no defense to a complaint for a forcible entry.[35]

There are several reasons why the law cannot suffer a forcible entry upon a peaceable possession, even though it be in the assertion of a valid title against a mere intruder. *First*—Whoever assumes to make such an entry makes himself judge in his own cause, and enforces his own judgment. *Second*—He does this by the employment of force against a peaceable party. *Third*—As the other party must have an equal right to judge in his own cause, and to employ force in giving effect to his judgment, a breach of the public peace would be invited, and any wrong, if redressed at all, would be redressed at the cost of a public disturbance, and perhaps of serious bodily injury to the parties.[36] The good of the state could not tolerate such proceedings, and therefore when forcible possession is taken, the law compels a restoration and refuses to inquire into the title until it is made. But if one lawfully entitled to possession can make peaceable entry, even while another is in occupation, the entry, in contemplation of

[35] Newton v. Harland, 1 M. & Gr. 644; Hillary v. Gay, 6 C. & P. 284. See Mugford v. Richardson, 6 Allen, 76, 83 Am. Dec. 617; Gault v. Jenkins, 12 Wend. 488; Mussey v. Scott, 32 Vt. 82; Judy v. Citizen, 101 Ind. 18; Rawson v. Putnam, 128 Mass. 552; Sinclair v. Stanley, 69 Tex. 718, 7 S. W. 511; Coonradt v. Campbell, 25 Kan. 227; Spiers v. Duane, 54 Cal. 176; Kimball v. Shoemaker, 82 Ia. 459, 48 N. W. 925; Nicol v. Illinois Cent. R. R. Co., 44 La. Ann. 816, 11 So. 34. There may be a forcible entry or detainer without use of personal violence. Steinlein v. Halstead, 42 Wis. 422; Ely v. Yore, 71 Cal. 130. But see Fort Dearborn Lodge v. Klein, 115 Ill. 177, 56 Am. Rep. 133; Johnson v. West, 41 Ark. 535. A forcible entry and detainer statute covers the forcible seizure of a railroad. Iron Mt., etc., Co. v. Johnson, 119 U. S. 608.

[36] A mere right to possession can never justify the use of force in order to regain it. Parsons v. Brown, 15 Barb. 590; Newkirk v. Sabler, 9 Barb. 652; State v. Yeaton, 53 Me. 125; Newcombe v. Irwin, 55 Mich 620; Wahl v. Laubensheimer, 174 Ill. 338, 51 N. E. 860; Concanan v. Boynton, 76 Ia. 543, 41 N. W. 213; Bristor v. Burr, 120 N. Y. 427, 24 N. E. 937.

law, restores to him complete possession,[37] and it is not unlawful for him to resort to such means, short of the employment of force, as will render further occupation by the other impracticable.[38]

It is never unlawful, however, to expel by force an intruder upon lands, provided the party intruded upon is prompt in his action. If he, his family, or his servants, are upon the land at the time, the necessary force may then be employed; but if the intruder steals in unawares, the rightful possessor, instead of treating this as a dispossession, may at once proceed to remove him. "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession."[39] But instead of resorting to force, it is equally competent for the person ejected to maintain trespass, provided he moves promptly and does not, by sleeping on his rights, acquiesce in his dispossession.[40]

From what has been said it appears that possession is either rightful or wrongful. Presumptively, a peaceful possession is always rightful, and the proof of it is sufficient evidence of

[37] Esty v. Baker, 50 Me. 325, 79 Am. Dec. 616; Ryan v. Sun Sing Chow Poy, 164 Ill. 259, 45 N. E. 497; Vial v. Hofen, 106 Mich. 160, 64 N. W. 11.

[38] Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442 and cases cited. See Illinois, etc., Co., v. Cobb, 94 Ill. 55; Clower v. Maynard, 112 Ga. 340, 37 S. E. 370; Lieberstadter v. Fedugreen, 80 Hun, 245, 29 N. Y. S. 1039.

[39] Lord Denman, Ch. J., in Browne v. Dawson, 12 Ad. & El. 624, 628. See Hillary v. Gay, 6 C. & P. 284; Asher v. Whitlock. L. R. 1 Q. B. 1; Christy v. Scott, 14 How. 282; Ward v. McIntosh, 12 Ohio St. 231; Harrington v. Scott, 1 Mich. 17; Nichols v. Todd, 2 Gray, 568; Marsh v. Bristol, 65 Mich. 378, 32 N. W. 645; Wray v. Taylor, 56 Ala. 188; Mitchell v. Mitchell, 54 Minn. 301, 55 N. W. 1134; Brebach v. Johnson, 62 Ill. App. 131; Lyon v. Fairbank, 79 Wis. 455, 48 N. W. 492, 24 Am. St. Rep. 732; Bliss v. Johnson, 73 N. Y. 529.

[40] Browne v. Dawson, 12 Ad. & El. 624, 628. Where a disseizee acquiesces for the time in his dispossession, he cannot afterward bring trespass for injuries to the freehold while he was dispossessed. Allen v. Thayer, 17 Mass. 299; Rowland v. Rowland, 8 Ohio, 40; Wood v. Lafayette, 68 N. Y. 181.

title to enable one to recover in ejectment against one who is subsequently found in possession, and who shows no right in himself.[41] A tenant's possession, while it continues, is as complete for all purposes of redress against wrong-doers as is the possession of an owner in fee simple. An injury to real estate while the tenancy exists, may support two actions, one by the tenant, who in any event, must suffer some legal injury, and one by the reversioner, when the injury is of a nature to affect the reversion. A trespass is an injury to the tenant, but his recovery is limited to the injury suffered by himself.[42] Thus, the destruction of buildings is an injury to both; so may be the flooding of lands, the cutting of timber, and the obstruction of a right of way under circumstances of injury to the reversion.[43] An act to the injury of the reversion is an act of waste, and whether committed by the tenant himself or by any third person, will support an action on the case by the reversioner.[44]

The entry of the landlord on the rightful possession of the tenant is as much a trespass as the entry of any third person;[45]

[41] Kilbourn v. Rewer, 8 Gray, 415; Look v. Norton, 55 Me. 103; Black v. Grant, 50 Me. 364; Illinois, etc., Coal Co. v. Cobb, 82 Ill. 183; Austin v. Bailey, 37 Vt. 219, 86 Am. Dec. 703; Van Auken v. Monroe, 38 Mich. 725; Bradshaw v. Emory, 65 Ala. 208; Hoffman v. Harrington, 44 Mich. 183; Duncan v. Yordy, 27 Kan. 348; Keith v. Tilford, 12 Neb. 271; New Windsor v. Stockdale, 95 Md. 196, 52 Atl. 596, 60 L. R. A. 580. Not enough for defendant to show title in third person unless he connects himself with it. Stratton v. Lyons, 53 Vt. 641. But mere possession is not enough against one who has claim or color of title. Dunn v. Miller, 75 Mo. 260.

[42] Gilbert v. Kennedy, 22 Mich. 5; Foster v. Elliott, 33 Iowa 216; Parks v. Boston, 15 Pick. 198; Hosking v. Phillips, 3 Exch. 168; Strohlburg v. Jones, 78 Cal. 381, 20 Pac. 705.

[43] See Dobson v. Blackmore, 9 Q. B. 991; Higgins v. Farnsworth, 48 Vt. 512; George v. Norcross, 32 N. H. 32. The landlord cannot sue unless the reversion is injured. Bascom v. Dempsey, 143 Mass. 409. Putting up on poles on the demised land a boarding to obstruct a window is not such an injury. Cooper v. Crabtree, L. R. 19 Ch. D. 193, 20 *id.* 589.

[44] Randall v. Cleveland, 8 Conn. 328; Lane v. Thompson, 43 N. H. 320. This subject, however, will be considered in another place.

[45] Luther v. Arnold, 8 Rich. 24, 62 Am. Dec. 422; Bryant v. Sparrow, 62 Me. 546; Crowell v. New Orleans, etc., Co., 61 Miss. 631.

but if the tenant hold over after the expiration of his term, the landlord may rightfully make a peaceable entry,[46] and though it has been held in some cases, with much good reason, that he is not warranted in employing force to expel the tenant,[47] he may, nevertheless, treat as trespassers all other persons who may then be there without authority, or who may afterward make entry.[48] His own peaceable entry gives him seizin, and the previous relation of landlord and tenant, and the possession of the tenant under it is sufficient evidence of his title as against one who shows no right in himself.[49]

§ 167. Remedy of those having estates not in possession. A trespass may not only be an injury to the possession, but it may be a permanent injury to the property. In such case those having an estate or interest in the property, and not having possession, actual or constructive, may recover in an action on the case, the damages they have sustained, but they cannot maintain trespass.[50]

[46] Taylor v. Cole, 3 T. R. 292; Taunton v. Costar, 7 T. R. 431.

[47] Newton v. Harland, 1 M. & Gr. 644; Hillary v. Gay, 6 C. & P. 284; Moore v. Boyd, 24 Me. 242; Dustin v. Cowdry, 23 Vt. 631; Reeder v. Purdy, 41 Ill. 279; Meader v. Stone, 7 Met. 147. There is a dispute on this point, some courts holding that in a civil suit against the landlord who has, by force, put out a tenant at sufferance, his title is a complete protection, and that it is only when prosecuted criminally for the force that he is precluded from showing title. See Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442; Sterling v. Warden, 51 N. H. 217, 239, 12 Am. Rep. 80; Clark v. Keliher, 107 Mass. 406; Wood v. Phillips, 43 N. Y. 152; Fort Dearborn Lodge v. Klein, 115 Ill. 177, 56 Am. Rep. 133; Souter v. Codman, 14 R. I. 119, 51 Am. Rep. 364; Mason v. Hawes, 52 Conn. 12, 52 Am. Rep. 552; State v. Shepard, 82 N. C. 614; Ely v. Yore, 71 Cal. 130; Johnson v West, 41 Ark. 535; Biddall v Moitland, L. R. 17 Ch. D. 174.

[48] Hey v. Moorhouse, 6 Bing (N. C.) 52; Butcher v. Butcher, 7 B. & C. 400; S. C. 1 M. & Ry. 220.

[49] Jayne v. Price, 5 Taunt. 326; Daintry v. Brocklehurst, 3 Exch. 207.

[50] Randall v. Cleaveland, 6 Conn. 328; Bucki v. Cone, 25 Fla. 1, 9, 6 So. 160; Halligan v. Chicago, etc., R. R. Co. 15 Ill. 558; Topping v. Evans, 58 Ill. 209; Walden v. Conn, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204; Lienow v. Ritchie, 8 Pick. 235; Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442; Browne v. Dinsmore, 3 N. H. 103; Lane v. Thompson, 43 N. H. 320; Hall v. Snowhill, 2 Green, N. J. L. 8; Williams v. Lanier, 44 N. C. 30; Ripka v. Sar-

§ 168. **Justifiable entries—License.** An entry upon the land of another may be justified, if made by permission of the owner, and the permission may be either express or implied. In some cases the law gives one permission to enter the lands of another. Such permission is known in law as a license. The subject of license has already been considered to some extent in a former chapter.[60] Lawful license, therefore, to enter one's premises may be given, 1. Impliedly by the owner; 2. Expressly by the owner; 3. By the law.

§ 169. **Implied licenses.** Every retail dealer impliedly invites the public to enter his shop for the examination of his goods, that they may purchase them if they see fit; the mechanic extends the like invitation to those who may have occasion to become his customers; the physician and the lawyer invite them to their respective offices, and so on.[61] But the invitation is limited by the purpose; it would be an abuse of the implied license, and a trespass, if one, instead of visiting a dealer's shop for the purposes of the business carried on there, were to assemble his associates there for some political or other purpose, for which the shop had not been thrown open.[62] No doubt one may visit another's place of business from no other motive than curiosity, without incurring liability, unless he is warned away by placard or otherwise. So every man, by implication, invites others to come to his house as they may have proper occasion, either of business,[63] of

geant, 7 W. & S. 9, 42 Am. Dec. 214; Devlin v. Snellenburg, 132 Pa. St. 186, 18 Atl. 1119; Bacon v. Bullard, 20 R. I. 404, 39 Atl. 751; Jesser v. Gifford, 4 Burr. 2141.

[60] See *ante*, §§ 46, 47, 65.

[61] Gowen v. Phila. Exchange Co., 5 Watts & S. 141, 143, 40 Am. Dec. 489.

[62] If one having authority to enter for one purpose enters for another it is a trespass. Kent County Agricultural Soc. v. Ide, 128 Mich. 423, 87 N. W. 369.

[63] It is no trespass to enter upon a man's premises to obtain settlement of a debt, even though it be not yet due. Lehman v. Shackleford, 50 Ala. 437. Nor to enter to make a tender of a debt; but there is no license to stay to insist on an acceptance. Breitenbach v. Trowbridge, 64 Mich. 393, 31 N. W. 402. The servants of a wife who has been divorced from her husband for his fault may peaceable enter afterward to remove her goods from the husband's premises. Kallock v. Perry, 61 Me. 273.

courtesy, for information, etc. Custom must determine in these cases what the limit is of the implied invitation.[64] In the case of young children and other persons not fully *sui juris* an implied license might sometimes arise when it would not in behalf of others. Thus, leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it;[65] and, perhaps, if one were to throw away upon his premises, near the common way, things tempting to children, the same implication should arise. So dogs may be impliedly invited upon lands by exposing meat which is apparently abandoned.[66] So one who has an easement in the lands of another is licensed to enter upon such lands, whenever it becomes necessary to repair or protect it.[67] And in a previous chapter many cases are enumerated in which one, by implication of law, is licensed to enter upon the land of another to remove property which he purchased while it was there, or which was left there under express license, or taken there wrongfully, and in some other cases.[68] The grant

[64] Kay v. Pennsylvania R. R. Co., 65 Pa. St. 273, 3 Am. Rep. 628. A husband has an implied license to come upon station grounds to meet his wife who is coming on a railroad train. McKone v. Mich. Centr. R. R. Co., 51 Mich. 601, 47 Am. Rep. 596.

[65] Keefe v. Milwaukee, etc., R. R. Co., 21 Minn. 207, 18 Am. Rep. 393. Compare Wood v. School District, 44 Iowa, 27; Mangan v. Atterton, L. R. 1 Exch. 239; Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, and see *post*, § 361.

[66] One who baits traps on his premises for dogs is liable to their owner for their value if they are killed in consequence. Townsend v. Walthen, 9 East, 277.

[67] See Prescott v. Williams, 5 Met. 429, 39 Am. Dec. 685. So is the lessor of premises when by the lease it is his duty to repair. Saner v. Bilton, L. R. 7 Ch. D. 815.

[68] See *ante*, § 47. One may go upon the land of another to get personal property which it is the duty of the owner of the land to deliver to him. Smith v. Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485. And see Fischer v. Johnson, 106 Ia. 181, 76 N. W. 658; Erskine v. Savage, 96 Me. 57, 51 Atl. 242. And as to license to enter burial lot to remove monument. Fletcher v. Evans, 140 Mass. 241. If one's beast's escape from him upon the adjoining premises, when he is driving along the highway with due care, he may lawfully enter to reclaim them. Goodwin v. Cheveley, 4 H. & N. 631. But he must take them out through the proper openings. If he lets down the

of coal under land carries with it by implication the right to use such means for mining and removing it as are reasonably necessary and includes the right to construct a switch track on the land to the mine.[69]

§ 170. **Express license.** Where one gives to another authority to enter upon his lands to do a certain act or succession of acts, without at the same time granting to him any interest in the land itself, this is a license, whether given by parol or in writing. It may be given on condition, in which case it is inoperative, unless the condition is performed.[70] It is personal as between the parties, and cannot be assigned by the licensee,[71] and is revoked by a sale of the land by the licensor,[72] or by his death.[73] If not acted upon within a reasonable time it is presumptively recalled;[74] if it is acted upon, the licensee assumes the obligation to observe due care, and to negligently do nothing upon the land that shall be injurious.[75] In general, the licensor assumes toward the licensee no duty, but to refrain from acts willfully injurious.[76] except, perhaps, when he

fence for the purpose, when he might take them through a gate, he may be a trespasser. Gardner v. Rowland, 2 Ired. 247. If one marks what he claims as his boundary he licenses his neighbor to cut timber or grass up to the line, though it be not the true one. Parks v. Pratt, 52 Vt. 449; Clark v. Dustin, 52 Vt. 568.

[69] Ingle v. Bottoms, 160 Ind. 73, 66 N. E. 160.

[70] Mumford v. Whitney, 15 Wend. 380; Freeman v. Headley, 33 N. J. L. 523.

[71] Carleton v. Redington, 21 N. H 291; Jackson v Babcock, 4 Johns 418; Ruggles v Lesure, 24 Pick. 187.

[72] Drake v. Wells, 11 Allen, 141; Houx v. Seat, 26 Mo. 178, 72 Am. Dec. 202; Carter v. Harlan, 6 Md. 20; Groendyke v. Cramer, 2 Ind. 382; Mendenhall v. Klinck, 51 N. Y. 246; Estes v. China, 56 Me. 407; Dark v. Johnson, 55 Penn. St. 164, 93 Am. Dec. 732; Prince v. Case, 10 Conn. 382, 27 Am. Dec. 675; Maxwell v. Bay City, etc., Co., 41 Mich. 453; Cox v. Leviston, 63 N. H. 283; Jenkins v. Lykes, 19 Fla. 146, 45 Am. Rep. 19.

[73] Estelle v. Peacock, 48 Mich. 469; Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720.

[74] Hill v. Lord, 48 Me. 83; Parsons v. Camp, 11 Conn. 525; Holt v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119.

[75] Eaton v. Winnie, 20 Mich. 156.

[76] *Post*, § 360; Vanderbeck v. Hendry, 34 N. J. L. 467; Wright v. Boston, etc., R. R. Co., 142 Mass. 296; Batchelor v. Fortescue, L. R. 11 Q. B. D. 474; Gray v. Hedges, L. R. 9 Q. B. D. 80.

had received a consideration for the license, or where his own business was such as to render the enjoyment of the license dangerous, in which case the license would impose upon him the obligation of additional care.[77] A license is not to be extended by construction, and therefore a license for the erection of a bridge will not extend to and license the rebuilding of the bridge after the original structure has passed away.[78] So a license is always subject to revocation before it has been executed, but not afterward. By this is meant that the license accompanies and justifies every act done under it, but is subject at any moment to be put an end to as to any act contemplated by it but not yet performed.[79] The exceptions to this general right to revoke a license embrace those cases where the licenses are coupled with an interest. By this is meant, not the interest the licensee has in doing the act permitted, but a legal interest conveyed to him in connection with the license, and to the enjoyment of which the license is essential.[80] Such a license is implied in case of personal property purchased of the owner of the land or placed thereon

[77] Steger v. Van Sicklen, 132 N. Y. 499, 30 N. E. 987, 28 Am. St. Rep. 594, 16 L. R. A. 640; Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154.

[78] Hall v. Boyd, 14 Ga. 1; Gilmore v. Wilbur, 12 Pick. 120, 22 Am. Dec. 410; Ameriscoggin Bridge v. Bragg, 11 N. H. 102; Gardner v. Rowland, 2 Ired. 247. The same is true in the case of dams erected under license. See Cook v. Stearns, 11 Mass. 533.

[79] Houston v. Laffee, 46 N. H. 505; Dodge v. McClintock, 47 N. H. 383; Batchelder v. Hibbard, 58 N. H. 269; Chynoweth v. Tenney, 10 Wis. 397; Kimball v. Yates, 14 Ill. 464; Allen v. Fiske, 42 Vt. 462; Woodward v. Seely, 11 Ill. 157; Druse v. Wheeler, 22 Mich. 439; S. C. 26 Mich. 189; Randal v. Elder, 12 Kan. 257; Giles v. Simonds, 15 Gray, 441, 77 Am. Dec. 373; Cook v. Stearns, 11 Mass. 533; Clute v. Carr, 20 Wis. 531. It is a complete protection as to everything done under it before revocation. Wood v. Leadbitter, 13 M. & W. 838; Rawson v. Morse, 4 Pick. 127; Giles v. Simonds, 15 Gray, 441; Marston v. Gale, 24 N. H. 177; Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484; Owens v. Lewis, 46 Ind. 489, 15 Am. Rep. 295; Van Deusen v. Young, 29 N. Y. 9; Freeman v. Headley, 32 N. J. L. 225.

[80] See Wood v. Manley, 11 Ad. & El. 34; Barnes v. Barnes, 6 Vt. 388; Parsons v. Camp, 11 Conn. 525; Whitmarsh v. Walker, 1 Met. 313; Giles v. Simons, 15 Gray, 441; White v. Elwell, 48 Me. 360, 77 Am. Dec. 271; Lewis v. McNatt, 65 N. C. 63.

with his permission.[81] But a license cannot be coupled with an interest in the lands, so as to give the licensee a permanent right, unless created by deed, or by such other instrument as is sufficient to convey such an interest under the statute of frauds. Therefore, rights of way, sales of growing trees, permission to flow lands permanently, or to carry water over or pipes under the land of another, are mere licenses, and revocable as such, unless created or made by deed.[82] And so are the licenses which are given by the sale of tickets to theatres and other places of public amusement.[83]

§ 171. **Revocation of license to flow lands and the like after expense incurred.** In some cases where a license is revoked, it is of very little importance whether the licensee is or is not protected against liability as a trespasser for what has been done under it, because such a liability is insignificant as compared with the loss he must suffer by the license being withdrawn as to the fuutre. The case of license to erect mill dams, and thereby flow the lands of proprietors above, is a suitable illustration. When the license to flow lands is withdrawn, the dam which causes the flow must be removed. But the right of the licensor to revoke in these cases is recognized very generally and very fully.[84] Some courts have been inclined to hold that, after the license has been acted upon and considerable expenditures made, it should not be revoked

[81] *Ante*, § 47; Barnes v. Barnes, 6 Vt. 388; Smith v. Benton, 1 Hill, 176; Dubois v. Kelley, 10 Barb. 496; Ricker v. Kelly, 1 Me. 117; Schoonover v. Irwin, 58 Ind. 287; Fischer v. Johnson, 106 Ia. 181, 76 N. W. 658.

[82] Washburn, Real Prop., B. 1, ch. 12, § 2; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Cronkhite v. Cronkhite, 94 N. Y. 323; Wilkins v. Irvine, 33 Ohio St. 138; Owens v. Lewis, 46 Ind. 489, 15 Am. Rep. 295; Spalding v. Archibald, 52 Mich. 365, 50 Am. Rep. 253; Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776.

[83] Wood v. Leadbitter, 13 M. & W. 838; Burton v. Scherff, 1 Allen, 133, 79 Am. Dec. 717. But see Drew v. Peer, 93 Pa. St. 234.

[84] See Wallis v. Harrison, 4 M & W. 538; Cocker v. Cowper, 1 C. M. & R. 418; Mumford v. Whitney, 15 Wend. 380; Houston v. Laffee, 46 N. H. 505; Selden v. Delaware, etc., Co., 29 N. Y. 634; Foot v. New Haven, etc., Co., 23 Conn. 214; Morse v. Copeland, 2 Gray, 302; Hall v. Chaffee, 13 Vt. 150; Kivett v. McKeithan, 90 N. C. 106; Johnson v. Skillman, 29

without making compensation to the licensee.[85] Other cases go still further, and hold that where the licensor has stood by and seen the licensee make large expenditures in reliance upon his license, and which will be wholly or in great part lost to him if the license should be recalled, these facts are sufficient to create an *estoppel in pais* which will preclude him from revoking.[86] There is also considerable support for the doctrine, that the permission to flow after it has been acted upon may be enforced in equity on the same ground on which the courts of equity enforce parol contracts for the sale of land after there has been partial performance. Says Judge Redfield: "If such a license be given by parol, and expense incurred on the faith of it, so that the parties cannot now be placed *in statu quo*, there would seem to be the same reason why a court of equity should grant relief as in any other case of part performance of a parol contract for the sale of land or any interest therein, *i. e.*, to prevent fraud."[88] In Pennsylvania it has been explicitly held that "expending money or labor in consequence of a license to divert a water-course, or use a water-power in a particular way, has the effect of turning such license into an agreement that will be enforced in equity."[89]

Minn. 95, 43 Am. Dec. 192; Huber v. Stark, 124 Wis. 359, 102 N. W. 12; Cook v. Stearns, 11 Mass. 538; Druse v. Wheeler, 29 Mich. 439; Hetfield v. Central R. R. Co., 29 N. J. L. 571; Foster v. Browning, 4 R. I. 47, 67 Am. Dec. 505.

[85] Addison v. Hack, 2 Gill, 221, 41 Am. Dec. 421; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Snowden v. Wilas, 19 Ind. 10; Woodbury v. Parshley, 7 N. H. 237, 26 Am. Dec. 739; Ameriscoggin Bridge v. Bragg, 11 N. H. 102; Sampson v. Burnside, 13 N. H. 264; Hall v. Chaffee, 13 Vt. 150.

[86] Swartz v. Swartz, 4 Pa. St. 353, 45 Am. Dec. 697; Rerick v. Kern, 14 S. & R. 267, 16 Am. Dec. 497; Huff v. McCauley, 53 Pa. St. 206, 91 Am. Dec. 203; Cook v. Pridgen, 45 Ga. 331, 12 Am. Rep. 582; Snowden v. Wilas, 19 Ind. 10; Wilson v. Chalfant, 15 Ohio, 248, 45 Am. Dec. 574; Ricker v. Kelly, 1 Me. 117; Russell v. Hubbard, 59 Ill. 335; Campbell v. Ind., etc., R. R. Co., 110 Ind. 490; Decorah, etc., Co. v. Greer, 49 Ia. 490.

[88] Hall v. Chaffee, 13 Vt. 157.

[89] Rerick v. Kern, 14 S. & R. 267, 16 Am. Dec. 497. Compare Le Fevre v. Le Fevre, 4 S. & R. 241, 8 Am. Dec. 696; Strickler v. Todd, 10 S. & R. 63, 13 Am. Dec. 649; Wheatley v. Chrisman, 24 Pa. St. 298, 44 Am. Dec. 657; Dark v. Johnston, 55 Pa. St. 164, 93 Am. Dec. 732.

The same doctrine is held in Indiana;[90] and in both these states it is held that, inasmuch as they have no court with full equity powers, they will give the licensee the necessary protection when he is proceeded against at law.[91]

What has been said with reference to a license to flow lands is applicable to a license for any other purpose.[92] Where adjoining proprietors have united in constructing a ditch or drain to carry off the surface water from their estate, it is held in Indiana and Iowa that neither can revoke the implied license or interfere with the ditch or drain to the detriment of the other.[93] But such license is held to be revocable in most of the states.[94]

§ 172. License given by law. The third class of licenses comprehends those cases in which the law gives permission to enter a man's premises. This permission has no necessary connection with the owner's interest, and is always given on public grounds. An instance is where a fire breaks out in a city. Here the public authorities, and even private individuals, may enter upon adjacent premises as they may find it necessary or convenient in their efforts to extinguish or to arrest the spread of the flames.[95] So, if a highway is out of

[90] Snowden v. Wilas, 19 Ind. 10; Lane v. Miller, 27 Ind. 534.

[91] See the cases above cited. Also Wetmore v. White, 2 Caines' Cas. 87, 2 Am. Dec. 323; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675.

[92] Kamphouse v. Gaffner, 73 Ill. 453; Maxwell v. Bay City, etc., Co., 41 Mich. 453, and numerous cases cited in 2 Lewis, Em. Dom. § 298.

[93] Ferguson v. Spencer, 127 Ind. 66, 25 N. E. 1035; Vanvert v. Fleming, 79 Ia. 638, 44 N. W. 906, 18 Am. St. Rep. 387, 8 L. R. A. 277. To same effect where one had erected gates in reliance upon a parol license. Nowlin v. Whipple, 120 Ind. 596, 22 N. E. 609, 6 L. R. A. 159.

[94] Hicks v. Swift Creek Mill Co., 133 Ala. 411, 31 So. 947, 91 Am. St. Rep. 38, 57 L. R. A. 520; Durham v. Joyce, 129 Mo. 5, 31 S. W. 337; Yeager v. Woodruff, 17 Utah, 361, 53 Pac. 1045; Thoemke v. Fiedler, 91 Wis. 386, 64 N. W. 103; 2 Lewis, Em. Dom. § 298.

[95] Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198. No compensation can be had for damages by such entries, except as allowed by statute. Darlington v. New York, 31 N. Y. 164; New York v. Lord, 18 Wend. 126; Stone v. New York, 25 Wend. 157; Surocco v. Geary, 3 Cal. 69, 58 Am. Dec. 385; American Print Works v. Law-

repair or obstructed, a traveler having occasion to make use of it may lawfully pass upon the adjoining premises, carefully avoiding any unnecessary injury.[96] So the statutes which permit lands to be taken for public purposes may provide for preliminary surveys, in order to determine the necessity for any particular appropriation, and in thus providing, they license an entry upon the lands for the purpose.[97] An entry may be authorized by law for purpose of marking boundaries,[98] or making surveys for an official map,[99] or for making coast surveys by the general government.[1] So administrative officers are licensed by the law to enter upon private premises when necessary in the discharge of their duties.[2]

A more common instance of a license given by the law is where an officer has process, in the service of which it becomes necessary to enter upon private grounds or into private buildings. In general an officer may go wherever a man is, in order to make service of process upon him. The limitation of the right is expressed in that familiar maxim of the law which

rence, 21 N. J. L. 257; S. C. 23 N. J. L. 9, 590, 57 Am. Dec. 420; McDonald v. Red Wing, 13 Minn. 38.

[96] Absor v. French, 2 Show. 28; Taylor v. Whitehead, Doug. 749; Bullard v. Harrison, 4 M. & S. 387; Campbell v. Race, 7 Cush. 408, 44 Am. Dec. 728; Williams v. Safford, 7 Barb. 309; Hedgepeth v. Robertson, 18 Tex. 858; Ruch v. New Orleans, 43 La. Ann. 275, 9 So. 473; Morey v. Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811; Irwin v. Yeagar, 74 Ia. 174, 37 N. W. 136. The rule is not the same in the case of a private way. Taylor v. Whitehead, Doug. 749; Boyce v. Brown, 7 Barb. 80; Holmes v. Seeley, 19 Wend. 506. Though if the private way is obstructed by the owner of the adjoining land, it would be justifiable to pass over his land to avoid the obstruction. Kent v. Judkins, 53 Me. 160, 87 Am. Dec. 544; Haley v. Colcord, 59 N. H. 7, 47 Am. Rep. 176.

[97] Walther v. Warner, 25 Mo. 277; Mercer v. McWilliams, Wright (Ohio), 132; Fox v. W. P. R. R. Co., 31 Cal. 538; Bloodgood v. Mohawk, etc., R. R. Co., 14 Wend. 51; S. C. 18 Wend. 9; Cushman v. Smith, 34 Me. 247; Stuart v. Baltimore, 7 Md. 500, 516; State v. Seymour, 35 N. J. L. 47, 53.

[98] Winslow v. Gifford, 6 Cush. 327.

[99] Edwards v. Law, 63 App. Div. 451.

[1] Orr v. Quimby, 54 N. H. 590, 596. See further illustrations: Cool v. Crommet, 13 Me. 250; Keene v. Chapman, 25 Me. 126; Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 389.

[2] See Ruan v. Perry, 3 Caine's Rep. 120; Durand v. Hollins, 4 Blatchf. 451.

recognizes every man's house as his castle.[3] The meaning is, that every man's dwelling is sacred against any unlicensed intrusion, and he may close and defend it not against private persons merely, but against the ministers of the law also.[4] The privilege of the castle, however, is in the outer walls only; if the outer door is found open, the officer may enter for any lawful purpose, and having entered, he may, if need be, break open inner doors to make or complete a service.[5] Even the outer doors may be forced for the purposes of an arrest for treason, felony, or breach of the peace, or to serve a search warrant which particularly specifies the building entered as the one to be searched, or to dispossess the occupant when another by the judgment of a competent court, has been awarded the possession.[6] In these cases the privilege must yield to the demands of public justice. The privilege does not in any degree depend upon the character of the building except in this, that it must be the man's habitation. It may even be the part of a house only, as where one building was occupied by many persons who had their separate apartments opening into a common hall, those of the plaintiff communicating with the hall by several doors.[7] Another case of a li-

[3] Curtis v. Hubbard, 1 Hill, 437, 40 Am. Dec. 292.

[4] If an officer breaks and enters a dwelling to serve civil process it is a trespass. Kelly v. Schuyler, 20 R. I. 432, 39 Atl. 893, 78 Am. St. Rep. 887, 44 L. R. A. 435.

[5] Williams v. Spencer, 5 Johns. 352; Hubbard v. Mace, 17 Johns. 127.

[6] Semayne's Case, 5 Co. 91; Yelv. 29; S. C. Smith, Lead. Cas. 213. See Commonwealth v. Tobin, 108 Mass. 426, 11 Am. Rep. 375.

[7] Swain v. Mizner, 8 Gray, 182, 184, 69 Am. Dec. 244, following Ilsley v. Nichols, 12 Pick. 270, 22 Am. Dec. 425, in which, in an able opinion delivered by Chief Justice Shaw, a levy on chattels, which an officer broke into a dwelling-house to make, was held to be void. The same doctrine is laid down in People v. Hubbard, 24 Wend. 369, 35 Am. Dec. 628, and Bailey v. Wright, 39 Mich. 96. See, also, Attack v. Bramwell, 3 Best & S. 520; Oystead v. Shed, 13 Mass. 520, 7 Am. Dec. 172; Snydacker v. Brosse, 51 Ill. 357. Where rooms over a store are used as a dwelling, breaking the outer door of the store to serve civil process is not a breaking of the outer door of a house. The dwelling in such case is to be considered as that portion of the building which is in fact occupied as a dwelling. Stearns v. Vincent, 50 Mich. 209, 45 Am. Rep. 37. A room used as a dwel-

cense granted by the law is that to enter and abate a nuisance. We have spoken of these licenses elsewhere, and need not repeat what was there said.[8]

§ 173. **Abuse of license—Trespasser ab initio.** A license, whether given by the owner himself, or by the law, may be lost by abusing it. Thus, one licensed to build an arch over a way abuses his authority if he obstructs the way in building it.[9] But, as respects the consequences of the abuse, a distinction which is of high importance is to be taken between the two classes of cases. The distinction is this: That if the authority was conferred by the law, an abuse not only terminates it, but revokes it; and it is presumed, from the misbehavior of the licensee, that he entered originally with the intent to do the wrong he has actually committed, and not in good faith under his license. The wrong-doer is thereupon held responsible as a trespasser *ab initio;* a trespasser in the entry itself, as in everything done afterward. Thus, if parties enter a public inn and demand entertainment there—the landlord being obliged by law to receive them—and if, after having entered, they abuse the license by riotous conduct, they not only become trespassers, but their trespass dates from their entry.[10] So the officer who distrains property for taxes is a trespasser *ab initio* if, instead of proceeding to dispose of it as required by law, he misuses or misappropriates it.[11] In these cases the law has given an authority which the owner cannot resist, and as no choice is allowed him in respect to the person who is to exercise it, it is but reasonable that the law which confers the authority should withdraw it wholly when it is abused. But when the party himself grants a license, which he might, at his option, have withheld, there is no reason why the remedy for an abuse should be broader

ling and a store is a dwelling as to breaking door to serve civil process. Welsh v. Wilson, 34 Minn. 92. An officer may enter premises of one man to seize goods of another, the defendant in the writ. Link v. Harrington, 23 Mo. App. 429.

[8] *Ante*, § 46.

[9] Cushing v. Adams, 18 Pick. 110.

[10] Six Carpenters' Case, 8 Co. 290; S. C. 1 Smith, L. C. 216.

[11] The cases respecting trespass *ab initio* will be referred to hereafter, when protection by process is considered. *Post*, § 242.

than the abuse itself. The licensee is therefore not a trespasser in his entry, but he is liable on the special case for exceeding his license, or for any misconduct after entry.[12]

§ 174. **Trespass upon abutting owners.** Where one's land is bounded on a public highway, it presumptively extends, not to the outer line, but to the middle of the road, and his supreme dominion embraces the whole, qualified only by the public easements.[13] Says Parsons, Ch. J.: "Every use to which the land may be applied, and all the profits which may be derived from it consistently with the continuance of the easement, the owner can lawfully claim."[14] The herbage in the highway is therefore his, and he may maintain trespass against one whose cattle graze upon it, unless by law the cat-

[12] Edelman v. Yeakel, 27 Penn. St. 26; Cushing v. Adams, 18 Pick. 110; Beers v. McGinnis, 191 Mass. 279; Faulkner v. Alderson, Gilm. (Va.) 221; Jewell v. Mahood, 44 N. H. 474, 84 Am. Dec. 90; Ballard v. Noaks, 2 Ark. 45; Dumont v. Smith, 4 Denio, 319; Van Brunt v. Schenck, 13 Johns. 414; Stone v. Knapp, 29 Vt. 501; Ferrin v. Symonds, 11 N. H. 363; Rogers v. Duhart, 97 Cal. 500, 32 Pac. 570; Webber v. Barry, 66 Mich. 127, 33 N. W. 289, 11 Am. St. Rep. 466; Kent County Agricultural Soc. v. Ide, 128 Mich. 423, 87 N. W. 369; O'Connell v. Samuel, 81 Hun, 357, 30 N. Y. S. 889; Madden v. Brown, 8 App. Div. 454, 40 N. Y. S. 714.

[13] Lade v. Sheperd, 2 Str. 1004; Goodtitle v. Alker, 1 Burr. 133; Grose v. West, 7 Taunt. 39; Doe v. Pearsey, 7 B. & C. 304; U. S. v. Harris, 1 Sumner, 21; Harris v. Elliott, 10 Pet. 25; Cole v. Drew, 44 Vt. 49, 8 Am. Rep. 363; Watkins v. Lynch, 71 Cal. 21; Chatham v. Brainerd, 11 Conn. 60; Jackson v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263; Dean v. Lowell, 135 Mass. 55; Chadwick v. Davis, 143 Mass. 7; Transue v. Sill, 105 Pa. St. 604; Helmer v. Castle, 109 Ill. 664; Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 19 So. 1; Huffman v. State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368; Stevens v. Gordon, 87 Me. 564, 33 Atl. 27; Rich v. Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861; Friedman v. Suare, 71 N. J. L. 605.

[14] Perley v. Chandler, 6 Mass. 454, 456, 4 Am. Rep. 159. See Lane v. Kennedy, 13 Ohio St. 42; Phifer v. Cox, 21 Ohio St. 248, 8 Am. Rep. 58; Higgins v. Reynolds, 31 N. Y. 151; Cole v. Drew, 44 Vt. 49, 8 Am. Rep. 363; Graves v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536; Woodring v. Forks Township, 28 Pa. St. 355, 361, 70 Am. Dec. 134; Adams v. Emerson, 6 Pick. 57; Barclay v. Howell, 6 Pet. 498; Jackson v. Hatheway, 15 Johns. 447, 8 Am .Dec. 263; Reichert v. St. Louis, etc., R. R. Co., 51 Ark. 491, 11 S. W. 696; Farnsworth v. Rockland, 83 Me. 508, 22 Atl. 394; People v. Foss, 80 Mich. 559, 45 N. W. 400; Palatine v. Kruger, 121 Ill. 72.

tle are permitted to roam at large.[15] The growing trees in the highway also belong to the adjoining owner, except as they may be needed for the purpose of making the way or of repairing it [16] and if the highway officers sell trees thus standing in the road, and they are cut without necessity, they are liable in trespass for so doing.[17] So it is a trespass on the adjoining owner for a person to deposit in the highway any thing not in any manner connected with the enjoyment of the easement,[18] or to extend a structure on other lands out over it,[19] or to take a stand in the highway for the purpose of blackguardism and abuse.[20]

§ 175. Tenants in common. The possession of one tenant in common is in law the possession of both, and, therefore, if one makes entry, he is presumed to do so in the right of both and to hold in their right afterward.[21] But one tenant may

[15] Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121; Cool v. Crommet, 13 Me. 250; Avery v. Maxwell, 4 N. H. 36; Woodruff v. Neal, 28 Conn. 165; Stevens v. Gordon, 87 Me. 564, 33 Atl. 27. So he may maintain ejectment against one who appropriates any part of his land within the highway limits. Goodtitle v. Alker, 1 Burr. 133.

[16] Adams v. Emerson, 6 Pick. 56; Sanderson v. Haverstick, 8 Pa. St. 294; Overman v. May, 35 Iowa, 89; Commissioners, etc., v. Beckwith, 10 Kan. 603; Hoyt v. Southern N. E. Tel. Co., 60 Conn. 385, 22 Atl. 957; Cumberland T. & T. Co. v. Cassidy, 78 Miss. 606, 29 So. 762.

[17] Clark v. Dasso, 34 Mich. 86; Baker v. Shephard, 24 N. H. 208; Wellman v. Dickey, 78 Me. 29. See, further, Jackson v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263; Babcock v. Lamb, 1 Cow. 238; Williams v. N. Y. Cent. R. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Dubuque v. Maloney, 9 Iowa, 450; Dubuque v. Benson, 23 Iowa, 248; White v. Godfrey, 97 Mass. 472; Bliss v. Ball, 99 Mass. 597; Makepeace v. Worden, 1 N. H. 16; Sanderson v. Haverstick, 8 Pa. St. 294; Woodring v. Forks Town, 28 Pa. St. 355; Read v. Leeds, 19 Conn. 183; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; West Covington v. Freking, 8 Bush, 121.

[18] Lewis v. Jones, 1 Pa. St. 336.

[19] Codman v. Evans, 5 Allen, 308, 81 Am. Dec. 748.

[20] Adams v. Rivers, 11 Barb. 390. So, to use without the consent of the adjoining owner the street as a hackstand in accordance with an ordinance. McCaffrey v. Smith, 41 Hun, 117. As to rights of abutting owners when they do not own the fee of the highway see 1 Lewis, Em. Dom. § 91*b et seq.*

[21] Roberts v. Morgan, 30 Vt. 319; Dubois v. Campau, 28 Mich. 304; Van Bibber v. Frazier, 17 Md.

disseize the other, either by a forcible expulsion or exclusion, or by an exclusive receipt of the rents and profits, accompanied by a denial of all right in his co-tenant.[22] The ouster, however, must be by some decisive, unequivocal act or conduct, for, as the tenant in possession is rightfully there, the presumption must always be that he holds only as he rightfully may—in the interest of both—and not wrongfully to the other's exclusion.[23] Where there is an actual ouster, the disseizee is put to his ejectment, and his right may be barred by a continuous adverse possession of his co-tenant for the period prescribed by the statute of limitations.[24] When the ousted tenant recovers, he may then maintain trespass for the mesne profits.[25] For a distinct injury by one co-tenant to the joint estate, during the joint possession, the other may have the appropriate remedy against him, as where by negligence he burns down a house, or by means of a dam on his several

436; McClung v. Ross, 5 Wheat. 116; Bishop v. Blair, 36 Ala. 80. See Terrell v. Martin, 64 Tex. 121.

[22] Bracket v. Norcross, 1 Me. 89; Abercrombie v. Baldwin, 15 Ala. 363; Larman v. Huey's Heirs, 13 B. Mon. 436. Disseizin is not to be presumed from the long continued possession of one, even though it be continued for twenty years. Northrup v. Wright, 24 Wend. 221; Van Bibber v. Frazier, 17 Md. 436. Compare Purcell v. Wilson, 4 Gratt. 16, and Dubois v. Campau, 28 Mich. 304, and numerous cases cited. The possession to constitute disseizin must be public and totally irreconcilable with that of a co-tenant. Long v. McDow, 87 Mo. 197. Presumption that the entry is not hostile ceases when the possession has been exclusive for nearly forty years. Campau v. Dubois, 39 Mich. 274.

[23] Forward v. Deetz, 32 Penn. St. 69; Bennett v. Bullick, 35 Penn. St. 364; Anders v. Anders, 9 Ired. 214; Newell v. Woodruff, 30 Conn. 492; Colburn v. Mason, 25 Me. 434, 43 Am. Dec. 292; Hannon v. Hannah, 9 Gratt. 146. Giving a deed of the whole does not alone make out an ouster. Roberts v. Morgan, 30 Vt. 319; Wilson v. Collishaw, 13 Pa. St. 276. It does, if followed by possession of the grantee. Kinney v. Slattery, 51 Ia. 353. Giving by a co-tenant a quitclaim of his interest and a warranty deed of a part of the tract, does not. Hume v. Long, 53 Ia. 299.

[24] Russell's Heirs v. Mark's Heirs, 3 Met. (Ky.) 37; Gill v. Fauntleroy's Heirs, 8 B. Mon. 177, 186; Dubois v. Campau, 28 Mich. 304; Hampton v. Wheeler, 99 N. C. 222, 6 S. E. 236.

[25] Goodtitle v. Tombs, 3 Wils. 118; Allen v. Carter, 8 Pick. 175; Critchfield v. Humbert, 39 Pa. St. 427, 80 Am. Dec. 533; Tongue v. Nutwell, 31 Md. 302.

estate floods the common property.[26] But in the use of the premises he has large liberty of judgment and is only responsible for a clear abuse.

§ 176. **Injuries to land, other than trespass.** These may consist of damages done or suffered by those in lawful possession of the land to the prejudice of those having interests in the land as reversioners, mortgagees and the like. This damage is known as waste and is considered in the following section. Land may be injured also by some negligent or unreasonable use of adjoining land. These cases will be considered in the chapters on negligence and nuisance. The remedy for all such indirect or consequential injury is an action on the case.[27]

§ 177. **Waste.** Waste is an injury done or suffered by the owner of the present estate which tends to destroy or lessen the value of the inheritance. This is an injury to any person having an interest in the reversion, and it may be an injury to any person having a lien on the land. Waste differs from trespass in its being committed or suffered by the person actually or constructively in possession of the land, while trespass is an injury to the possession itself.[28]

Waste is either voluntary or permissive. The first consists of some positively wrongful act which injures the inheritance; the other consists in the neglect of some duty from which a like injury follows.[29] There is no absolute rule as to what shall constitute waste under all circumstances, because many things are injurious at some times and in some places which might be positively beneficial in others. A striking illustration is afforded in the case of the cutting of timber, which may be injurious or beneficial according to circumstances.[30]

[26] Chesley v. Thompson, 3 N. H. 9, 14 Am. Dec. 324; Blanchard v. Boher, 8 Me. 253, 23 Am. Dec. 504; Odiorne v. Lyford, 9 N. H. 502, 32 Am. Dec. 387; Jones v. Weatherbee, 4 Strob. 50, 51 Am. Dec. 653. See Hutchinson v. Chase, 39 Me. 508, 63 Am. Dec. 645; Guyther v. Pettijohn, 6 Ired. 388, 45 Am. Dec. 499; McClellan v. Jenness, 43 Vt. 183.

[27] 1 Chitty, Pl. 139; Panton v. Holland, 17 Johns. 92, 8 Am. Dec. 369.

[28] Duvall v. Waters, 1 Bland. Md. 569, 18 Am. Dec. 350; Price v. Ward, 25 Nev. 203, 209; Lander v. Hall, 69 Wis. 326, 34 N. W. 80; 1 High on Injunctions, § 650.

[29] 30 Am. & Eng. Encly. of Law, pp. 236, 237.

[30] Webster v. Webster, 33 N. H. 18; Lester v. Young, 14 R. I. 579; Dorsey v. Moore, 100 N. C. 41, 6

For the tenant to do upon leasehold premises that for which the premises are leased can never be waste, provided it is done in a proper manner. But, except where they are leased for a special purpose, and always when the estate comes into existence by operation of law, as in case of dower, the question of waste must be governed largely by the previous use. This is particularly true as regards buildings. It would be waste to turn a dwelling into a shop or a stable; or, on the other hand, to make over a shop or a stable into a dwelling; the right of the tenant is to use the buildings as they are, and not to force upon the reversioner something new or different in the place of them.[31] Slight changes may lawfully be made, provided they do not injure the inheritance, but preserve the estate substantially the same.[32] So with respect to the land itself; it would be waste to cut up farming lands with excavations in search of minerals or to sell gravel or clay; though if such had been the previous use of the premises it would be different.[33] To sell manure made on the premises to be re-

S. E. 270; Powell v. Cheshire 70 Ga. 357, 48 Am. Rep. 572; Silva v. Garcia 65 Cal. 591; White v. Cutler, 17 Pick. 248; Livingston v. Reynolds, 2 Hill, 157; Elliott v. Smith, 2 N. H. 430; Richardson v. York, 14 Me. 221; Phillips v. Allen, 7 Allen, 115; Crockett v. Crockett, 2 Ohio St. 180; Parkins v. Coxe, 2 Hayw. 339; Owen v. Hyde, 6 Yerg. 334, 27 Am. Dec. 467; Hastings v. Crunckleton, 3 Yeates, 261; Allen v. McCoy, 8 Ohio, 418; Shine v. Wilcox, 1 Dev. & Bat. Eq. 631; Conner v. Shepherd, 15 Mass. 164; White v. Cutler, 17 Pick. 248; Wilkinson v. Wilkinson, 59 Wis. 557; Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621.

[31] Huntley v. Russell, 13 Q. B. 572.

[32] See Winship v. Pitts, 3 Paige, 259. The general principle governing waste is, that the tenant shall not be permitted to do any act or permanent injury to the inheritance, except to take his reasonable estovers. Webster v. Webster, 33 N. H. 18, citing Chase v. Hazeltine, 7 N. H. 171; Pynchon v. Stearns, 11 Met. 304. But decayed and worthless buildings may be taken down. Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621; Beers v. St. John, 16 Conn. 322. The right to alter a building does not include the right to tear down though a better one is erected. Davenport v. Magoon, 13 Oreg. 3, 57 Am. Rep. 1. To build a chimney without the landlord's consent is waste. Brock v. Dole, 66 Wis. 142.

[33] Tenant for life of salt works may open new wells. Findlay v. Smith, 6 Munf. 134, 8 Am. Dec. 733, relying upon Clavering v. Clavering, 2 P. Wms. 388. If coal has been mined for domestic use, the life tenant may not mine for sale. Franklin Coal Co. v. McMil-

moved from it is waste in the case of agricultural lands, because it is implied in leasing such lands that the manure made is to be used thereon.[34]

Permissive waste consists in suffering that to take place to the injury of the inheritance, which ordinary care would prevent. In respect to buildings, a tenant, unless he has covenanted to make repairs, is under no obligation to do more than to exercise reasonable diligence for their preservation; but a duty to that extent is incident to the relation. A like duty arises to protect the remainder of the estate against negligent waste and decay, and this extends to protection against the acts of trespassers.[35] A tenant is liable for waste if a building is injured or destroyed by his negligence; but not for accidental fires occurring without his fault, unless upon covenants.[36] Where a tenant overloaded a barn, by reason of which it collapsed, he was held liable for voluntary waste.[37]

For waste actually committed an action on the case for the recovery of damages is the proper remedy.[38] But where the injury is only begun or threatened the more effectual remedy is a bill for injunction.[39] Mortgagees and other incumbrancers are entitled to these remedies to protect or vindicate their rights.[40]

lan, 49 Md. 549, 33 Am. Rep. 280. So, if mining has been abandoned for forty years by the owner a life tenant may not mine. Gaines v. Green Pond, etc., Co., 32 N. J. Eq. 86.

[34] Perry v. Carr, 44 N. H. 118; Hill v. DeRochemont, 48 N. H. 87; Lassell v. Reed, 6 Me. 222; Lewis v. Jones, 17 Penn. St. 262; Daniels v. Pond, 21 Pick, 367, 32 Am. Dec. 269.

[35] Attersoll v. Stevens, 1 Taunt. 183; Cook v. Champlain, etc., Co., 1 Denio, 91.

[36] 4 Kent, 81, and note.

[37] Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769. A tenant is not liable for waste unless he is guilty of some fault or negligence, and therefore is not liable for what is done under the exercise of the police or eminent domain powers. Beekman v. Van Dolsen, 63 Hun, 487, 18 N. Y. S. 376.

[38] Bellows v. McGinnis, 17 Ind. 64; Stetson v. Day, 51 Me. 434; Dickinson v. Baltimore, 48 Ind. 583; Moore v. Townshend, 33 N. J. L. 284; Robinson v. Wheeler, 25 N. Y. 252; Shields v. Lawrence, 72 N. C. 43; McCullough v. Irvine, 13 Pa. St. 438; Rogers v. Coal Riv. B. & D. Co., 41 W. Va. 593, 23 S. E. 919, 26 S. E. 1008; Taylor, L. & T. § 686.

[39] 1 High, Inj. § 649 *et seq.*

[40] 1 High, Inj. §§ 478-483.

CHAPTER XI.

INJURIES BY ANIMALS.

§ 178. Common-law rule as to trespassing animals. The common law made it the duty of every man to keep his cattle within the limits of his own possessions. If he failed so to keep them, he failed in duty, and when they strayed upon the land of another, the owner was chargeable with a trespass. Nor did his liability for the mischief done by them depend in any degree upon his personal fault, since, if the cattle escaped from his custody, notwithstanding due care on his part, his responsibility for the injury actually committed by them was the same that it would have been had he voluntarily permitted them to roam at large. Nor did the common law impose upon the owner of lands the obligation to enclose them as a protection against the beasts of others; but he might, at his option, leave them entirely unenclosed, and it was then as unlawful for the beasts of a neighbor to cross the invisible boundary line as it would be to overleap or throw down the most substantial wall. This rule became a part of the common law in most of the American states, and it still remains a part of it, except as legislation has modified or abolished it.[1] It has been

[1] Vandegrift v. Delaware, etc., R. R. Co., 2 Houst. 87; Bulfit v. Matthews, 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55; Brady v. Ball, 14 Ind. 317; Kelenberg v. Russell, 125 Ind. 531, 25 N. E. 596; De Mers v. Rohan, 126 Ia. 488, 102 N. W. 413; Little v. Lathrop, 5 Me. 356; Lord v. Wormwood, 29 Me. 282; Richardson v. Milburn, 11 Md. 340; Rust v. Low, 6 Mass. 90; Lyons v. Merrick, 105 Mass. 71; Williams v. Mich. Cent. R. R. Co., 2 Mich. 259, 55 Am. Dec. 59; Locke v. First. Div., etc., R. R. Co., 15 Minn. 350; Lorance v. Hillyer, 57 Neb. 266, 77 N. W. 755; Avery v. Maxwell, 4 N. H. 36; Angus v. Radin, 5 N. J. L. 815; Coxe v. Robbins, 9 N. J. L. 384; Wells v. Howell, 19 Johns 385; Holladay v. Marsh, 3 Wend. 142, 20 Am. Dec. 678; Wood v. Snider, 187 N. Y. 28; Bostwick v. Minneapolis, etc., Ry. Co., 2 N. D. 440, 51 N. W. 781; Ely v. Rosholt, 11 N. D. 559, 93 N. W. 864; Morgan v. Hudnell, 52 Ohio St.

held in some of the western states that the common law on this subject is not suited to their conditions and circumstances and was consequently never adopted.[2] And it has been repeatedly said in particular states, that the common-law rule was inconsistent with their legislation, and therefore not in force.[3] And in these states the owner of land is left to protect his lands against injuries by domestic animals as he may think is for his interest. But though the owner of cattle may lawfully permit them to run at large, either because the common-law rule is held not to prevail or by virtue of a statute, he may not willfully drive them upon the unenclosed lands of another and depasture or herd them thereon, and such an act is a trespass.[4] Whether the owner of unenclosed lands owes any duty of care with respect to trespassing animals, where by law they are

552, 40 N. E. 716, 27 L. R. A. 862; Northcott v. Smith, 4 Ohio C. C. 565; Bilen v. Paisley, 18 Ore. 47, 21 Pac. 934, 4 L. R. A. 840; Pacific Live Stock Co. v. Murray, 45 Ore. 103, 76 Pac. 1079; Dolph v. Ferris, 7 W. & S. 367, 42 Am. Dec. 246; Gregg v. Gregg, 55 Pa. St. 227; Stone v. Donaldson, 1 Pinney, 393; Harrison v. Brown, 5 Wis. 27. See Union Pac. R. R. Co. v. Rollins, 5 Kan. 167; Markin v. Priddy, 39 Kan. 462, 18 Pac. 514; Bernhorn v. Griswold, 27 Mont. 79, 69 Pac. 557, 94 Am. St. Rep. 818, 59 L. R. A. 771.

[2] Merritt v. Hill, 104 Cal. 184, 37 Pac. 893; Johnson v. Oregon Short Line Ry. Co., 7 Idaho, 355, 63 Pac. 112, 53 L. R. A. 744; Pace v. Potter, 85 Tex. 473, 22 S. W. 300; Cosgriff v. Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977; Martin v. Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571; Hardman v. King, 14 Wyo. 503. See Seeley v. Peters, 10 Ill. 130; Michigan, etc., R. R. Co. v. Fisher, 27 Ind. 96; Vicksburg, etc., R. R. Co. v. Patton, 31 Miss. 156; Walker v. Herron, 22 Tex. 55.

[3] Seeley v. Peters, 10 Ill. 130; Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561; Studwell v. Ritch, 14 Conn. 291; Campbell v. Bridwell, 5 Oreg. 211; Baylor v. Balt. & Ohio R. R. Co., 9 W. Va. 270; Wagner v. Bissell, 3 Iowa, 396; Smith v. Chicago, etc., R. R. Co., 34 Iowa, 96; Kerwhacker v. Cleveland, etc., R. R. Co., 3 Ohio St. 172; Cent. R. R. Co., v. Davis, 19 Ga. 437; Murray v. Sou. Car. R. R. Co., 10 Rich. 227; Jones v. Witherspoon, 7 Jones, (N. C.) 555, 78 Am. Dec. 263; Walker v. Herron, 22 Tex. 55; Ala., etc., R. R. Co. v. Harris, 25 Ala. 232; Hurd v. Lacy, 93 Ala. 427, 9 So. 378, 30 Am. St. Rep. 61; Harrison v. Adamson, 76 Ia. 337; Delaney v. Errickson, 10 Neb. 492; Morris v. Fraker, 5 Colo. 425.

[4] Harrison v. Adamson, 76 Ia. 337, 41 N. W. 34; Cosgriff v. Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977; Delaney v. Errickson, 11 Neb. 533; Otis v. Morgan, 61 Ia. 712.

permitted to run at large, is a question not settled by the authorities. The negative is held in Montana and, where the plaintiff's cattle trespassed on the defendant's land, drank poison left thereon in a vat and died from its effects, it was held there was no liability.[5] But in Alabama it is held that such owner is liable for injuries to stock by any artificial erection or excavation naturally calculated to produce injury to stock, such as a single barbed wire loosely strung around a lot.[6]

Where beasts unlawfully enter upon the premises of another, and there commit mischief, because of some vicious propensity, the owner is liable for this injury, whether he had notice of the propensity or not.[7] The particular injury might not of itself support an action, but it is a part of the damage suffered from the trespass, and goes to swell a recovery which the unlawful entry justifies.[8] It has been held that if one's horse reaches over the division fence, and bites and injures another horse, this is a trespass, which renders the owner liable, irrespective of any question of fault on his part.[9] Where animals, while trespassing, injure third persons, the owner is not liable, unless the animals are vicious and he had knowledge of the fact.[10] Where cattle are in the hands of an agister who suffers them to escape and do mischief, he, and not the owner, is liable.[11]

[5] Beinhorn v. Griswold, 27 Mont. 79, 69 Pac. 557, 94 Am. St. Rep. 818, 59 L. R. A. 771. To same effect Fennell v. Sequin St. Ry. Co., 70 Tex. 670, 8 S. W. 486.

[6] Hurd v. Lacy, 93 Ala. 427, 9 So. 378, 30 Am. St. Rep. 61.

[7] Morgan v. Hubnell, 52 Ohio St. 552, 40 N. E. 716, 27 L. R. A. 862; Snow v. McCracken, 107 Mich. 49, 64 N. W. 866; Burleigh v. Hines, 124 Ia. 199, 99 N. W. 723.

[8] Lyke v. Van Leuven, 4 Denio, 127; S. C. 1 N. Y. 515; Mason v. Morgan, 28 Up. Can. Q. B. 328. If an animal is not wrongfully on land, the owner is not liable unless he had notice of the vicious propensity. Scott v. Grover, 56 Vt. 499, 48 Am. Rep. 814

[9] Ellis v. Loftus Iron Co., L. R. 10 C. P. 10; S. C. 11 Moak, 214.

[10] Klenberg v. Russell, 125 Ind. 531, 25 N. E. 596, Troth v. Wills, 8 Pa. Supr. Ct. 1.

[11] Rossell v. Cottom, 31 Pa. St. 525; Ward v. Brown, 64 Ill. 307, 16 Am. Rep. 561; Reddick v. Newburn, 76 Mo. 423; Atwater v. Lowe, 39 Hun, 150; Eck v. Hocker, 75 Ill. App. 641. See Tewksbury v. Bucklin, 7 N. H. 518; Moulton v. Moore, 56 Vt. 700; Weymouth v. Gile, 72 Me. 446. In Sheridan v. Bean, 8 Met. 284, 41 Am. Dec.

§ 179. **Modifications of common law — Fencing statutes.** The statutes which, under some circumstances, or for some purposes, require lands to be fenced by their owners, are so various in the several states that it is not easy even to classify them. Some of them provide merely that unless the owner shall cause his lands to be fenced with such a fence as is particularly described, he shall maintain no action for the trespasses of beasts upon them. These statutes are generally limited in their force to exterior fences, and are intended as a part of a system under which cattle are or may be allowed to depasture the highway.[12] In some states, from the earliest days, beasts have been allowed to roam at large in the highways and unenclosed lands, either by general law or on a vote of the township or county to that effect; a futile permission, if owners of lands are not required to fence against them.[13] A more common provision is one requiring the owners of adjoining premises to keep up, respectively, one-half the partition fence between them, this being apportioned for the purpose of agreement, by prescription, or by the order of fence viewers. A neglect of duty under these statutes would not only preclude the party in fault from maintaining suit for injuries suffered by himself in consequence thereof,[14] but it would seem that if the domestic animals of his neighbor should wander upon his lands, invited by his own neglect, and should there fall into pits, or otherwise receive injury, he would be responsible for this injury, as one occurring proximately from

507, it is held that either or both may be proceeded against. No action lies at common law for the mere entry of one's dog upon the premises of another. Brown v. Giles, 1 C. & P. 118; Buck v. Moore, 35 Hun, 338.

[12] Johnson v. Wing, 3 Mich. 163; Brady v. Ball, 14 Ind. 317; Cook v. Morea, 33 Ind. 497; Herold v. Meyers, 20 Iowa, 378; Reddick v. Nedburn, 76 Mo 423.

[13] See Kerwhacker v. Cleveland, etc., R. R. Co., 3 Ohio St. 172; Tonawanda R. R. Co. v. Munger, 5 Denio, 255, 49 Am. Dec. 239; S. C 4 N. Y. 349; Avery v. Maxwell, 4 N. H. 36.

[14] Shepherd v. Hess, 12 Johns. 433; Colden v. Eldred, 15 Johns. 220; Stafford v. Ingersoll, 3 Hill, 38; Akers v. George, 61 Ill. 376; Phelps v. Cousins, 29 Ohio St. 135; Milligan v. Wehinger, 68 Pa. St. 235; Roach v. Lawrence, 56 Wis. 478; Mann v. Williamson, 70 Mo. 661; D'Arcy v. Miller, 86 Ill. 102.

his own default.[15] The statutes which require the construction of partition fences do so for the benefit exclusively of the adjoining proprietors. These proprietors may, at their option, by agreement, dispense with them, and even if they do not agree to do so, but fail to maintain them as the law contemplates, still if the cattle of third persons come wrongfully upon one man's lands, and from there enter the adjoining enclosure, it is no answer to an action of trespass brought by the owner of the latter that the partition fence provided for by the law was not maintained.[16]

§ 180. **Cattle escaping when being driven on highway.** There is an exception in the common law to the rule that every man at his peril must keep his beasts from the lands of others. If one is driving his domestic animals along the public highway, he is bound to observe due care, and if, notwithstanding, he is guilty of no negligence, they escape from him and go upon private grounds, he is not responsible, provided he removes them within a reasonable time.[17] And what is a reasonable time must depend upon all the circumstances.[18]

[15] See Lee v. Riley, 18 C. B. (N. S.) 722; Powell v. Salisbury, 2 Y. & Jer. 391; Sexton v. Bacon, 31 Vt. 540; Cate v. Cate, 50 N. H. 144, 9 Am. Rep. 179; Gilman v. Noyes, 57 N. H. 629; Eddy v. Kinney, 60 Vt. 554, 15 Atl. 198; Wilder v. Stanley, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479. But see Krum v. Anthony, 115 Pa. St. 431, 8 Atl. 598; Roy v. Stuckey, 113 Wis. 77, 88 N. W. 900, 90 Am. St. Rep. 844.

[16] Avery v. Maxwell, 4 N. H. 36; Lawrence v. Combs, 37 N. H. 331, 72 Am. Dec. 332; Little v. Lathrop, 5 Maine, 356; Lord v. Wormwood, 29 Me. 282; Eames v. Salem, etc., R. R. Co., 98 Mass. 560, 96 Am. Dec. 676; Lyons v. Merrick, 105 Mass. 71; Hurd v. Rutland, etc., R. R. Co., 25 Vt. 116; Wilder v. Wilder, 38 Vt. 678; Chambers v. Matthews, 18 N. J. L. 368; Cook v. Morea, 33 Ind. 497; Aylesworth v. Herrington, 17, Mich. 417. As between adjoining proprietors, until the statutory assignment of what each shall build and keep in repair has been made to *them* respectively, each remains liable at the common law for injuries done by his beasts. Coxe v. Robbins, 9 N. J. L. 384; Rust v. Low, 6 Mass. 90; Heath v. Ricker, 2 Me. 72; Little v. Lathrop, 5 Me. 357; Knox v. Tucker, 48 Me. 373, 77 Am. Dec. 233; Bradbury v. Gilford, 53 Me. 99; Harlow v. Stinson, 60 Me. 347.

[17] Tillett v. Ward, L. R. 10 Q. B. D. 17; Dovaston v. Payne, 2 H. Bl. 527; Hartford v. Brady, 114 Mass. 466, 468, 19 Am. Rep. 377; Wood v. Snider, 187 N. Y. 28.

[18] Goodwin v. Chevely, 4 H. & N. 631.

But this exemption extends only to lands abutting upon the highway. If animals escape without fault upon abutting lands and go from thence upon other lands, the latter is a trespass for which the owner of the animals is liable.[18a]

§ 181. **Injuries by vicious animals.** The reason why the common law makes the owner of domestic animals responsible for such injuries as have already been specified, is because, taking notice of their propensities, it is his duty to anticipate that they will commit them as opportunity offers, and to guard against it. But domestic animals are not ordinarily vicious and do not ordinarily injure other animals or human beings. For this reason the keeper of a domestic animal is not in general responsible for any mischief that may be done by such animal which was of a kind not to be expected from him, and which it would not be negligence in the keeper to fail to guard against.[19] But if it be made to appear that any domestic animal is vicious and accustomed to do hurt, and that the owner has been notified, or has knowledge of the fact, a duty is then imposed upon him to keep the animal secure, and he is responsible for the mischief done by the animal in consequence of the failure to observe this duty.[20] To recover the plaintiff

[18a] Lord v. Wormwood, 29 Me. 282; McDonald v. Pittsfield, etc., R. R. Co., 115 Mass. 564; Wood v. Snider, 187 N. Y. 28.

[19] Vrooman v. Lawyer, 13 Johns. 339; Van Leuven v. Lyke, 1 N. Y. 515; Smith v. Causey, 22 Ala. 568; Wormley v. Gregg, 65 Ill. 251; Dearth v. Baker, 22 Wis. 73; Jackson v. Smithson, 15 M. & W. 563; Hudson v. Roberts, 6 Exch. 697; Cox v. Burbridge, 13 C. B. (N. S.) 430; Moss v. Pardridge, 9 Ill. App. 490; Finney v. Curtis, 78 Cal. 498, 21 Pac. 120; Ward v. Danzeezen, 111 Ill. App. 163; Martinez v. Bernhard, 106 La. 368, 30 So. 901, 55 L. R. A. 671.

[20] Smith v. Pelah, Stra. 1264. "The Chief Justice ruled that if a dog has once bit a man, and the owner having notice thereof keeps the dog, and lets him go about, or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes; for it was owing to his not hanging the dog on the first notice. And the safety of the King's subjects ought not afterward to be endangered. The *scienter* is the *gist* of the action." Baker v. Borello, 136 Cal. 160, 68 Pac. 591; Conway v. Grant, 88 Ga. 40, 13 S. E. 803, 30 Am. St. Rep. 145, 14 L. R. A. 196; Hill v. Applegate, 40 Kan. 31, 19 Pac. 315; Brooks v. Taylor, 65 Mich. 208, 31 N. W. 837; Fake v. Addicks, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716; Brice

must prove both that the animal was vicious and that the defendant had notice of the fact.[21] If the defendant had no notice of the vicious propensities of the animal he is not liable.[22] The rule of liability is applicable to all classes of domestic animals.[23] When an animal is permitted to be at large, in violation of law, the owner is liable for all damage or in-

v. Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454; Sylvester v. Maag, 155 Pa. St. 225, 26 Atl. 392, 35 Am. St. Rep. 878; Lynch v. Kineth, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958.

[21] Clowdis v. Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; Harvey v. Buchanan, 121 Ga. 384, 49 S. E. 281; Fritsch v. Clemow, 109 Ill. App. 355; Eastman v. Scott, 182 Mass. 192, 64 N. E. 968; Cuney v. Campbell, 76 Minn. 59, 78 N. W. 878; Brice v. Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454; Hallyburton v. Burke County Fair Ass'n, 119 N. C. 526, 26 S. E. 114, 38 L. R. A. 156; Meegan Bros. v. McKay, 1 Okl. 59, 30 Pac. 232; Eddy v. Union R. R. Co., 25 R. I. 451, 56 Atl. 677.

[22] Finney v. Curtis, 78 Cal. 498, 21 Pac. 120; Cox v. Murphy, 82 Ga. 623, 9 S. E. 604; Reed v. Southern Express Co., 95 Ga. 108, 22 S. E. 213, 51 Am. St. Rep. 62; Ward v. Danzeezen, 111 Ill. App. 163; Maitenez v. Bernhard, 106 La. 368, 30 So. 901, 55 L. R. A. 671; State v. Donohue, 49 N. J. L. 548, 10 Atl. 150.

[23] Injuries by *rams:* Jackson v. Smithson, 15 M. & W. 563; Oakes v. Spaulding, 40 Vt. 347, 94 Am. Dec. 404; Spaulding v. Oakes, 42 Vt. 343; Graham v. Payne, 122 Ind. 403, 24 N. E. 216. Injuries by *hogs:* Jenkins v. Turner, Ld. Raym. 109; Sherfey v. Bartley, 4 Sneed, 58, 67 Am. Dec. 597; Morse v. Nixon, 6 Jones, (N. C.) 293. Injuries by *horses:* Cox v. Burbridge, 13 C. B. (N. S.) 430; Popplewill v. Pierce, 10 Cush. 509; Dickson v. McCoy, 37 N. Y. 400; Goodman v. Gay, 15 Pa. St. 188, 53 Am. Dec. 589; Wales v. Ford, 8 N. J. L. 267; Eastman v. Scott, 182 Mass. 192, 64 N. E. 968; Lynch v. Kineth, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958. Injuries by *cows:* Hewes v. McNamara, 106 Mass. 281; Stumps v. Kelley, 22 Ill. 140; Cogswell v. Baldwin, 15 Vt. 404; Mahoney v. Dwyer, 84 Hun, 348, 32 N. Y. S. 346. Injuries by *mules:* Hill v. Applegate, 40 Kan. 31, 19 Pac. 315; Meegan Bros. v. McKay, 1 Okl. 59, 30 Pac. 232. In Dean v. St. Paul Union Depot Co., 41 Minn. 360, 43 N. W. 54, 16 Am. St. Rep. 703, 5 L. R. A. 442, the rule appears to be applied in case of the human animal and it was held that, where the tenant of the parcel room in the defendant's depot kept in his employ a savage and vicious man, who had frequently assaulted people lawfully there, and all this was known to the defendant, the latter was liable for an assault by this man upon a passenger. See, further, Van Leuven v. Lyke, 1 N. Y. 515; Wolff v. Chalker, 31 Conn. 121, 81 Am. Dec. 175.

jury done by the animal, whether he knew of its vicious propensities or not.[24] And where the plaintiff was kicked by the defendant's horse, which was being led on the sidewalk by his servant, the defendant was held liable without proof of *scienter*, and it is said that when the animal inflicting the injury is where it has no right to be, the rule as to proof of vicious character and *scienter* does not apply.[25] In such cases the liability is grounded on negligence.[26]

According to the great preponderance of authority, in a suit for injuries by a vicious animal, the gist of the action is not negligence in keeping the animal, but the keeping him with knowledge of his vicious propensity. According to these authorities one having such knowledge keeps such an animal at his peril and must respond for any damage done by the animal, irrespective of negligence on his part.[27] Some courts, however, hold that the gist of the action is negligence.[28] Where the domestic animals of different owners unite in committing an injury, the wrong is not a joint wrong of the owners, but each owner must be sued separately for the damage done by his own beast.[29] But in Ohio the ruling is other-

[24] Kitchens v. Elliott, 114 Ala. 290, 21 So. 965; Briscoe v. Alfrey, 61 Ark. 196, 32 S. W. 505, 54 Am. St. Rep. 203, 30 L. R. A. 607; Meier v. Shrunk, 79 Ia. 17, 44 N. W. 209; Decker v. McSorly, 111 Wis. 91, 86 N. W. 554; Burleigh v. Hines, 124 Ia. 199, 99 N. W. 723.

[25] Healey v. Ballentine, 66 N. J. L. 339, 49 Atl. 511.

[26] See Klenberg v. Russell, 125 Ind. 531, 25 N. E. 596.

[27] Murray v. Young, 12 Bush. 337; Twigg v. Ryland, 62 Md. 380, 50 Am. Rep. 226; Mann v. Weiand, *81 Pa. St. 243; Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Brooks v. Taylor, 65 Mich. 208, 31 N. W. 837; Spring Co. v. Edgar, 99 U. S. 645; Dockerty v. Hutson, 125 Ind. 102, 25 N. E. 144; McGuire v. Ringrose, 41 La. Ann. 1029, 6 So. 895; Fye v. Chapin, 121 Mich. 675, 80 N. W. 797; Robinson v. Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50; Lynch v. Keneth, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958.

[28] Hayes v. Smith, 62 Ohio St. 161, 182, 56 N. E. 879; Fake v. Addicks, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716; DeGray v. Murray, 69 N. J. L. 458, 55 Atl. 237; Worthen v. Love, 60 Vt. 285, 14 Atl. 461. See Clowdis v. Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; Barnum v. Terpening, 75 Mich. 557, 42 N. W. 967.

[29] Adams v. Hall, 2 Vt. 9, 19 Am. Dec. 690; Buddington v. Shearer, 20 Pick. 477; Russell v. Tomlinson, 2 Conn. 206; Van

wise.[30] The liability of the owners of dogs for injuries done by them has been greatly changed in some states by statute, but space will not permit the giving of these statutes or of the decisions under them.[31]

§ 182. **The notice.** The notice which charges the owner with the duty must be a notice that the animal was inclined to do the particular mischief that has been done. Notice that a dog is disposed to worry sheep is no notice that he will attack persons. Notice that a horse is unruly is no notice that he is likely to kick and bite.[32] But notice that a bull attacks and gores other domestic animals is sufficient warning that he would attack persons in like manner.[33] The question in each case is whether the notice was sufficient to put the owner on his guard, and to require him to anticipate the injury which has actually occurred. It is not necessary that it be notice of mischief actually committed; it is the propensity to commit the mischief that constitutes the danger.[34] And if the

Steenburgh v. Tobias, 17 Wend. 562; Auchmuty v. Ham, 1 Denio, 495; Partenheimer v. Van Order, 20 Barb. 479; Wilbur v. Hubbard, 35 Barb. 303; Denny v. Correll, 9 Ind. 72; Powers v. Kindt, 13 Kan. 74; Cogswell v. Murphy, 46 Ia. 44.

[30] McAdams v. Sutton, 24 Ohio St. 333; Jack v. Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298; Boyd v. Watt, 27 Ohio St. 259

[31] See 1 Cooley on Torts, p. 703 *et seq.*

[32] Spray v. Ammerman, 66 Ill. 309; Keightlinger v. Egan, 65 Ill. 235; Cockersham v. Nixon, 11 Ired. 269; Hartley v. Halliwell, 2 Stark. 212; Twigg v. Ryland, 62 Md. 380, 50 Am. Rep. 226.

[33] Earhart v. Youngblood, 27 Pa. St. 331; Cockersham v. Nixon, 11 Ired. 269.

[34] McCaskill v. Elliott, 5 Strob. 196, 53 Am. Dec. 706; Worth v. Gilling, L. R. 2 C. P. 1; Rowe v. Ehrmantraut, 92 Minn. 17, 99 N. W. 211; Reynolds v. Hussey, 64 N. H. 64, 5 Atl. 458; Mann v. Weiand, *81 Pa. St. 243; Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751; State v. McDermott, 49 N. J. L. 163, 6 Atl. 653. Notice to defendant of mischief on a single previous occasion seems to be sufficient. Arnold v. Norton, 25 Conn. 92; Kittredge v. Elliott, 16 N. H. 77, 41 Am. Dec. 717, and cases cited; Mann v. Weiand, *81 Pa. St. 243; Marsel v. Bowman, 62 Ia. 57; Bauer v. Lyons, 23 App. Div. 204, 48 N. Y. S. 729. Compare Bulkley v. Leonard, 4 Denio, 500; Appleby v. Percy, L. R. 9 C. P. 647; Perkins v. Mossman, 44 N. J. L. 579; Benoit v. Troy, etc., R. R. Co., 154 N. Y. 223, 48 N. E. 524. Direct proof is not essential. Knowledge may be made out by circumstances without it. Judge v. Cox, 1 Stark. 285; McCaskill v. Elliott, 5 Strob. 196, 53 Am. Dec. 706. May be presumed from his

mischief is of a sort that animals of the kind are likely to commit at a certain season of the year—as in the case of stallions—the owner should anticipate and guard against it without any special notice or warning.[35]

§ 183. **Who liable.** The duty to protect against vicious animals is imposed upon the keeper, irrespective of ownership.[36] If the animal is kept on the defendant's premises with his knowledge and consent, he is liable, though he may be owned and cared for by others.[37] A railroad corporation was held liable for injuries by a vicious dog kept at its station by its agent.[38] In such case, doubtless, the agent would be liable also,[39] as all who take part in harboring a vicious dog are jointly and severally liable.[40] In New York it is held that "a vicious domestic animal, if permitted to run at large, is a nuisance, and a person who, knowingly, keeps or harbors it, and thus affords it a place of protection and refuge, is liable for the maintenance of a nuisance, and for all the damages

keeping dog tied during the day. Goode v. Martin, 57 Md. 606, 40 Am. Rep. 448; Brice v. Bauer, 108 N. Y. 428, 15 N. E. 695. Or from the fact that he keeps the dog to guard his property, and usually keeps him chained or muzzled. Hahnke v. Frederich, 140 N. Y. 224, 35 N. E. 487. Notice to a servant who has charge of the beast is sufficient. Baldwin v. Casella, L. R. 7 Exch. 325; S. C. 3 Moak, 434; Clowdis v. Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; Curtiss v. Smith, 53 Vt. 532.

[35] Meredith v. Reed, 26 Ind. 334. See McIlvaine v. Lantz, 100 Pa. St. 586, 45 Am. Rep. 400; Hammond v. Melton, 42 Ill. App. 186.

[36] Frammell v. Little, 16 Ind. 251; Marsh v. Jones, 21 Vt. 378, 52 Am. Dec. 67; Wilkinson v. Parrott, 32 Cal. 102; Marsel v. Bowman, 62 Ia. 57; Twigg v. Ryland, 62 Md. 380, 50 Am. Rep. 226; Marsh v. Handy, 40 Hun, 339; Hornbein v. Blanchard, 4 Colo. App. 92, 35 Pac. 187; Shultz v. Griffith, 103 Ia. 150, 72 N. W. 445 40 L. R. A. 117; Duval v. Barnaby 75 App. Div. 154, 77 N. Y. S. 337. Hayes v. Smith, 62 Ohio St. 161 56 N. E. 879.

[37] Snyder v. Patterson, 161 Pa St. 98, 28 Atl. 1006.

[38] Chicago, etc., R. R. Co. v Kuckkuck, 197 Ill. 304, 64 N. E. 358.

[39] Lawlor v. French, 14 Misc. 497, 35 N. Y. S. 1077.

[40] Hayes v. Smith, 15 Ohio C. C. 300. The defendant was held not to harbor a dog kept by his hired man with his knowledge, who occupied a separate house on the defendant's farm. Simpson v. Griggs, 58 Hun, 393, 12 N. Y. S. 162.

directly resulting from it."[41] In the case referred to the wife was held liable for injuries by a vicious dog owned by her husband and kept upon her premises, where they both resided, she paying the family expenses and caring for the dog. But in such case, if the wife does not consent she is not liable.[42] In Alabama it is held that, though the wife owns the dog and the same is kept upon her premises, where she and her husband reside, he alone is liable, as he is the head of the family and controls the premises.[43]

§ 184. Effect of plaintiff's contributory negligence or other fault. If the injury committed was to a person, it is no defense to an action therefor that the party injured was at the time committing some trifling trespass upon the defendant's land, for the law will not suffer a man to defend his premises against mere trespasses by such dangerous means as ferocious animals,[44] whose assault might be dangerous to life and limb, any more than it will by scattering poison about to kill animals that come upon them,[45] or by setting spring guns.[46] The doctrine of contributory negligence applies to the case of injury by animals.[47] But where a child is injured by vicious

[41] Quilty v. Battle, 135 N. Y. 201, 204, 32 N. E. 47, 17 L. R. A. 521.

[42] McLaughlin v. Kemp, 152 Mass. 7, 25 N. E. 18.

[43] Strouse v. Leiff, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622.

[44] Blackman v. Simmons, 3 C. & P. 138; Loomis v. Terry, 17 Wend. 496, 31 Am. Dec. 306; Sherfey v. Bartley, 4 Sneed, 58, 67 Am. Dec. 597. Compare Brock v. Copeland, 1 Esp. 203; Conway v. Grant, 88 Ga. 40, 13 S. E. 803, 30 Am. St. Rep. 145, 14 L. R. A. 196; Carroll v. Marcoux, 98 Me. 259, 56 Atl. 848; Leonorvoitz v. Ott, 40 Misc. 551, 82 N. Y. S. 880. See Hill v. Applegate, 40 Kan. 31, 19 Pac. 315.

[45] Johnson v. Patterson, 14 Conn. 1.

[46] See *Ante*, § 77

[47] Williams v. Moray, 74 Ind. 478; Eberhart v. Reister, 96 Ind. 25, 39 Am. Rep. 76; Quimby v. Woodbury, 63 N. H. 370; Twigg v. Ryland, 62 Md. 380, 50 Am. Rep. 226; Carpenter v. Latta, 29 Kan. 591; Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Stuber v. Gannon, 98 Ia. 228, 67 N W. 105; Bush v. Wathen, 104 Ky. 548, 47 S. W. 599; Wooldridge v. White, 105 Ky. 247, 48 S. W. 1081; Hathaway v. Tinkham, 148 Mass. 85, 19 N. E. 18; Brooks v. Taylor, 65 Mich. 208, 31 N. W. 837; Woodbridge v. Marks, 17 App. Div. 139, 45 N. Y. S. 156; Hallyburton v. Burke County Fair Ass'n, 119 N. C. 526, 26 S. E. 114, 38 L. R. A. 156. Accidentally stepping on a dog is not contribu-

animals, the party responsible for their keeping cannot escape liability because the child did not exhibit a thoughtfulness and prudence beyond his years.[48]

§ 185. **Right to kill vicious animals.** Sometimes a vicious animal may lawfully be killed, though the circumstances would not support an action against the owner. Thus, if a savage dog is actually found doing mischief,[49] or if it becomes necessary in order to protect against him,[50] the dog may be killed, whether the owner has notice of his disposition or not. A trespassing dog may be killed when reasonably necessary, for the protection of the person of the plaintiff, or of any of his family, or of his property.[51] And a dog that is ferocious and accustomed to bite, or that has been bitten by a mad dog, may be killed as a common nuisance.[52] But animals that are property

tory negligence. Fake v. Addicks, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716.

[48] Munn v. Reed, 4 Allen, 431; Plumley v. Birge, 124 Mass. 57, 26 Am. Rep. 645.

[49] Wadhurst v. Damme, Cro. Jac. 45; Vere v. Cawdor, 11 East, 568; Barrington v. Turner, 2 Lev. 28; Protheroe v. Mathews, 5 C & P. 581; Putnam v. Payne, 13 Johns. 312. But a man has no right to kill a dog found on his premises doing no mischief, simply because he suspects him to have done mischief before. Brent v. Kimball, 60 Ill. 211, 14 Am. Rep. 35. But if he has killed hens, and to prevent such killing at that time it is reasonably necessary to shoot him, he may be killed. Anderson v. Smith, 7 Ill. App. 354; Marshall v. Blackshire, 44 Ia. 475. See Livermore v. Batchelder, 141 Mass. 179. One has no right to enter the owner's dwelling to kill a dog not registered and collared. Bishop v. Fahay, 15 Gray, 61; Uhlein v. Cromack, 109 Mass. 273. Any one may kill an uncollared dog if in so doing he commit no trespass. Morewood v. Wakefield, 133 Mass. 240. See Dinwiddie v. State, 103 Ind. 101; Lowell v. Gathright, 97 Ind. 313. In Missouri a sheep-killing dog may be killed by any one at any time. Carpenter v. Lippitt, 77 Mo. 242.

[50] Janson v. Brown, 1 Camp. 41; Wells v. Head, 4 C. & P. 568; Reynolds v. Phillips, 13 Ill. App. 557.

[51] Gillum v. Sisson, 53 Mo. App. 516; Fenton v. Bisel, 80 Mo. App. 135; Fisher v. Badger, 95 Mo. App. 289; Life v. Blackwelder, 25 Ill. App. 119.

[52] Barrington v. Turner, 2 Lev. 28; Dodson v. Mock, 4 Dev. & Bat. 146, 32 Am. Dec. 677; Perry v. Phelps, 10 Ired. 261; Brown v. Carpenter, 26 Vt. 638; Putnam v. Payne, 13 Johns. 312; Hinckley v. Emerson, 4 Cow. 351, 15 Am. Dec. 383; Loomis v. Terry, 17 Wend. 496, 31 Am. Dec. 306; Maxwell v. Palmerston, 21 Wend. 406; Brill

at the common law could not thus be destroyed.[53] Before one could be justified in killing them, it would be necessary to show that protection to human beings, or, to more valuable property, appeared to require it.[54]

§ 186. **Injuries by wild beasts.** As to animals *feræ naturæ* the general rule is that a person keeps them at his peril and is liable for any injury they do to one who is not at fault, regardless of negligence in the keeping.[55] The keeper of a zoological park was held not liable for injury by an escaped animal, unless he was negligent.[56] The rule of absolute liability for the keeping of wild animals is held not to apply to bees.[57] In the case cited, the defendant was held to be negligent in placing bee hives within twenty-five feet of a hitching post in the highway, and was held liable for the loss of horses stung to death while hitched to the post. The court expressed the view that the true basis of liability for injuries by wild animals is negligence and that the degree of care to be exercised varies with the natural propensities of the animals.[58]

v. Flagler, 23 Wend. 354; Dunlap v. Snyder, 17 Barb. 561; Parker v. Mise, 27 Ala. 480, 62 Am. Dec. 776.

[53] Reis v. Stratton, 23 Ill. App. 314. See Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219; Heiligmann v. Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272; Wright v. Ramscot, 1 Saund. 83; Dodson v. Mock, 4 Dev. & Bat. 146; Tyner v. Cory, 5 Ind. 216 (Dogs). Ford v. Taggart, 4 Tex. 492; State v. Bates, 92 N. C. 784; Chappell v. State, 35 Ark. 345 (Cattle). Clark v. Keliher, 107 Mass. 406; Johnson v. Patterson, 14 Conn. 1 (Hens).

[54] Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175.

[55] 1 Hale P. C. 430, pt. 1, C. 33; Bull. N. P. 77; May v. Burdett, 9 Q. B. (N. S.) 101; Vredenburg v. Behan, 33 La. Ann. 627; Congress, etc., Spring Co. v. Edgar, 99 U. S. 651; Filburn v. People's Palace, etc., Co., 25 Q. B. D. 258; Rex v. Huggins, Ld. Raym. 1583; Besozzi v. Harris, 1 F. & F. 92; Van Leuven v. Lyke, 1 N. Y. 515; Laverone v. Mangianti, 41 Cal. 138.

[56] Jackson v. Baker, 24 App. Cas. D. C. 100. And see Congress & S. Spring Co. v. Edgar, 99 U. S. 651, 25 L. Ed. 487; Marquet v. La Duke, 96 Mich. 596, 55 N. W. 1006.

[57] Parsons v. Mauser, 119 Ia. 88, 93 N. W. 86, 97 Am. St. Rep. 283, 62 L. R. A. 132. See note on the liability of owners of bees for injuries done by them in 62 L R. A. 132.

[58] And see Bostock-Ferari Amusement Co. v. Brocksmith, 34 Ind. App. 566, 73 N. E. 281, 107 Am. St. Rep. 213; Earl v. Van Alstine, 8 Barb. 630; Canefox v. Crenshaw, 24 Mo. 199, 69 Am. Dec. 427.

CHAPTER XII.

INJURIES TO INCORPOREAL RIGHTS.

§ 187. **Nature of incorporeal rights.** Incorporeal rights are said to exist merely in idea and abstract contemplation, though as regards many of them, their effects, in which consists their value, are objects cognizable by the bodily senses. In the classification of property as real or personal, some of these rights are designated incorporeal hereditaments, either because they are or may be inheritable, or because they issue out of or are ennexed to, or exercisable within corporeal hereditaments. Thus, at the common-law, offices, dignities, franchises, pensions and annuities may all be inheritable, and so may be the right to rents, and the right in the owner of one estate to pass and repass over the estate of his neighbor for the convenient enjoyment of his own. All these rights, it is perceived, are intangible rights; the right to rents is not a right in certain pieces of money, but it is a right to receive periodically a certain sum of money; and it is the satisfaction of the right to rents that creates the right in the money received thereby. All such rights have or may have a money value, and they are, therefore, with entire propriety, considered as property rights. Rights corresponding to these may exist which are only personal property, since they are neither inheritable, nor are they in any manner connected with the realty. Among the chief of these is the right which one has to the productions of his intellect.

§ 188. **Copyrights and patents.** Among the chief of the incorporeal rights is that which one has to the productions of his intellect. The governments of civilized countries have deemed it wise to make provision whereby the interests of authors and inventors may be subserved by securing to them for a certain length of time a monopoly in the publication or reproduction of that which they have produced, invented, or

designed. This is done by copyright and patent laws, all of which name certain conditions, which, when complied with, will entitle the author, inventor, or designer to remedies by means of which he may protect himself in his monopoly during the period to which by law it is limited. When the conditions have been complied with the proper certificate or patent is issued as evidence of the right, and the violation of the monopoly becomes a legal wrong, which is punished by penalties, or by the recovery of damages, or, perhaps, by both. But the legal protection will fail if it shall turn out that the book, design, etc., purporting to be original was not so in fact, or that the invention was not new. The infringement of a copyright or patent is a tort for which an action *ex delicto* will lie to recover the damages sustained,[1] but, as the prevention of future infringements is usually more important than the recovery for past aggressions, the remedy is generally sought in a court of equity, which can give complete relief in a single suit by way of an injunction to prevent future infringements and an award of damages for past aggressions.[2]

§ 189. **Inventions not patented.** A person has a property right in any invention he makes,[3] but if he allows it to be published to the world or to come into use the right is lost.[4] Where, however, he has simply delayed applying for letters patent until another has made the discovery known, or even brought it into use, this will not prevent the first discoverer securing his monopoly afterwards; for even if there be two independent discoveries, only the first is entitled to take out letters patent which shall protect him.[5] But there is no monopoly until the letters are obtained.

[1] Novello v. Sudlow, 12 C. B. 177, 74 E. C. L. R. 176; Beckford v. Hood, 7 T. R. 620; Roworth v. Wilkes, 1 Camp. 94, 98; Colburn v. Simms, 2 Hare, 543, 549; Ames v. Howard, 1 Sumner, 482; Drone on Copyright, p. 468; 3 Robinson on Patents, p. 111.

[2] Drone on Copyright, p. 496; 3 Rob. on Patents, § 1081 *et seq.*

[3] Bezer v. Hall Signal Co., 22 App. Div. 489, 48 N. Y. S. 203; Westervelt v. National P. & S Co., 154 Ind. 673, 57 N. E. 552.

[4] Bedford v. Hunt, 1 Mason, 302; Shaw v. Cooper, 7 Pet. 292; Whittemore v. Cutter, 1 Gall 478; Pennock v. Dialogue, 2 Pet 1; Wyeth v. Stone, 1 Story, 273

[5] Woodcock v. Parker, 1 Gall 438; Bedford v. Hunt, 1 Mason 302.

§ 190. Literary and artistic productions not copyrighted. As in the case of inventions no monopoly in the production of literary and artistic productions is secured, except by compliance with the statute. But an author may keep his production by him indefinitely, and though others may see it, or hear it, or become familiar with it, they are not at liberty to publish it without his consent. As was said in the leading case of *Wheaton v. Peters,* "That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted."[6] When, however, an author or an artist publishes his production, he is supposed to abandon it to the public, and he thereby licenses the public to reproduce copies indefinitely. A publication, to constitute an abandonment, must be literally one which puts the production before the general public. A teacher does not publish an original work in his department of study by instructing his pupils in its principles.[7] Neither does a photographer publish his photograph by loaning a copy to a friend;[8] nor an author abandon his play to the public by allowing it to be publicly acted.[9] In short, the writer of any literary, dramatic, or musical composition or work of art is entitled of right to give it a restricted publica-

[6] McLean, J., Wheaton v. Peters, 8 Pet. 591, 657. See Bartlett v. Crittenden, 5 McLean, 32; Ibid, 4 McLean, 300 Boucicault v. Fox, 5 Blatch. 87, 97; Keene v. Clarke, 5 Rob. (N. Y.) 38; Palmer v. DeWitt, 40 How. Pr. 293; Stern v. Rosey, 17 App. D. C. 562; Holmes v. Hurst, 174 U. S. 82, 85.

[7] Bartlett v. Crittenden, 4 McLean, 300; S. C. 5 McLean, 32. While one may take notes at a public lecture he may not publish the lecture from them for profit. Nichols v. Pitman, L. R. 26 Ch. D. 374.

[8] Mayall v. Higbey, 1 H. & C. 148.

[9] Macklin v. Richardson, Amb. 694; Boucicault v. Fox, 5 Blatch. 87; Palmer v. DeWitt, 40 How. Pr. 293. See Thomas v. Lennon, 14 Fed. Rep. 849; Goldmark v. Kreling, 25 Fed. Rep. 349; Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177; Chappell v. Boosey, L. R. 21 Ch. D. 232; Tompkins v. Hallick, 133 Mass. 32, 43 Am. Rep. 480; Keene v. Kimball. 16 Gray, 545, 77 Am. Dec. 426; The "Mikado" Case, 25 Fed. 183; The "Iolanthe" Case, 15 Fed. 439; Aronson v. Fleckenstein, 28 Fed. 75; Carte v. Evans, 27 Fed. 861; Fairlie v. Boosey, L. R. 4 App. Cas. 711; Duck v. Bates, L. R. 13 Q. B. D. 843.

tion, and to be still protected in his property, provided he gives evidence of a clear intent to make his publication a restricted one only. The right to the first general publication belongs to him; he may enjoin any attempt to take it from him; and if he see fit to do so, he may refuse any publication whatever. Nor is his death an abandonment of the right to publish, but his representatives may exercise and control it afterwards. Moreover, this common-law right is not local, but would be protected in any country where the common law prevails, and probably wherever the civil law prevails also.

§ 191. Private letters. Private letters often have a value for publication, and the question who, as between the writer and receiver, has the right to control their publication is sometimes the subject of litigation. It appears to be well settled that the literary property in letters and the right to control their publication is in the writer, and not in the receiver.[10] The usual remedy for protecting this property is by bill to enjoin the publication of the letters.[11] Where a letter is valuable only as a curiosity or as an autograph, the property must be in the receiver. But we should say the receiver was under no obligation to treat such letters as a part of his general estate. They are to be made use of as property only at his option; they cannot be taken from him on execution or demanded from him by an assignee in bankruptcy.[12] Nobody can be compelled to make market wares of his private letters merely because they would sell in market. At his death they would be family papers which his administrator could not of right demand.[13]

§ 192. Wrongs in respect to trade marks. A trade mark consists of a word, mark or device adopted by a manufacturer

[10] Pope v. Curl, 2 Atk. 342; Folsom v. Marsh, 2 Story, 111, 51 L. R. A. 360–363 note.

[11] 2 Story, Eq. §§ 946–948; 2 High, Inj. § 1012; 3 Pom. Eq. § 1353; Barrett v. Fish, 72 Vt. 18, 21, 22, 47 Atl. 174, 82 Am. St. Rep. 914, 51 L. R. A. 754; Woolsey v. Judd, 4 Duer, 379; Eyre v. Higbee, 35 Barb. 502; Grigby v. Breckinridge, 2 Bush, 480, 92 Am. Dec. 509; Gee v. Pritchard, 2 Swanston, 419.

[12] See Thompson v. Stanhope, Amb. 737; Gee v. Pritchard, 2 Swanst. 402; Earl of Grannard v. Dunkin, 1 Ball & B. 207.

[13] See the case of Tobias Lear's Letters, Eyre v. Higbee, 35 Barb. 502.

or vendor to distinguish his wares or productions from other goods of the same description.[15] It is held that a trade mark which is not in some manner attached or affixed or stamped on the article indicated by it involves a contradiction in itself, the idea of some distinctive brand or mark being inherent in the expression itself.[16] The law will protect the proprietor of a trade mark, not only by enjoining the use of it by another, but by giving damages for the violation of the right to its exclusive use.[17] The right to protection springs from two circumstances: *First*—That by adopting and making use of the trade mark a property right has been acquired therein which is valuable; and, *Second*—That another in making use of it practices a fraud, not only upon the public, who are thereby deceived into purchasing one article when they suppose they are getting another, but also upon the proprietor or proprietors of the trade mark, whose own dealings with the public are likely to be limited in proportion as the public are induced to deal with the fraudulent appropriator.[18] "A sym-

[15] Weener v. Brayton, 152 Mass. 101, 102, 25 N. E. 46; Cigar Makers' Protective Union v. Conham, 40 Minn. 243, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125; Hoyt v. Hoyt, 143 Pa. St. 623, 638, 639, 22 Atl. 755, 24 Am. St. Rep. 575; Cady v. Schultz, 19 R. I. 193, 195, 32 Atl. 915, 61 Am. St. Rep. 763; Elgin Natl. Watch Co. v. Ill. Watch Case Co., 179 U. S. 665, 673; Brown on Trademarks, § 80; Hopkins on Trademarks, § 2. In the United States trade marks may be patented, and to take out letters patent may be a convenient way of avoiding difficulties. For the law, and decisions under the same, see Bump on Patents, etc., 343.

[16] Oakes v. St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467.

[17] High on Injunctions, § 673; Hirst v. Denham, L. R. 14 Eq. Cas. 542; S. C. 3 Moak, 833; Coffeen v. Brunton, 4 McLean, 516; Congress, etc., Spring Co. v. Highrock, etc., Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; Stonebreaker v. Stonebreaker, 33 Md. 252; Perry v. Truefitt, 6 Beav. 66; Waterman v. Shipman, 130 N. Y. 301, 29 N. E. 111; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722; Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676; Robinson v. Storm, 103 Tenn. 40, 52 S. W. 880; Wolfe v. Barnett, 24 La. Ann. 97, 13 Am. Rep. 111; Gillott v. Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553; Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401; Seixo v. Provezende, L. R. 1 Ch. App. 191; McLean v. Fleming, 96 U. S. 245.

[18] Davis v. Kendall, 2 R. I. 556; Walton v. Crowley, 3 Blatch. 440; McCartney v. Garnhart, 45 Mo. 593, 100 Am. Dec. 397; Filley v.

bol or label claimed as a trade mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained."[19] This principle is well illustrated by the following case: The plaintiff company had a mine of iron ore known as the "Prince Mine," the ore from which it used in the manufacture of a metallic paint known as "Prince's Metallic Paint," which it represented and warranted was made from ore taken from the Prince Mine. Afterwards the plaintiff acquired other similar mines, from which it also manufactured metallic paints and on which it used the same label, thus falsely representing that all its paints were made from ore taken from the Prince Mine. In a suit to enjoin an infringement of its trade mark and labels, relief was denied because of this fraudulent use of the same.[20]

The right to a trade mark is not lost by a temporary discontinuance of its use, if there is no intent to abandon it.[21] But it may be lost by being suffered, without objection, to come into common use in the trade.[22]

§ 193. **What may be a trade mark.** In general, a man may adopt for a trade mark whatever he chooses; but when he as-

Fassett, 44 Mo. 168, 100 Am. Dec. 275; Amoskeag Manuf. Co. v. Spear, 2 Sandf. 599; Apollinaris Co. v. Scherer, 27 Fed. Rep. 18.

[19] Holzapeel's Comp. Co. v. Rahtjen's Am. Comp. Co., 183 U. S. 1, 22 S. C. Rep. 6, 46 L. Ed. 49.

[20] Prince Mfg. Co. v. Prince's Metallic Paint Co, 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129. To the same effect: Lemke v. Deitz, 121 Wis. 102, 98 N. W. 936; Worden v. California Fig Syrup Co., 187 U. S. 516, 23 S. C. 161, 47 L. Ed. 282; California Fig Syrup Co. v Putnam, 69 Fed. 740, 16 C. C. A. 376; California Fig Syrup Co. v. Frederick Stearns & Co., 73 Fed. 812, 20 C. C. A. 22. But the rule does not apply to an immaterial false statement. Tarrant & Co. v. Hoff, 76 Fed. 959, 22 C. C. A. 644; Gluckman v. Strauch, 99 App. Div. 361, 91 N. Y. S. 223. Words which assert a physiological impossibility, such as "One night cough cure," will not be protected as a trade mark. Kohler Mfg. Co. v. Beeshore, 59 Fed. 572, 8 C. C. A. 215.

[21] Burt v. Tucker, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112; Mouson v. Boehm, L. R. 26 Ch. D. 298; In re Heaton, L. R. 27 Ch. D. 570; In re Anderson, L. R. 26 Ch. D. 409.

[22] Ford v. Foster, L. R. 7 Ch App. 611; S. C. 3 Moak, 538; Caswell v. Davis, 58 N. Y. 223, 17 Am. Rep. 233.

serts and seeks to enforce exclusive right therein, it becomes necessary to ascertain whether it is just to others that this be permitted. If the name, device, or designation is purely arbitrary or fanciful and has been first brought into use by him, his right to the exclusive use of it is unquestionable.[23] But the mere designation of a quality, as "nourishing," applied to an article of drink, cannot be appropriated as a trade mark;[24] neither can any general description, by words in common use, of a kind of article, or of its nature by qualities.[25] "The office

[23] As the *"New Era"* newspaper, Bell v. Locke, 8 Paige, 75; "Dr. Johnson's Yellow Ointment," Singleton v. Bolton, 3 Doug. 293; The "Vegetable Pain Killer," Davis v. Kendall, 2 R. I. 566; "Congress Spring," Congress, etc., Spring Co. v. High Rock, etc., Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; "Eureka Shirt," Ford v. Foster, L. R. 7 Ch. App. 611; "What Cheer House," Woodward v Lazar, 21 Cal. 448, 82 Am. Dec. 751; "Revere House," as the designation of a coach to run to that house; Marsh v. Billings, 7 7 Cush. 322, 44 Am. Dec. 723; "Roger Williams Long Cloth," Barrows v. Knight, 6 R. I. 434, 78 Am. Dec. 452; "Sliced Animals," as applied to toys, Selchow v. Baker, 93 N. Y. 59, 45 Am. Rep. 169; "Alpine," as applied to textile fabrics, *In re* Trade Mark "Alpine," L. R. 27 Ch. D. 879; "Pride," to cigars, Hier v. Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Number "523" in connection with other devices to show the origin of goods, Lawrence, etc., Co. v. Lowell, etc., Mills, 129 Mass. 325; "Marvel," as applied to flour, Listman Mill Co. v. Wm. Listman Mill Co., 88 Wis. 334, 60 N. W. 621, 43 Am. St. Rep. 907; "Ideal," to fountain pens, Waterman v. Shipman, 130 N. Y. 301, 29 N. E. 111.

[24] Raggett v. Findlater, L. R. 17 Eq. Cas. 29; S. C. 7 Moak, 653. See Taylor v. Gillies, 59 N. Y 331, 17 Am. Rep. 333; Caswell v. Davies, 58 N. Y. 223, 17 Am. Rep. 233; Candee v. Deere, 54 Ill. 439, 5 Am. Rep. 125; Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204. Nor may the designation "A. C. A.," to denote quality, be appropriated; Mfg. Co. v. Trainer, 101 U. S. 51, nor "Royal," Royal, etc., Co. v. Sherrell, 93 N. Y. 331, nor "National Sperm," *In re* Price L. R. 27 Ch. D. 681; nor "Health Preserving," Ball v. Siegel, 116 Ill. 137, 56 Am. Rep. 767.

[25] Gilman v. Hunnewell, 122 Mass. 139; Dunbar v. Glenn, 42 Wis. 118, 24 Am. Rep. 395; Choynski v. Cohen, 39 Cal. 501, 2 Am. Rep. 476; Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204; Caswell v. Davis, 58 N. Y. 223, 17 Am. Rep. 233; Koehler v. Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576; Cook & Cobb Co. v. Miller, 169 N. Y. 475, 62 N. E. 582; Alff v. Radam, 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep 792, 9 L. R. A. 145; Gessler Grieb, 80 Wis. 21, 48 N. W. 10[illegible] 27 Am. St. Rep. 20; Brown Che[illegible] ical Co. v. Meyer, 139 U. S. 54[illegible],

of a trade mark is to point out distinctively the origin or ownership of the article to which it is affixed, and no sign or form of words can be appropriated as a valid trade mark which, from the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose."[26] As a general thing, a man cannot acquire an exclusive right to his own name as a trade mark, as against others of the same name who may see fit to engage in the same business,[27] though if the latter resort to any such artifice or device, in connection with a use of the name, as shall be calculated to mislead the public, they may be restrained from such use; for it cannot be tolerated that one shall take advantage of the accidental circumstance of an identity of names to withdraw trade from a rival by practicing a deception upon the public.[28] A corporation organized to carry on a particular

11 S. C. Rep. 625, 35 L. Ed. 247; Beadleston v. Cooke Browning Co., 74 Fed. 229, 20 C. C. A. 405; Computing Scale Co. v. Standard Computing Scale Co. 118 Fed. 965, 55 C. C. A. 459; Bennett v. McKinley, 65 Fed. 505, 13 C. C. A. 25.

[26] Barrett Chemical Co. v. Stern, 176 N. Y. 27, 68 N. Y. 65.

[27] Rogers v. Taintor, 97 Mass. 291; Emerson v. Badger, 101 Mass. 82; Gilman v. Hunnewell, 122 Mass. 139; Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; Rogers v. Rogers, 53 Conn. 121. See Harson v. Halkyard, 22 R. I. 102, 46 Atl. 271; Duryea v. National Starch Mfg. Co., 79 Fed. 651, 25 C. C. A. 139; Turton v. Turton, 42 L. R. Ch. 128; Caswell v. Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833.

[28] Croft v. Day, 7 Beav. 84; Rodgers v. Nowill, 5 M. G. & S. 109; Sykes v. Sykes, 3 B. & C. 541; Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401; Holmes v. Holmes, etc., Co., 37 Conn. 278, 9 Am. Rep. 324; Blakely v. Sousa, 197 Pa. St. 305, 47 Atl. 286, 80 Am. St. Rep. 824; Robinson v. Storm, 103 Tenn. 40, 52 S. W. 880; Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 S. C. Rep. 625, 35 L. Ed. 247; R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 70 Fed. 1017, 17 C. C. A. 576; Tarrant & Co. v. Hoff, 76 Fed. 959, 22 C. C. A. 644; Stuart v. F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480; Walter Baker & Co. v. Sanders, 80 Fed. 889, 26 C. C. A. 220. In all such cases the vital question is, whether that which is done by the defendant is calculated to deceive and defraud. Leather Cloth Co. v. Am. Leather Cloth Co., 11 H. L. Cas. 523; James v. James, L. R. 13 Eq. 421; Candee v. Deere, 54 Ill. 439, 5 Am. Rep. 125; Gilman v. Hunnewell, 122 Mass. 139; Delaware, etc., Canal Co. v. Clark, 13 Wall. 311; Williams v. Brooks, 50 Conn. 278; Shaver v. Shaver, 54 Ia. 208;

business may not assume a name so similar to that of an older corporation in the same business as to deceive the public and injure the trade of the latter.[29] The name of a place cannot be appropriated as a trade mark as against others who may see fit to engage in the same business at the same place,[30] though it may be as against one who, at a different place, undertakes to appropriate it; as where parties at Syracuse proposed to sell cement under the designation of "Akron," which was the name under which the cement produced at Akron had been previously sold.[31] But the defendant, though carrying on the same business as the plaintiff at the same place, may be restrained from making use of the name of the place in connection with his goods or business in such manner as to deceive and defraud the public.[32] There can be no trade mark in the

Marshall v. Pinkham, 52 Wis. 572, 38 Am. Rep. 756; Drummond Tob. Co. v. Randle, 114 Ill. 412; Massam v. Thorley's, etc., Co., L. R. 14 Ch. D. 748. One entering into competition with one of the same name having an old established business is bound to distinguish his goods so as to avoid confusion. Walter Baker & Co. v. Sanders, 80 Fed. 889, 26 C. C. A. 220; Tarrant & Co. v. Hoff, 76 Fed. 959, 22 C. C. A. 644.

[29] American Clay Mfg. Co. of Pa. v. Am. Clay Mfg. Co. of N. J., 198 Pa. St. 189, 47 Atl. 936; Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42; Tuerk Hydraulic Power Co. v. Tuerk, 92 Hun, 65, 36 N. Y. S. 384; Employers' Liability Ass'n Co. v. Employers' Liability Ins. Co. 61 Hun, 552, 16 N. Y. S. 397; Armington v. Palmer, 21 R. I. 109, 41 Atl. 1012, 79 Am. St. Rep. 786, 43 L. R. A. 95; R. W. Rogers Co. v. Wm. Rogers Mfg. Co. 70 Fed. 1017, 17 C. C. A. 576; Peck Bros. Co. v. Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251; North Cheshire & Manchester Brewing Co., Limited, v. Manchester Brewing Co., Limited, (1899) A. C. 83. See Hazleton Boiler Co. v. Hazleton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339; People v. Rose, 219 Ill. 46.

[30] Glendon Iron Co. v. Uhler, 75 Pa. St. 467, 15 Am. Rep. 599; Candee v. Deere, 54 Ill. 439, 5 Am. Rep. 125; Dunbar v. Glenn, 42 Wis. 118, 24 Am. Rep. 395; Canal Co. v. Clark, 13 Wall. 311; Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599; Morgan Envelope Co. v. Walton, 86 Fed. 605, 30 C. C. A. 383; Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 S. C. Rep. 151, 37 L. Ed. 1144; Genesee Salt Co. v. Burnap, 73 Fed. 818, 20 C. C. A. 27.

[31] Newman v. Alvord, 49 Barb 588; S. C. on Appeal, 51 N. Y. 189, 10 Am. Rep. 588.

[32] Elgin National Watch Co. v Illinois Watch Co. 179 U. S. 665, 21 S. C. Rep. 270, 45 L. Ed. 365;

color of a label,[33] nor in the method of wrapping goods,[34] nor in the size or shape of the bottle, box or package containing the goods.[35] The trade mark may be applied to a natural product as well as to a manufacture, as in the case of the celebrated "Congress" water, and the like.[36]

§ 194. What is an infringement. In order to constitute an infringement it is not necessary that the imitation should be exact. It is sufficient that there is such a substantial similarity that the public would be likely to be deceived.[37] "In order to support the action the imitation of the trade mark need not be exact or perfect. It may be limited and partial. Nor is it necessary that the whole should be pirated. Nor is it necessary to show that anyone has in fact been deceived. Nor is it necessary to prove intentional fraud. If the court sees that the plaintiff's trade marks are simulated in such a manner as probably to deceive customers or patrons of its trade or business, the piracy should be checked at once by injunction."[37a]

Genesee Salt Co. v. Burnap, 73 Fed. 88, 20 C. C. A. 27; Lee v. Haley, L. R. 5 Ch. App. 155; Radde v. Norman, L. R. 14 Eq. Cas. 348; S. C. 3 Moak, 776; Wotherspoon v. Currie, L. R. 5 H. L. 508; American Waltham Watch Co. v. U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826.

[33] Fleischmann v. Starkey, 25 Fed. 127.

[34] Davis v. Davis, 27 Fed. 490.

[35] Enoch Morgan's, etc., Co. v. Troxell, 89 N. Y. 292; Hoyt v. Hoyt, 143 Pa. St. 623, 22 Atl. 755, 24 Am. St. Rep. 575, 13 L. R. A. 343; Lafevre v. Weeks, 177 Pa. St. 412, 35 Atl. 693, 34 L. R. A. 172.

[36] Congress, etc., Spring Co. v. High Rock, etc., Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; Dunbar v. Glenn, 42 Wis. 118, 24 Am. Rep. 395. The subject of trade marks is carefully and fully considered in this case, as it is also in McLean v. Fleming, 96 U. S. 245.

[37] Bradley v. Norton, 33 Conn. 157, 87 Am. Dec. 200; Popham v. Cole, 66 N. Y. 69, 23 Am. Rep. 22; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722; Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676; Pillsbury v. Pillsbury-Washburn Flour Mills Co., 64 Fed. 841, 12 C. C. A. 432. See Siegert v. Findlater, L. R. 7 Ch. D. 801; Alexander v. Morse, 14 R. I. 153, 51 Am. Rep. 369; Woodcock v. Guy, 33 Wash. 234, 74 Pac. 358.

[37a] Listman Mill Co. v. Wm. Listman Mill Co., 88 Wis. 334, 312, 60 N. W. 261, 43 Am. St. Rep. 907. See Seixo v. Provezende, L. R. 1 Ch. App. 191, 196; Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204. Case will lie for infringement of trade mark. Sykes v. Sykes, 3 B. & C. 541.

§ 195. Unfair competition. What has been said about the infringement of rights in trade marks will apply to all devices by means of which one endeavors to deprive another of the value of the good will of his business by deceiving the public. The good will of a business is often very valuable property, and the use of a trade mark is only one method of building it up. Therefore, one person may not by means of an imitation of the marks, labels, wrappers or packages of a rival dealer, or by any other device palm off his goods upon the public as those of such rival dealer, and any such fraudulent imitation and device is known as "unfair competition," and is an actionable wrong, though a technical trade mark may not be involved.[38] "Unfair competition in trade is not confined to the imitation of a trade mark, but takes as many forms as the ingenuity of man can devise. It may consist of the imitation of a sign, a trade name, a label, a wrapper, a package, or almost any other imitation by a business rival of some distinguishing ear mark of an established business, which the court can see is calculated to mislead the public and lead purchasers into the belief that they are buying the goods of the first manufacturer."[39] Unfair competition, though ordinarily remediable in equity, may be treated as a tort where the circumstances constitute legal fraud.[40]

[38] Sartor v. Schaden, 125 Ia. 696, 101 N. W. 511; Wirtz v. Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658; Fischer v. Blank, 138 N. Y. 244, 33 N. E. 1040; Brown v. Doscher, 147 N. Y. 647, 42 N. E. 268; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722; Robinson v. Storm, 103 Tenn. 40, 52 S. W. 880; Offerman v. Waterman, 94 Wis. 583, 69 N. W. 569; Coats v. Merrick Thread Co., 149 U. S. 562, 13 S. C. Rep. 966, 37 L. Ed. 847; Saxlehuer v. Eisner & M. Co., 179 U. S. 19, 21 S. C. Rep. 7, 45 L. Ed. 60; N. K. Fairbank Co. v. R. W Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554; Pillsbury-Washburn Flour Mills Co. v. Eagle, 86 Fed. 608, 30 C. C. A. 386; Paris Medicine Co. v. W. H. Hill & Co., 102 Fed. 148, 42 C. C. A. 227; Sterling Remedy Co. v. Spermine Med. Co., 112 Fed. 1000, 50 C. C. A. 657; Bickmore Gall Cure Co. v. Karns, 134 Fed. 833 — C. C. A. —; Reddaway v. Banham, (1896) A. C. 199; Birmingham Vinegar Brewing Co. v. Powell, (1897) A. C. 710; Powell v. Birmingham Vinegar Brewing Co., (1896) 2 Ch. 54.

[39] Manitowoc Malting Co. v. Mil. Malting Co., 119 Wis. 543, 97 N. W. 389.

[40] Blofeld v. Payne, 4 B. & Ad 410; Marsh v. Billings, 7 Cush 322; Bell v. Locke, 8 Paige, 75.

§ 196. **Easements in general.** "An easement or servitude is a right which one proprietor has to some profit, benefit or lawful use, out of, in, or over the estate of another proprietor."[41] Easements owe their increase, variety, and importance to modern civilization: they have become so numerous that it is difficult even to classify them. A few of the more important will be considered.

§ 197. **Right of way.** A common easement is that of the right to pass or repass over the land of another. This may come into existence by grant,[42] in which case it is necessary that the way be defined and located, either by the grant itself or by the acts of the parties; and if not located by grant or consent, the grantee may select the route for it.[43] Or it may be established by prescription;[44] and in such case the user itself must determine the location. An indefinite right of passage cannot be thus acquired.[45] Or the way may come into existence as a way of necessity. This happens where one grants a parcel of land so surrounded by other lands owned by himself that access to it except over such lands is impracticable; or where he grants lands so surrounding a parcel retained by himself that the latter is practically inaccessible except over that he has granted. In the former case, by implication he grants a right of way over his own lands to that he has sold, and in the latter he reserves such a right.[46] In either case the owner of the tenement over which the way must extend may

[41] Ritger v. Parker, 8 Cush. 145, 147. See Washburn on Easements, pp. 1–22; 3 Kent, Com. 527.

[42] Washburn, Easements, p. 34; Gale on Easements (Bennett's Ed.), p. 92; Goddard on Easements, pp. 25, 96; 14 Cyc. 1159.

[43] Hart v. Connor, 25 Conn. 331.

[44] Washburn, Easements, p. 98; Gale, Easements (Bennett's Ed.), p. 136; Goddard, Easements, p. 164; 14 Cyc. 1145.

[45] Jones v. Percival, 5 Pick. 485, 16 Am. Dec. 415. See Atwater v. Bodfish, 11 Gray, 150; Haag v. Delorme, 30 Wis. 591; Belknap v. Trimble, 3 Paige, 577.

[46] Kitchey v. Welsh, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; Estep v. Hammons, 104 Ky. 144, 46 S. W. 715; Jay v. Michael, 92 Md. 198, 48 Atl. 61; Morse v. Benson, 151 Mass. 440, 24 N. E. 675; Palmer v. Palmer, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; Wooldridge v. Coughlin, 46 W. Va. 345, 33 S. E. 233. The right is held to exist in case of partition. Kitchey v. Welsh, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; Palmer v. Palmer, 150 N.

locate it, but he must exercise the right reasonably and with due regard to the other's convenience.[47] If he refuses, on request, to locate the way, or locates it unfairly, the party entitled to the easement may locate it himself.[48] In any case when a way is once located, it is fixed permanently and for all purposes, and neither party can change it except by mutual consent.[49] A right of way by necessity is strictly construed and it extends no farther than the necessity which creates it.[50] The necessity must be a positive one and it is not enough that a way over the land granted or retained would be more convenient.[51] Hence when the land conveyed abuts upon the ocean or upon navigable water, it is held that there is no way of necessity by land.[52] There is a difference of opinion as to whether the right ceases when the necessity ceases. Some courts hold that it does,[53] and others that when once fixed it is permanent and that it does not cease though the grantee buys another outlet.[54]

Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653.

[47] Kitchey v. Welsh, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; Palmer v. Palmer, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653.

[48] Ibid.

[49] Holmes v. Seely, 19 Wend. 507; Brice v. Randall, 7 Gill & J. 349; Powers v. Harlow, 53 Mich. 507; Kitchey v. Welsh, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; Dudgeon v. Bronson, 159 Ind. 562, 64 N. E. 910, 65 N. E. 752, 95 Am. St. Rep. 315; Morse v. Benson, 151 Mass. 440, 24 N. E. 675.

[50] Kingsley v. Gouldsborough L. I. Co., 86 Me. 279, 29 Atl. 1074, 25 L. R. A. 502; Morse v. Benson, 151 Mass. 440, 24 N. E. 675.

[51] Turnbull v. Rivers, 3 McCord, 131, 15 Am. Dec. 622; McDonald v. Lindall, 3 Rawle, 492; Gayetty v. Bethune, 14 Mass. 49, 7 Am. Dec. 188; Suffield v. Brown, 4 DeG. J. & S. 185; Burns v. Gallagher, 62 Md. 462; Outerbridge v. Phelps, 13 Abb. N. C. 117; Francies' App. 96 Pa. St. 200; Kingsley v. Gouldsborough L. I. Co. 86 Me. 279, 29 Atl. 1074, 25 L. R. A. 502.

[52] Kingsley v. Gouldsborough L. I. Co., 86 Me. 279, 29 Atl. 1074, 25 L. R. A. 502; Hildreth v. Googins, 91 Me. 227, 39 Atl. 550; Lawton v. Rivers, 2 McCord, 445, 13 Am. Dec. 741; Turnbull v. Rivers, 3 McCord, 131, 15 Am. Dec. 622. See Burlew v. Hunter, 41 App. Div. 148, 58 N. Y. S. 453.

[53] Holmes v. Goring, 2 Bing. 76. See Palmer v. Palmer, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653.

[54] Estep v. Hammons, 104 Ky. 144, 46 S. W. 715. See Morse v. Benson, 151 Mass. 440, 24 N. E. 675.

Besides the right of way for the passage of persons, beasts, and vehicles, there may be a right of way for pipes to carry water, gas, steam, etc., or for drains, and for any purpose whatsoever, for which one might have occasion to make use of a passage across his neighbor's land for the greater or more convenient enjoyment of his own. These also may be acquired by grant or prescription, under the rules already given, but they do not come into existence as ways of necessity strictly, though they often arise by implication from grants the benefits of which cannot be enjoyed without them, and must therefore be understood to have contemplated them.[55] Grants of right of way are to be so construed as not needlessly to restrict the enjoyment of his estate by the owner of the servient tenement. The owner of the easement is entitled to the fair enjoyment of his privilege, but nothing more,[56] and therefore the owner of the servient tenement may erect gates at the termini of a private way, when it is not unreasonable to do so.[57]

§ 198. **Easements in respect to water.** These are considered in the chapter on nuisances to which the reader is referred.

§ 199. **Easement of support.** Incident to the ownership of land is the right to lateral support by the land which adjoins it. This is an absolute right and to remove such support is an actionable wrong.[58] But the right is limited to the sup-

[55] Carbrey v. Willis, 7 Allen, 364, 83 Am. Dec. 688; Rome Gaslight Co. v. Meyerhardt, 61 Ga. 287; Sanderlin v. Baxter, 76 Va. 299; McPherson v. Ackee, 4 MacArth. 150.

[56] Atkins v. Bordman, 2 Met. 457, 37 Am. Dec. 100. Where an easement is created by grant the rights of the parties depend upon the construction of the grant. Arnold v. Fee, 87 Hun, 502, 34 N. Y. S. 1028. But where it is acquired by prescription it is limited and defined by the user. North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69.

[57] Maxwell v. McAtee, 9 B. Mon. 20, 48 Am. Rep. 409; Garland v. Furber, 47 N. H. 301; Boyd v. Bloom, 152 Ind. 152, 52 N. E. 751; Ames v. Shaw, 82 Me. 379, 19 Atl. 856; Brill v. Brill, 108 N. Y. 511, 15 N. E. 538; Johnson v. Borson, 77 Wis. 593, 46 N. W. 815, 20 Am. St. Rep. 146; Dyer v. Walker, 99 Wis. 404, 75 N. W. 79.

[58] Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57; Gilmore v. Driscoll, 122 Mass. 199, 201; Lasala v. Holbrook, 4 Paige, 169, 25 Am. Dec. 524; McGuire v. Grant, 25 N. J. L. 356; Foley v. Wyeth, 2 Allen, 131, 79 Am. Dec. 771; Charless v. Rankin, 22 Mo. 566; Boothby v. Androscoggin R. R. Co., 51 Me. 318; Guest v. Reynolds, 69 Ill. 478, 18 Am. Rep.

port of the land in its natural condition; and if the land shall be weighted with buildings or other burdens, the owner of the servient tenement, in removing collateral support, can be held responsible only for such consequences as would have followed if the land had not been thus weighted, provided he exercises due care.[59] The case, however, is eminently one in which the obligation of care for the protection of the neighbor's interest is imposed; and before proceeding to remove collateral support, he should give reasonable notice of his intention, that the owner of the dominant tenement may have the opportunity to provide against any threatened danger.[60] He must also observe due care in making the excavations, and will be responsible for all the consequences of negligence.[61] The right to collateral support of land weighted with buildings

570; Baltimore, etc., R. R. Co. v. Reaney, 42 Md. 117; Beard v. Murphy, 37 Vt. 99; Stimmel v. Brown, 7 Houst. 219, 30 Atl. 996; Moellering v. Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449; Clemens v. Speed, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; Nichols v. Duluth, 40 Minn. 389, 42 N. W. 84, 12 Am. St. Rep. 743; Schultz v. Bowen, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630; Novotney v. Danforth, 9 S. D. 301, 68 N. W. 749.

[59] Wyatt v. Harrison, 3 B. & Ad. 871; Partridge v. Scott, 3 M. & W. 220; Backhouse v. Bonomi, 9 H. L. Cas. 502; Humphries v. Brogden, 12 Q. B. 739; Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57; Foley v. Wyeth, 2 Allen, 131, 79 Am. Dec. 771; Richardson v. Vermont Cent. R. R. Co., 25 Vt. 465, 60 Am. Dec. 283; Clemens v. Speed, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; Obert v. Dunn, 140 Mo. 476, 41 S. W. 901; Ketcham v. Newman, 141 N. Y. 205, 36 N. E. 197, 24 L. R. A. 102; McGettigan v. Potts, 149 Pa. St. 155, 24 Atl. 198; Bailey v. Gray, 53 S. C. 503, 31 S. E. 354.

[60] Wyley Canal Co. v. Bradley, 7 East, 368; Massey v. Goyder, 4 C. & P. 161; Shriever v. Stokes, 8 B. Mon. 453; Richard v. Scott, 7 Watts, 460; Brown v. Werner, 40 Md. 15; Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482; Serio v. Murphy, 99 Md. 545, 58 Atl. 435, 105 Am. St. Rep. 316; Gerst v. St. Louis, 185 Mo. 191, 84 S. W. 34, 105 Am. St. Rep. 580; Schultz v. Byers, 53 N. J. L. 442, 22 Atl. 514, 13 L. R. A. 569; Davis v. Summerfield, 131 N. C. 352, 42 S. E. 818, 92 Am. St. Rep. 781. No notice is necessary if the adjoining owner has knowledge. Schultz v. Byers, 53 N. J. L. 442, 22 Atl. 514, 13 L. R. A. 569; Novotney v. Danforth, 9 S. D. 301, 68 N. W. 749.

[61] Jeffries v. Williams, 5 Exch. 792; Elliot v. N. E. R. Co., 10 H. L. Cas. 333; Humphries v. Brog-

cannot be acquired in this country by prescription,[62] though it is otherwise in England.[63]

A freehold is sometimes divided laterally, that is, one man owns the surface, and another owns the sub-surface where minerals exist or are supposed to exist. Where that condition of things is found, it must have had its origin in grants emanating from a common source; as the whole must at some time have been in the same hands. Therefore contracts or covenants fixing the respective rights and obligations of the parties are likely to exist, and these must govern so far as they extend.[64] In the absence of any such contracts or covenants, the owner of the surface is entitled to support, not only for the land itself, but for the buildings erected upon it.[65] The liability of the sub-surface owner does not depend upon negligence, but if he removes the natural support he must substitute that

den, 12 Q. B. 739; Baltimore, etc., R. R. Co. v. Reaney, 42 Md. 117; Boothby v. Androscoggin, etc., R. R. Co., 51 Me. 318; Shriever v. Stokes, 8 B. Mon. 453; Foley v. Wyeth, 2 Allen, 131, 79 Am. Dec. 771; Myer v. Hobbs, 57 Ala. 175; Clemens v. Speed, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; Serio v. Murphy, 99 Md. 545, 58 Atl. 435, 105 Am. St. Rep. 316; Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; Larson v. Met. St. Ry. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330; Obert v Dunn, 140 Mo. 476, 41 S. W. 901; Davis v. Summerfield, 131 N C. 352, 42 S. E. 818, 92 Am. St. Rep. 781; Board of Education v. Volk, 72 Ohio St. 469; Spohn v. Davis, 174 Pa. St. 474, 34 Atl. 192; Witherow v. Tannehall, 194 Pa. St. 21, 44 Atl. 1088; Bailey v. Gray, 53 S. C. 503, 31 S. E. 354. If a person exercises due care in excavating on his own land, he is not obliged to expend money in order to support his neighbor's building and he cannot recover for money so expended either in contract or tort. First National Bank v. Villegra, 92 Cal. 96, 28 Pac. 97. A recovery was allowed for such expense in Eads v. Gains, 58 Mo. App. 586, but the grounds of recovery are not made very clear.

[62] Mitchell v. Rome, 49 Ga. 19; Clemens v. Speed, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; Gilmore v. Driscoll, 122 Mass. 199, 207; Richard v Scott, 7 Watts, 460, 462; Napier v. Bulwinkle, 5 Rich. L. 311, 324.

[63] Gale, Easements, pp. 346–358.

[64] See, for example, Smith v. Darby, L. R. 7 Q. B. 715; S. C. 3 Moak, 281; Aspden v. Seddon, L. R. 10 Ch. App. 394.

[65] Hext v. Gill, L. R. 7 Ch. App. 699; S. C. 3 Moak, 574; Bonomi v. Backhouse, El., Bl. & El. 622; S. C. in error, 9 H. L. Cas. 503; Smith v. Thackerah, L. R. 1 C. P. 564.

which is sufficient to protect the surface. And a custom to work mines without providing such support is unreasonable and void.[66]

§ 200. Party walls. A party wall is a wall on the division line of estates which each proprietor is at liberty to use as a support to his building. When such a wall stands in part on the land of each it is presumed to be owned by the two, unless the contrary is shown.[67]

Where a party wall is built by agreement, the strict rule of law requires a deed, but if the agreement was by parol only, the case would be a very strong one for the application of the doctrine of equitable estoppel, and no doubt a dissatisfied proprietor would be enjoined from repudiating the arrangement and interfering with his neighbor's enjoyment of the wall as a party wall afterwards.[68] If one erects a block of houses or shops, and then conveys them separately to purchasers, the walls between them become party walls for the mutual benefit.[69] Where a party wall exists, each proprietor has an easement in the land of the other for its use, repair and support; but the extent of his rights may be limited by the contract between them with respect to the wall, or by the user or the

[66] Hilton v. Lord Granville, 5 Q. B. 701; Humphries v. Brogden, 12 Q. B. 739; Blackett v. Bradley, 1 Best & S. 940; Jones v. Wagner, 66 Penn. St. 429, 5 Am. Rep. 385; Horner v. Watson, 79 Pa. St. 242, 21 Am. Rep. 55; Zinc Co. v. Franklinite Co., 13 N. J. L. 342.

The right of action arises when some actual damage is done. Bonomi v. Backhouse, El., Bl. & El. 622; S. C. in error, 9 H. L. Cas. 503; Fisher v. Beard, 32 Iowa, 346.

[67] Campbell v. Mesier, 4 Johns. Ch. 334; Matts v. Hawkins, 5 Taunt. 20. A party wall may be wholly on the land of one proprietor. Dorsey v. Habersack, 84 Md. 117, 35 Atl. 96. When partly on the land of each, each owns his part in severalty with cross easement of support. Fidelity Lodge v. Bond, 147 Ind. 437, 45 N. E. 388, 46 N. E. 825.

[68] Bell v. Rawson, 30 Ga. 712. If one abutter in such case by digging causes it to fall, he is liable. Hammond v. Schiff, 100 N. C. 161, 6 S. E. 753; Briggs v. Klosse, 5 Ind. App. 129, 31 N. E. 208, 51 Am. St. Rep. 238.

[69] Matts v. Hawkins, 5 Taunt. 20; Richards v. Rose, 9 Exch. 218; Webster v. Stevens, 5 Duer, 553; Wheeler v. Clark, 58 N. Y. 267. The owner may not enlarge such party wall to make a dwelling house into a family hotel. Musgrave v. Sherwood, 60 How. Pr. 339.

statute under which it was built or is owned.[70] Rights in party walls pass with the land to heirs or assignees without being specially mentioned in the conveyance.[71] Each proprietor owes to the other the duty to do nothing that shall weaken or endanger it,[72] and though each may rightfully, when he finds it to his interest to do so, increase its height, sink the foundations deeper, or on his own side add to it,[73] yet it seems that in doing so he is insurer against damages to the other proprietor.[74] If the wall becomes ruinous, and ceases to answer the purposes of support, the easement is at an end, and each

[70] Brooks v. Curtis, 4 Lansing, 283; Brooks v. Curtis, 50 N. Y. 639; 10 Am. Rep. 545; Fidelity Lodge v. Bond, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825; Briggs v. Klosse, 5 Ind. App. 129, 31 N. E. 208, 51 Am. St. Rep. 238. A flue in a party wall is presumably for common use, though mainly on one side of the wall. Weil v. Baker, 39 La. Ann. 1102, 3 So. 361.

[71] See Standish v. Lawrence, 111 Mass. 111; Brooks v. Curtis, 4 Lansing, 283; Warner v. Rogers, 23 Minn. 34.

[72] Eno v. Del Vecchio, 6 Duer, 17; Brooks v. Curtis, 50 N. Y. 639, 10 Am. Rep. 545; Dowling v. Hennings, 20 Md. 179, 83 Am. Dec. 545; Hieatt v. Morris, 10 Ohio St. 523, 78 Amer. Dec. 280; Hammond v. Schiff, 100 N. C. 161, 6 S. E. 753. One may not tear down such wall because it turns out to be wholly on his own ground. Henry v. Koch, 80 Ky. 391, 44 Am. Rep. 484; Schile v. Brockhahus, 80 N. Y. 614; Miller v. Brown, 33 Ohio St. 547. See West. Nat. Bank's App. 102 Penn. St. 171. One who has erected a wall under an agreement that it is to be used as a party wall is liable to adjoining owner for damage done by him by its fall before he has used it. Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 234; Beidler v. King, 209 Ill. 302, 70 N. E. 763.

[73] Matts v. Hawkins, 5 Taunt. 20; Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632; Brooks v. Curtis, 50 N. Y. 639, 10 Am. Rep. 545; Price v. McConnell, 27 Ill. 255; Dorsey v. Habersack, 84 Md. 117, 35 Atl. 96. He may increase its thickness and height if he does not impair the other's right. Andrae v. Haseltine, 58 Wis. 295, 46 Am. Rep. 635. If he builds it up it must be of the same kind as below, e. g. it may have no windows above if none below. Dauenhauer v. Devine, 51 Tex. 480, 32 Am. Rep. 627. If he builds a structure on top of the wall the other joint owner may knock the structure down. Watson v. Gray, L. R. 14 Ch. D. 192.

[74] Webster v. Stevens, 5 Duer. 553; Eno v. Del Vecchio, 4 Duer. 53; Dorsey v. Habersack, 84 Md. 117, 35 Atl. 96; Everett v. Edwards, 149 Mass. 588, 22 N. E. 52, 14 Am. St. Rep. 462, 5 L. R. A. 110. See Phillips v. Bordman, 4 Allen, 147; Potter v. White, 6 Bosw. 644; Hieatt v. Morris, 10

proprietor may build as he pleases upon his own land without any obligation to accommodate the other.[75]

§ 201. **Light and air.** In England one may acquire by prescription an easement to receive light and air over his neighbor's estate,[76] but the law is otherwise in the United States.[77] Such easements may, of course, be created by express grant,[78] or by implied grant.[79] But, as a general rule, grants are construed against such implication and the same will not be implied except when they are practically indispensable to the

Ohio St. 523; Dowling v. Hennings, 20 Md. 179; Bradbee v. Christ's Hospital, 4 M. & G. 714; Levy v. Fenner, 48 La. Ann. 1389, 20 So. 895; Negus v. Becker, 143 N. Y. 303, 38 N. E. 290, 42 Am. St. Rep. 724, 25 L. R. A. 667. But the plaintiff cannot recover for damages which he might readily have prevented by due care of his own property. Hartford Deposit Co. v. Calkins, 186 Ill. 104, 57 N. E. 863.

[75] Partridge v. Gilbert, 15 N. Y. 601; Sherred v. Cisco, 4 Sandf. 480; Campbell v. Mesier, 4 Johns. Ch. 334; Orman v. Day, 5 Fla. 395. So if the wall is destroyed by fire. Antomachi v. Russell, 63 Ala. 356. Or if the building is destroyed but the wall left standing. Hoffman v. Kuhn, 57 Miss. 746. According to some authorities either party may rebuild when necessary to make the wall answer the purposes for which it was built. Putzel v. Drovers and Mechanics Nat. Bank, 78 Md. 349, 28 Atl. 276, 44 Am. St. Rep. 298, 22 L. R. A. 632; Dorsey v. Habersack, 84 Md. 117, 35 Atl. 96; Partridge v. Lyon, 67 Hun, 29, 21 N. Y. S. 848.

[76] Gale on Easements, p. 286 *et seq.*; Washburn, Easements, pp. 574–582; Bishop, Non Contract Law, § 924.

[77] Kennedy v. Burnap, 120 Cal. 488, 52 Pac. 843, 40 L. R. A. 476; Turner v. Thompson, 58 Ga. 268, 24 Am. Rep. 497; Tinker v. Forbes, 136 Ill. 221, 26 N. E. 503; Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544; Lapere v. Luckey, 23 Kan. 534, 33 Am. Rep. 196; Oldstein v. Firemen's Bldg. Ass'n. 44 La. Ann. 492, 10 So. 928; Pierre v. Fernald, 26 Me. 436, 46 Am. Dec. 573; Cherry v. Stein, 11 Md. 1, 21; King v. Miller, 8 N. J. Eq. 559, 55 Am. Dec. 246; Parker v. Foote, 19 Wend. 308; Doyle v. Lord, 64 N. Y. 432, 21 Am. Rep. 629; Mathewson St. M. E. Church v. Shepard, 22 R. I. 112, 46 Atl. 402; Napier v. Bulwinkle, 5 Rich. L. 311; Bailey v. Gray, 53 S. C. 503, 31 S. E. 354. *Contra*, Clawson v. Primrose, 4 Del. Ch. 643. And see Washburn, Easements, pp. 582–594; Goddard, Easements (Bennett's Ed.) pp. 202–210.

[78] Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544; Ladd v. Boston, 151 Mass. 585, 24 N. E. 858, 21 Am. St. Rep. 481; Lattimer v. Livermore, 72 N. Y. 174.

[79] Greer v. Van Meter, 54 N. J. L. 270, 33 Atl. 794.

reasonable enjoyment of the property.[80] But the authorities are not uniform upon this point.[81]

§ 202. Rights of abutting owners. We have already referred to the rights of abutting owners, who own the fee of the street or highway upon which their property is situated.[82] Abutting owners, whether they own the fee of the street or not, have easements of light, air and access in the land occupied by the street, which are appurtenant to the abutting property.[83] These easements are subject to the paramount right of the public to use and improve the street as a highway.[84] An interference with the easements for any other purpose or in any other manner is an actionable wrong.[85]

§ 203. Rights of riparian owners. Riparian owners upon non-navigable lakes and streams own the bed of the waters to the middle of the lake or stream and they are entitled to the same exclusive possession as though the water was not there.[86] Their right to the flow and use of the waters is considered elsewhere.[87] Riparian owners upon navigable waters have rights similar to those of abutting owners upon highways. Subject to the public right of navigation, they have a right of ac-

[80] Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939; Puorto v. Chieppa, 78 Conn. 401; Turner v. Thompson, 58 Ga. 268, 24 Am. Rep. 497; Rennyson's Appeal, 94 Pa. St. 147, 39 Am. Rep. 777.

[81] See 19 Am. & Eng. Encyl. 115.

[82] *Ante*, § 174.

[83] Haynes v. Thomas, 7 Ind. 38; Indiana, etc., R. R. Co., v. Eberle, 110 Ind. 542; Crawford v. Delaware, 7 Ohio St. 459; Anderson v. Turbeville, 6 Coldw. 150; Story v. N. Y. El. R. R. Co., 90 N. Y. 122; Denver v. Bayer, 7 Colo. 113.

[84] Seldon v. Jacksonville, 28 Fla. 558, 10 So. 457; Adams v. Chicago, etc., R. R. Co., 39 Minn. 286, 39 N. W. 629; Halsey v. Rapid Transit St. R. R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Kane v. N. Y. El. R. R. Co., 125 N. Y. 164, 26 N. E. 278; Rauenstein v. New York, etc., R. R. Co., 136 N. Y. 528, 32 N. E. 1047.

[85] Shawneetown v. Mason, 82 Ill 337; Winchester v. Stevens Point, 58 Wis. 350; Buchner v. Chicago, etc., Ry. Co., 60 Wis. 264; Adams v. Chicago, etc., R. R. Co., 39 Minn. 286, 39 N. W. 629; Kane v. N. Y. El. R. R. Co., 125 N. Y. 164, 26 N. E. 278; Reining v. New York, etc., R. R. Co., 128 N. Y. 157, 28 N. E. 640; Willamette Iron Works v. Oregon R. & N. Co., 26 Ore. 224, 37 Pac. 1016. See 1 Lewis' Em. Dom. ch. V, for a full discussion of the subject.

[86] *Ante*, § 164.

[87] *Post*, chap. 17.

cess to and from the water and to and from the navigable part, a right to build piers and wharves for use in connection with their property, the right to accretions and perhaps other rights.[88] For an interference with these rights an action lies.[89]

§ 204. **Action for interfering with easement.** Any obstruction to an easement, any encroachment upon it, or any disturbance of the soil, or of that by means of which the easement is enjoyed, is an actionable wrong, provided damage is caused by it.[90] Thus, if a drain is stopped, or a fence be erected across a private way, or a water-course be diverted, and the like, an injury is presumed, because these, if persisted in, may extinguish the easement.[91] Whoever is owner of the dominant tenement at the time an easement is disturbed, or has any interest therein which entitles him to the enjoyment of the easement, may maintain an action for the injury;[92] and where the dominant tenement is under lease, the reversioner may also sue, if the injury is one that affects his rights as reversioner.[93] Suit may be brought against the owner of the

[88] 1 Lewis, Em. Dom. §§ 60–83; Yates v. Milwaukee, 10 Wall. 497; Rumsey v. New York, etc., R. R. Co., 133 N. Y. 79, 30 N. E. 654; Delaplaine v. Chicago, etc., Ry. Co., 42 Wis. 214; Lyon v. Fishmongers Co., L. R. 1 App. Cas. 662.

[89] Ibid; 1 Lewis, Em. Dom. §§ 84, 85; Carli v. Stillwater St. R. & T. Co., 28 Minn. 373; Druxy v. Midland R. R. Co., 127 Mass. 571; Gariter v. Baltimore, 52 Md. 422; Henry 1. Newburyport, 149 Mass. 582, 22 N. E. 75.

[90] Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Stallard v. Cushing, 76 Cal. 479, 18 Pac. 427; Hardin v. Sin Claire, 115 Cal. 460, 47 Pac. 363; Jones v. Sanders, 138 Cal. 405, 71 Pac. 506; Jay v. Michael, 92 Md. 198, 48 Atl. 61; Blood v. Millard, 172 Mass. 65, 51 N. E. 527; Boyd v. Woolwine, 40 W. Va. 282, 21 S. E. 1020; Chloupek v. Perotka, 89 Wis. 551, 62 N. W. 537, 46 Am. St. Rep. 858; Washburn on Easements, p. 658.

[91] Wood v. Waud, 3 Exch. 748; Nicklin v. Williams, 10 Exch. 259; Elliott v. Fitchburg R. R. Co., 10 Cush. 191, 57 Am. Dec. 85; Roundtree v. Brantley, 34 Ala. 544, 73 Am. Dec. 470; Welton v. Martin, 7 Mo. 307; Clifford v. Hoare, L. R. 9 C. P. 362; S. C. 9 Moak, 449; ante, § 12.

[92] Hastings v. Livermore, 7 Gray, 194.

[93] Kidgill v. Moor, 9 C. B. 364; Queen's College v. Hallett, 14 East, 489; Battishill v. Reed, 18 C. B. 696; Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Tinsman v. Belvidere R. R. Co, 25 N. J. L. 255. As to what would be an injury to the reversioner, see Dobson v. Blackmore, 9 Q. B. 991; Metropolitan Association v. Petch, 5 C. B. (N. S.) 504.

servient tenement if the injury was done by him or with his permission; and if it consists in an obstruction or encroachment, which is continued by his successor in the title, the latter may be held responsible if he fails to remove it within a reasonable time after notice.[94] As an obstruction or encroachment would constitute a private nuisance, the owner of the easement may, wherever it is practicable, and under the rules applicable to the abatement of nuisances in general, proceed to abate it.[95] But if in doing this, or in the enjoyment of the easement, he exceeds his right, he thereby becomes a trespasser.[96] Under certain circumstances the owner of the dominant estate may have a remedy in equity to abate an obstruction of his easement or to prevent the violation of his right.[97]

[94] Woodman v. Tufts, 9 N. H. 88; Thornton v. Smith, 11 Minn. 15; Grigsby v. Clear Lake, 40 Cal. 396; Dodge v. Stacy, 39 Vt. 558; Caldwell v. Gale, 11 Mich. 77.

[95] Amick v. Tharp, 13 Grat. 564, 67 Am. Dec. 787; Great Falls Co. v. Worster, 15 N. H. 412; Hutchinson v. Granger, 13 Vt. 386; Adams v. Barney, 25 Vt. 225; Ballard v. Butler, 30 Me. 94; Jewell v. Gardiner, 12 Mass. 312; Rhea v Forsyth, 37 Pa. St. 503, 78 Am. Dec. 411; *ante*, § 46.

[96] Ganley v. Looney, 14 Allen, 40. See Dyer v. Depui, 5 Whart. 584; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265.

[97] Washburn, Easements, p. 668; 1 High, Inj. §§ 484–896; 10 Am. & Eng. Encly. p. 431.

CHAPTER XIII.

VIOLATIONS OF OFFICIAL DUTY.

§ 205. **Liability in general.** From what has been said about the nature and definition of torts, it follows that, in order that a public officer should be liable to an individual in tort, it is necessary that the officer should have violated some legal duty owing by him to such individual and that the individual should have been damnified by such violation.[1] Every public officer is under a general obligation to the public to discharge the duties of his office in a proper manner. But this general obligation is not a duty to any particular individual or individuals and, manifestly, cannot be made the basis of a private action. All particular official duties are owed either (1) to the public collectively and exclusively, or (2) to the public collectively and distributively, or (3) to individuals. Examples of the first class are the duty of the governor of a state to see that the laws are executed and the duty of highway officers in exercising the power to lay out, alter and discontinue roads. This class of duties being owed solely and exclusively to the public in its collective capacity, it follows from the very nature of the case that there is no duty to any particular individual and, consequently, no foundation for an individual suit.[2] As

[1] *Ante*, §§ 1, 2, 3, 12. "In general a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of a particular duty owing to him." State v. Harris, 89 Ind. 363, 364, 46 Am. Rep. 169.

[2] State v. Harris, 89 Ind. 363, 46 Am. Rep. 169; Moss v. Cummings, 44 Mich. 359; Bartlett v. Crozier, 17 Johns, 439, 8 Am. Dec. 428; Butler v. Kent, 19 Johns. 223, 10 Am. Dec. 219; Waterer v. Freeman, Hob. 266. "The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its nonperformance." Gage v. Springer,

to the other two classes of duties, the question of liability will depend upon the nature of the duty. In this respect official duties may be classified as follows: 1. Executive. 2. Legislative. 3. Judicial. 4. Quasi-judicial. 5. Ministerial. The same officer may be clothed with duties of different sorts, but his liability in any case will depend upon the nature of the duty involved in that case.

§ 206. **Rules applicable to all officers.** Before proceeding to consider official duties in detail, it will be well to notice some rules that apply alike to all officers. One is that for the violation of a purely public duty no private action lies. This has been sufficiently noticed in the previous section. Another is that no officer is liable for doing in a proper manner what is commanded or authorized by a valid law.[3] But an invalid law is no protection.[4] "All persons are presumed to know the law, and if they act under an unconstitutional act of the

211 Ill. 200, 71 N. E. 860, 103 Am. St. Rep. 191. The duty of a health officer to take proper precautions against the spread of disease is purely public and no actions lies for its neglect. See White v. Marshfield, 48 Vt. 20; Brinkmeyer v. Evansville, 29 Ind. 187; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Western College, etc., v. Cleveland, 12 Ohio St. 375; Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451; Freeport v. Isbell, 83 Ill. 440, 25 Am. Rep. 407; Pontiac v. Carter, 32 Mich. 164. See Summers v. People, 109 Ill. App. 430. For an unauthorized fumigation of a fruit-laden vessel damaging the cargo, a health officer is liable to the shipper. Beers v. Board of Health, 35 La. Ann. 1132, 48 Am. Rep. 256. So if a health officer causes the plaintiff's animal to be killed as one diseased, when it is not so, he will be liable. Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116; Sahr v Scholle, 89 Hun, 42, 35 N. Y. S. 97.

[3] Thibodaux v. Thibodaux, 46 La. Ann. 1528, 16 So. 450; Highway Comrs. v. Ely, 54 Mich. 173; Orr. v. Quimby, 54 N. H. 590; Burton v. Fulton, 49 Pa. St. 151; Anderson v. Park, 57 Ia. 69.

[4] Sumner v. Beeler, 50 Ind. 341, 19 Am. Rep. 718; Ely v. Thompson, 3 A. K. Marsh. 70; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; Lynn v. Polk, 8 Lea, 121, 130; Board of Liquidation v. McComb, 92 U. S. 531, 541; Norton v. Shelby, 118 U. S. 425; Waterloo Woolen Mfg. Co. v. Shanahan, 58 Hun, 50, 11 N. Y. S. 829. But see Henke v. McCord, 55 Ia. 378; Anheuser-Busch Brewing Ass'n v. Hammond, 93 Ia. 520, 61 N. W. 1052; McCall v. Cohen, 16 S. C. 445, 42 Am. Rep. 641; Goodwin v. Guild, 94 Tenn. 486, 29 S. W. 721, 45 Am. St. Rep. 743, 27 L. R. A. 660.

legislature, they do so at their peril, and must take the consequences."[5] A judicial officer, who is called upon to act under a statute, must necessarily determine its validity, expressly or impliedly, and is not responsible for an erroneous decision.[6]

§ 207. **Executive officers.** An executive officer is one whose duty it is to cause the laws to be executed and obeyed.[7] The president of the United States and the governors of the several states are such officers. They are not amenable to the courts for a neglect or improper exercise of their executive duties.[8] The governor of the state is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take steps necessary for the proper enforcement of the laws; but neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforcement of the laws. The executive, in these particulars, exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department, and this would be inconsistent with the theory of republican institutions. Each department, within its province, is and must be independent. The same rules would undoubtedly apply to local executive officers, such as mayors of cities and the like, in so far as their duties are of the same nature. So of the heads of the executive departments of the government and of the states.[9]

[5] Sumner v. Beeler, 50 Ind. 341, 342, 19 Am. Rep. 718.

[6] Henke v. McCord, 55 Ia. 378, 384–386. But the authorities are not uniform as respects inferior courts. See Mechem, Pub. Officers, § 631.

[7] Bouvier, Law Dict., Tit. Executive.

[8] Kendall v. United States, 12 Pet. 524, 610; Decatur v. Paulding, 14 Pet. 497.

[9] Ibid; Spaulding v. Vilas, 161, U. S. 483. "When the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of the executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation." Marbury v. Madison, 1 Cranch, 137, 170 "The interference of courts with the performance of the ordinary duties of the execu-

§ 208. **Legislative officers.** Legislative officers are those who exercise the legislative power and legislative power is "the authority, under the constitution, to make laws, and to alter or repeal them."[10] The legislature has full discretionary authority in all matters of legislation, and it is not consistent with this that the members should be called to account at the suit of individuals for their acts and neglects.[11] Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence.[12] This remark is not true, exclusively, of legislative bodies proper, but it applies also to inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like.[13] When such bodies neglect and refuse to proceed to the discharge of their duties, the courts may interpose to set them in motion; but they cannot require them to reach particular conclusions, nor, for their failure to do so, impose the payment of damages upon them, or upon the municipality they represent.[14] It is only when some particular duty of a ministerial character is imposed upon a legislative body, in the performance of which its members severally are required to act—no liberty of action being allowed, and no discretion—that there can be a private action for neglect. Such ministerial duties are sometimes imposed upon the members of subordinate boards, like supervisors and county commissioners,

tive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." Decatur v. Paulding, 14 Pet. 497, 516.

[10] Bouvier, Dict.

[11] Kilbourn v. Thompson, 103 U. S. 168.

[12] Daniels v. Hathaway, 65 Vt. 247, 255, 26 Atl. 970.

[13] Baker v. State, 27 Ind. 485; Amperse v. Winslow, 75 Mich. 234; Jones v. Loving, 55 Miss. 109, 30 Am. Rep. 508; Freeport v. Marks, 59 Pa. St. 253; Daniels v. Hathaway, 65 Vt. 247, 26 Atl. 970. See Pruden v. Love, 67 Ga. 190; Morris v. People, 3 Denio, 381.

[14] Wells v. Atlanta, 43 Ga. 67. Even the allegation of fraud cannot be listened to for the purpose of establishing such a liability. Wilson v. New York, 1 Denio, 595; Freeport v. Marks, 59 Pa. St. 253; Buell v. Ball, 20 Iowa, 282. The motives of councilmen in passing an ordinance cannot be inquired into. Jones v. Loving, 55 Miss. 109, 30 Am. Rep. 508; Freeport v. Marks, 59 Pa. St. 253.

and when they are, if they are imposed for the benefit of individuals, the members may be personally responsible for failure in performance.[15]

§ 209. **Judicial officers.** Judicial officers, proper and as here intended, are those who exercise judicial power in courts of justice, the judges and magistrates of a state. A judicial officer is not liable to a private suit for any neglect of judicial duty nor for the manner in which he performs it. The rule applies alike to the highest judge in the state or nation,[16] and to the lowest officer who sits as a court and tries petty cases,[17]

[15] Amy v. Supervisors, 11 Wall. 136; Mechem, Pub. Officers, §§ 614, 615.

[16] Dicas v. Lord Brougham, 6 C. & P. 249; Fray v. Blackburn, 3 Best & S. 576; Yates v. Lansing, 5 Johns. 282; S. C. 9 Johns. 394; Lining v. Bentham, 2 Bay, 1; Bradley v. Fisher, 13 Wall. 335; Lange v. Benedict, 73 N. Y. 12. Courts of general or superior jurisdiction. Terry v. Wright, 9 Colo. App. 11, 47 Pac. 905; Harrison v. Redden, 53 Kan. 265, 36 Pac. 325; Murray v. Mills, 56 Minn. 75, 57 N. W. 324; Ayers v. Russell, 50 Hun, 282, 3 N. Y. S. 328; Root v. Rose, 6 N. D. 575, 72 N. W. 1022; Webb v. Fisher, 109 Tenn. 701, 72 S. W. 110, 97 Am. St. Rep. 863, 60 L. R. A. 791; Rudd v Darling, 64 Vt. 456, 25 Atl. 479.

[17] Floyd v. Barker, 12 Co. 25; Mostyn v. Fabrigas, Cowp. 161; Lowther v. Earl of Radnor, 8 East, 113; Pike v. Carter, 3 Bing. 78; Basten v. Carew, 3 B. & C. 652; Mills v. Collett, 6 Bing. 85; Holroyd v. Breare, 2 B. & Ald. 773; Fawcett v. Fowlis, 7 B. & C. 394; Brodie v. Rutledge, 2 Bay, 69; Evans v. Foster, 1 N. H. 374; Jordan v. Hanson, 49 N. H. 199, 8 Am. Rep. 508; Pratt v. Gardner, 2 Cush. 63, 48 Am. Dec. 652; Kelly v. Bemis, 4 Gray, 83, 64 Am. Dec. 50; Ambler v. Church, 1 Root, 211; Moore v. Ames, 3 Caines, 170; Cunningham v. Bucklin, 8 Cow, 178, 18 Am. Dec. 432; Stewart v. Southard, 17 Ohio, 402, 49 Am. Dec. 463; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131; Taylor v. Doremus, 16 N. J. L. 473; Mangold v. Thorpe, 33 N. J. L. 134; Little v. Moore, 4 N. J. L. 74, 7 Am. Dec. 574; Hamilton v. Williams, 26 Ala. 527; Walker v. Halleck, 32 Ind. 239; Deal v. Harris, 8 Md. 40, 63 Am. Dec. 686; Morrison v. McDonald, 21 Me. 550; Downing v. Herrick, 47 Me. 462; Bailey v. Wiggins, 5 Harr. 462, 60 Am. Dec. 650; Reid v. Hood, 2 N. & McCord, 471; Londegan v. Hammer, 30 Iowa, 508; Fuller v. Gould, 20 Vt. 643; Trammel v. Russellville, 34 Ark. 105, 36 Am. Rep. 1; Ely v. Thompson, 3 A. K. Marsh. 70; Coleman v. Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84; Calhoun v Little, 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630; People v. Suhre, 97 Ill. App. 231; State v. Wolever, 127 Ind. 306, 26 N. E. 762; Thompson v. Jackson, 93 Ia. 376, 61 N. W. 1004, 27 L. R. A. 92; Heath v.

and it applies not in respect to their judgments merely, but to all process awarded by them for carrying their judgments into effect.[18] Some of the reasons against liability are the following: 1. The necessary result of the liability would be to occupy the judge's time and mind with the defense of his own interests, when he should be giving them up wholly to his public duties, thereby defeating, to some extent, the very purpose for which his office was created. 2. The effect of putting the judge on his defense as a wrong-doer necessarily is to lower the estimation in which his office is held by the public, and any adjudication against him lessens the weight of his subsequent decisions. 3. The civil responsibility of the judge would often be an incentive to dishonest instead of honest judgments, and would invite him to consult public opinion and public prejudices, when he ought to be wholly above and uninfluenced by them. 4. Such civil responsibility would constitute a serious obstruction to justice, in that it would render essential a large increase in the judicial force, not only as it would multiply litigation, but as it would open each case to endless con-

Halfhill, 106 Ia. 133, 76 N. W. 522; Dixon v. Cooper, 109 Ky. 29, 58 S. W. 437; Raymond v. Lowe, 87 Me. 329, 32 Atl. 964; Roth v. Shupp, 94 Md. 55, 50 Atl. 430; Vennum v. Huston, 38 Neb. 293, 56 N. W. 970; Atwood v. Atwater, 43 Neb. 147, 61 N. W. 574; Kelsey v. Klabunde, 54 Neb. 760, 74 N. W. 1066, 1099; Booth v. Kurrus, 55 N. J. L. 370, 26 Atl. 1013; Austin v. Vrooman, 128 N. Y. 229, 28 N E. 477, 14 L. R. A. 138; Scott v. Fishblate, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696; Wheeler v Gavin, 5 Ohio C. C. 246; Smith v. Jones, 16 S. D. 337, 92 N. W. 1084; Marks v. Sullivan, 9 Utah, 12, 33 Pac. 224; Banister v. Wakeman, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201. If in the exercise of judicial functions upon a matter within its jurisdiction he acts corruptly or fraudulently, he is not liable civilly. Irion v. Lewis, 56 Ala. 190; Kress v. State, 65 Ind. 106. But see Knell v. Briscoe, 49 Md. 414; Hitch v. Lambright, 66 Ga. 228; Horne v. Pudil, 88 Ia. 533, 55 N. W. 485; Chambers v. Oehler, 107 Ia. 155, 77 N. W. 853.

[18] Hammond v. Howell, 1 Mod. 184; Dicas v. Lord Brougham, 6 C. &. P. 249. And see cases cited in last note generally. While for illegally issuing an execution a justice may be liable (Barrister v. Wakeman, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201; Sullivan v. Jones, 2 Gray 570), he is not for issuing one on his judgment, not appealed from though erroneous, at demand of judgment creditor. White v. Morse, 139 Mass. 162.

troversy. This of itself would be an incalculable evil. 5. But where the judge is really deserving of condemnation a prosecution at the instance of the state is a much more effectual method of bringing him to account than a private suit. 6. If such liability existed no man fit for the position, and having anything either of property or reputation to put at stake, would consent to occupy a judicial position. If at the peril of his fortune, he must justify his judgments to the satisfaction of a jury summoned by a dissatisfied litigant to review them, it would be presumptuous for any man to place himself in that position.

§ 210. Jurisdiction essential. Every judicial officer, whether the grade be high or low, must take care, before acting, to inform himself whether the circumstances justify his exercise of the judicial function. A judge is not such at all times and for all purposes: when he acts he must be clothed with jurisdiction; and acting without this, he is but the individual falsely assuming an authority he does not possess. The officer is judge in the cases in which the law has empowered him to act and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his cognizance, or cases between persons who are not, either actually or constructively, before him for the purpose. Neither is he exercising the judicial function when, being empowered to enter one judgment or make one order, he enters or makes one wholly different in nature. When he does this he steps over the boundary of his judicial authority, and is as much out of the protection of the law in respect to the particular act as if he held no office at all. This is a general rule.[19] Jurisdiction in a judge may be defined as the authority of law to act officially in the matter then in hand.[20] In favor of the action of superior courts, or

[19] Case of the Marshalsea, 10 Co. 68; Groenvelt v. Burwell, 1 Ld. Raym. 454; Yates v. Lansing, 5 Johns, 282; Phelps v. Sill, 1 Day, 315; Palmer v. Carroll, 24 N. H. 314; Rowe v. Addison, 34 N. H. 306; Craig v. Burnett, 32 Ala. 728; Clarke v. May, 2 Gray, 410; Piper v. Pearson, 2 Gray, 120, 61 Am. Dec. 438; State v. Nerland, 7 S. C. (N. S.) 241; Johnson v. Bouton, 35 Neb. 898, 53 N. W. 995.

[20] The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which

courts of general jurisdiction, to which vast interests and general powers are confided, it will be inferred that they have acted with full jurisdiction, and that they have assumed to do nothing that the law does not sanction.[21] Whoever, therefore, undertakes to hold a judge of such a court liable for his judicial acts, has the burden of showing that he acted without jurisdiction.[22]

On the other hand, the jurisdiction of an inferior court must appear of record and it cannot be supplied by intendment, or rest in the mere knowledge of witnesses to be brought out when the authority is questioned.[23] Therefore, a warrant of commitment which does not in its recitals show authority in the magistrate to issue it cannot be upheld.[24] Neither can a warrant issued by a magistrate for a seizure of goods, in which the same infirmity is manifest.[25] Nor a justice's commitment of a witness for contempt, issued after the case in which he was called had been disposed of.[26] But where the facts alleged before a magistrate are sufficient to give him jurisdiction, and he proceeds upon them to judgment and execution,

specially appears to be so, while nothing shall be intended to be within the jurisdiction of an inferior court but that which is specially so alleged. 1 Saund. 74. And, see The Brewers' Case, 1 Roll. Rep. 134; Parsons v. Loyd, 3 Wils. 341; Estopinal v. Peyroux, 37 La. Ann. 477. Jurisdiction is the power to hear and determine cases of the general class to which the proceeding in question belongs. Rush v. Buckley, 100 Me. 322, 330; State v. Neville, 110 Mo. 345, 19 S. W. 491.

[21] Bradley v. Fisher, 13 Wall. 335; Lange v. Benedict, 73 N. Y. 12, 29 Am. Dec. 80; Grove v. Van Duyn, 44 N. J. L. 654, 43 Am. Rep. 412; Freeman on Judgments, § 117, and cases cited; Mechem, Pub. Officers, §§ 620, 625 and cases cited.

[22] Reynolds v. Stansbury, 20 Ohio, 344, 353, 55 Am. Dec. 459; 1 Freeman, Judgments, § 124.

[23] Rossiter v. Peck, 8 Gray, 538; King v. Bates, 80 Mich. 367, 20 Am. St. Rep. 518; Root v. McFerrin, 37 Miss. 17, 75 Am. Dec. 49; Frees v. Ford, 6 N. Y. 176; Barron v. Dent, 17 S. C. 75. But see 2 Freeman, Judgments, § 518.

[24] Wickes v. Clutterbuck, 2 Bing. 483. See Hill v. Pride, 4 Call. 107; nor if commitment is for failure of officer to obey an order if there is no judgment on which to base it. Lanpher v. Dewell, 56 Ia. 153.

[25] Newman v. Earl of Hardwicke, 8 A. & E. 123; McClure v. Hill, 36 Ark. 268.

[26] Clark v. May, 2 Gray, 410.

his right to exemption from liability cannot be affected by the truth or falsity of those facts, or the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them.[27] Whether a different and more strict rule is to be applied to the case of inferior judges, than to the case of superior judges, in determining questions of jurisdiction, is a matter upon which the authorities differ.[28] Some recent cases hold that the same rules should be applied to both.[29] The supreme court of Maine, in a very recent case, expresses itself as follows upon this question: "We favor the doctrine, towards which we think, there is a strong tendency in more recent judicial opinion, that where a judge of an inferior court, or a magis

[27] Cave v. Mountain, 1 M. & G. 257; Dixon v. Cooper, 109 Ky. 29, 58 S. W. 437; Connolly v. Woods, 31 Kan. 359; Vennum v. Huston, 38 Neb. 293, 56 N. W. 970; Booth v. Kurrus, 55 N. J. L. 370, 26 Atl. 1013; Wheeler v. Gavin, 5 Ohio C. C. 246; Smith v. Jones, 16 S. D. 337, 92 N. W. 1084; Marks v. Sullivan, 9 Utah, 12, 33 Pac. 224; Terry v. Wright, 9 Colo. App. 11, 47 Pac. 905. When inferior courts or judicial officers act without jurisdiction the law can give them no protection whatever. Mitchell v. Galen, 1 Alaska, 339; De Courcey v. Cox, 94 Cal. 665, 30 Pac. 95; State v. Wolever, 127 Ind. 306, 26 N. E. 762; Horne v. Pudil, 88 Ia. 533, 55 N. W. 485; Glazar v. Hubbard, 102 Ky. 68, 42 S. W. 1114, 80 Am. St. Rep. 340, 39 L. R. A. 210; Head v. Levy, 52 Neb. 456, 72 N. W. 583. Where a justice of the peace granted a fourth continance in violation of a statue, in consequence of which he lost jurisdiction of the case, but afterwards issued a subpoena for a witness in the case and afterwards an attachment for the same witness, under which the latter was arrested, it was held the justice was liable for false imprisonment. Holz v. Rediske, 116 Wis. 353, 92 N. W. 1105.

[28] See the rule applied in case of superior judges in Bradley v Fisher, 13 Wall. 335, and the rule applied to inferior judges in Wingate v. Waite, 6 M. & W. 939; Houlden v. Smith, 14 Q. B. 841; Piper v. Pearson, 2 Gray. 120, 61 Am. Dec. 438; also Mechem, Pub. Officers, §§ 632, 633.

[29] Calhoun v. Little, 106 Ga. 336 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630; State v. Wolever, 127 Ind. 306, 26 N. E. 762; Thompson v. Jackson, 93 Ia. 376, 61 N. W. 1004, 27 L. R. A. 92; Heath v. Halfhill, 106 Ia. 133, 76 N. W. 522; Rush v. Buckley, 100 Me. 322; Grove v. Van Duyn, 44 N. J. L. 654, 43 Am. Rep. 412; Austin v. Vrooman, 128 N. Y. 228, 28 N. E. 477, 14 L. A. R. 138; Banister v. Wakeman, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201; Bohri v. Barnet, 144 Fed. 389 (C. C. A.). See McCaig v. Burr, 186 N. Y. 467; Goodell v. Tower, 77 Vt. 61.

trate, is invested by law with jurisdiction over the general subject-matter of an alleged offense, that is, has power to hear and determine cases of the general class to which the proceeding in question belongs, and decides, although erroneously, that he has jurisdiction over the particular offense of which complaint is made to him, or that the facts charged in the complaint constitute an offense, and acts accordingly in entire good faith, such erroneous decision is a judicial one for which he should not be, and is not, liable in damages to a party who has been thereby injured. We can perceive no good reason why the judge of general local, but inferior, jurisdiction should not be as fully protected against the consequences of his erroneous judicial decision, concerning a matter within the limits of his general jurisdiction over offenses of the same general nature, as should judges of superior courts for their judicial mistakes." [30]

§ 211. **Judge interested.** The magistrate or officer cannot protect himself behind his judicial or discretionary action, if it shall turn out that he was interested, and has assumed to sit or act in his own case, or in that of one of his near relatives, in whose case he would be disqualified to sit as a juror. His action under such circumstances is a mere nullity.[31] So, in general, if he is complainant or moving party in a prosecution or proceeding, he cannot act in deciding it.[32]

§ 212. **Ministerial action by judicial officers.** All judges may have duties imposed upon them which are purely ministerial, and where any discretionary action is not permitted. An illustration is to be found in the *habeas corpus* acts. These, generally, make it imperative that a judge, when an applica-

[30] Rush v. Buckley, 100 Me. 322, 331.

[31] Hall v. Thayer, 105 Mass. 219, citing Davis v. Allen, 11 Pick. 466, 22 Am. Dec. 386; Wolcott v. Ely, 2 Allen, 338; McGough v. Wellington, 6 Allen, 505; Fox v. Hazelton, 10 Pick. 275; Strong v. Strong, 9 Cush. 560, 574. And, see Dimes v. Proprietors, etc., 3 H. L. Cas. 787; Stockwell v. White Lake, 22 Mich. 341; Scanlan v. Turner, 1 Bailey, 421; Bedall v. Bailey, 58 N. H. 62; Matter of Ryers, 72 N. Y. 1, 28 Am. Rep. 88; Chase v. Weston, 75 Ia. 159, 39 N. W. 246; Stone v. Marion County, 78 Ia. 14, 42 N. W. 570.

[32] Rex v. Great Yarmouth, 6 B. & C. 646; Rex v. Hoseason, 14 East, 605, 608.

tion for the writ is presented which makes out a *prima facie* case of illegal confinement, shall issue the writ forthwith; and the judge is expressly made responsible in damages if he fails to obey the law. A similar liability arises when a justice of the peace refuses to issue a summons to one who lawfully demands it, or an execution on a judgment he has rendered,[33] or to enter up a judgment he has determined upon,[34] or to perform any other official act which in its nature is purely ministerial;[35] or when, in performing an official duty he is guilty of misconduct, to the prejudice of a party, as where he makes a false return to a writ of *certiorari*.[36] And generally "When the law assigns to a judicial office the performance of ministerial acts, he is as responsible for the manner in which he performs them, or for neglecting or refusing to perform them, as if no judicial functions were intrusted to him."[37]

§ 213. **Quasi judicial officers.** Apart from judges and magistrates, there is a large class of officers who are clothed with power and authority to be exercised according to their judgment and discretion. Their duties are of a judicial nature and they may appropriately be styled *quasi*-judicial officers.[38] As a general rule, they are exempt from liability to individuals

[33] Place v. Taylor, 22 Ohio St. 317; Gaylor v. Hunt, 23 Ohio St. 255. For the general rule, see Wilson v. New York, 1 Denio, 595; Rochester White Lead Co. v. Rochester, 3 N. Y. 463, 53 Am. Dec. 316; Noxon v. Hill, 2 Allen, 215; Way v. Townsend, 4 Allen, 114.

[34] Fairchild v. Keith, 29 Ohio St. 156.

[35] Such as to return in due time the papers on an appeal taken from his judgment. Peters v. Land, 5 Blackf. 12. Or to take security on issuing a writ of replevin. Smith v. Trawl, 1 Root, 165. Or security on an appeal. Tompkins v. Sands, 8 Wend. 462, 24 Am. Dec. 46. The general rule is, that when judicial officers are required to perform ministerial acts, they may be sued for neglect to do so. Ferguson v. Earl of Kinnoull, 9 Cl. & Fin. 251; Noxon v. Hill, 2 Allen, 215. For the refusal of a probate judge to issue a liquor license when all the requirements of the law have been complied with, his bondsmen are liable. Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65.

[36] Pangburn v. Ramsay, 11 Johns. 141, or an appeal. Brooks v. St. John, 25 Hun, 540. So highway commissioners for such return to a certiorari. Rector v. Clark, 78 N. Y. 21.

[37] Grider v. Tally, 77 Ala. 422, 424, 54 Am. Rep. 65.

[38] Mechem, Pub. Officers, §§ 636, 637.

for any mistake or neglect in the exercise of such powers.[38] The law applicable is well stated in one of the cases cited, as follows: "Discretionary power is, in its nature, independent, and to make those who wield it liable to be called to account by some other authority, is to take away discretion and destroy independence. Discretion, to a certain extent, implies judicial functions; and when officers act in such a capacity, they are not liable to any private person for a neglect to exercise these powers, nor for the consequences of a lawful exercise of them where no corruption or malice can be imputed, and they keep within the scope of their official duties and authority. It is not enough to charge or show that they omitted to act when they ought to have done so, or that their decisions were erroneous."[40] This rule of judicial immunity extends to military and naval officers in exercising their authority to order courts-martial for the trial of their inferiors, or in putting their inferiors under arrest preliminary to trial; and no inquiry into their motives in doing so can be suffered in a civil suit.[41] It extends also to grand and petit jurors in the discharge of their duties as such;[42] to assessors upon whom is imposed the duty of valuing property for the purpose of a levy of taxes;[43] to commissioners appointed to appraise dam-

[39] People v. Bartels, 138 Ill. 322, 27 N. E. 1091; Barry v. Smith, 191 Mass. 78; Amperse v. Winslow, 75 Mich. 234, 42 N. W. 823 Pawlowski v. Jenks, 115 Mich. 275, 73 N. W. 238; Jones v. Loving, 55 Miss. 109, 30 Am. Rep. 508; Schooler v. Arrington, 106 Mo. App. 607, 81 S. W. 468; Daniels v. Hathaway, 65 Vt. 247, 26 Atl. 970: United States v. Commissioner, 5 Wall. 563; Mechem, Pub. Officers, §§ 638, 639; also cases cited in following notes and sections

[40] Daniels v. Hathaway, 65 Vt. 247, 255, 26 Atl. 970.

[41] Sutton v. Johnstone, 1 T. R. 493; Grear v. Marshall, 4 Fost. & F. 485; Dawkins v. Lord Paulet, L. R. 5 Q. B. 94; S. C. 9 Best & S. 768; Dawkins v. Lord Rokeby, 4 Fost. & F. 806, where the subject was largely examined. Coroners, in holding inquests, are judges, and are not liable for excluding persons they think should not be present. Garnett v. Ferrand, 6 B. & C. 611.

[42] Hunter v. Mathis, 40 Ind. 356; Turpen v. Booth, 56 Cal. 65, 38 Am. Rep. 48; Sidener v. Russell, 34 Ill. App. 446; Engelke v. Chouteau, 98 Mo. 629, 12 S. W. 358.

[43] Ballerino v. Mason, 83 Cal. 447, 23 Pac. 530; Stewart v. Case, 53 Minn. 62, 54 N. W. 938, 39 Am. St. Rep. 575; Weaver v. Devendorf, 3 Denio, 117. See Auditor

ages when property is taken under the right of eminent domain;[44] to officers empowered to lay out, alter, and discontinue highways;[45] to highway officers in deciding that a person claiming exemption from a road tax is not in fact exempt,[46] or that one arrested is in default for not having worked out the assessment;[47] to members of a township board in deciding upon the allowance of claims;[48] to arbitrators,[49] and to the collector of customs in exercising his authority to sell perishable property, and in fixing upon the time for notice of sale,[50] and to other similar officers and boards.[51] It is an interesting and very important question whether, in the case of that class of officers who do not hold courts, but exercise power *quasi*-judicial, the immunity is not after all only partial and limited by good faith and honest purpose. There are certainly many cases which hold, and more which assume, that the law will hold such officers liable if they act maliciously to the prejudice of individuals.[52] Thus, it is said that the members of a

v. Atchison, etc., R. R. Co., 6 Kan. 500, 7 Am. Rep. 575, and a full discussion of the subject, with citation of numerous cases, in Cooley on Taxation, pp. 551 to 557.

[44] Van Steenbergh v. Bigelow, 3 Wend. 42.

[45] Sage v. Laurian, 19 Mich. 137. The case of Turnpike Road v. Champney, 2 N. H. 199, is *contra.*

[46] Harrington v. Commissioners, etc., 2 McCord, 400.

[47] Freeman v. Cornwall, 10 Johns. 470.

[48] Wall v. Trumbull, 16 Mich. 228.

[49] Pappa v. Rose, L. R. 7 C. P. 32; Jones v. Brown, 54 Ia. 74, 37 Am. Rep. 185

[50] Gould v. Hammond, 1 McAllister, 235. He is not liable, it is said, except for acting from corrupt motive.

[51] To county commissioners acting as a court. Gaines v. Newbrough, 12 Tex. Civ. App. 466, 34 S. W. 1048. To a county superintendent of schools in the matter of licensing teachers. Elmore v. Overton, 104 Ind. 548, 4 N. E. 197; Branaman v. Hinkle, 137 Ind. 496, 37 N. E. 546. To a prosecuting attorney in respect to indictments. Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001.

[52] See Hoggatt v. Bigley, 6 Humph. 236; Baker v. State, 27 Ind. 485; Chickering v. Robinson 3 Cush. 543; Gregory v. Brooks 37 Conn. 365; Wall v. Trumbull 16 Mich. 228; Seaman v. Patten, 2 Caines, 312; Tompkins v. Sands, 8 Wend. 462; Reed v. Conway, 20 Mo. 22, 24 Am. Dec. 46; Lilienthal v. Campbell, 22 La. Ann 600; Williams v. Weaver, 75 N. Y 30; McDaniel v. Tebbetts, 60 N H. 497; Harman v. Tappenden, 1 East, 555; Lenox v. Grant, 8 Mo.

school board may be held responsible for the dismissal of a teacher, if they act maliciously and without cause;[53] and a county clerk, for willfully and maliciously approving an insufficient appeal bond;[54] and a school superintendent for maliciously refusing a license to teach.[55] If courts lean against recognizing in such officers full discretionary powers, and hold them strictly within the limits of good faith, it is probably a leaning that, in most cases, will be found to harmonize with public policy.[56] Some cases, however, extend to such officers full immunity, even though they act maliciously or corruptly,[57] and this is declared by Mr. Mechem to be the better and safer rule.[58]

§ 214. **Ministerial officers.** A ministerial officer is one who is required to perform ministerial duties. "A ministerial duty is one in respect to which nothing is left to discretion."[59]

254; Stone v. Graves, 8 Mo. 148; Morrison v. McDonald, 21 Me. 550; Taylor v. Doremus, 16 N. J. L. 473; Way v. Townsend, 4 Allen, 114; Bailey v. Wiggins, 5 Harr. 462, 60 Am. Dec. 650; Little v. Moore, 4 N. J. L. 74.

[53] Bennet v. Fulmer, 49 Pa. St. 157. A school committee is not liable for expelling children from school if they act in good faith. Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256; Stewart v. Southard, 17 Ohio, 402; Stephenson v. Hall, 14 Barb. 222. See Spear v. Cummings, 23 Pick. 224, 34 Am. Dec. 53; Ferriter v. Tyler, 48 Vt. 444, 21 Am. Rep. 133.

[54] Billings v. Lafferty, 31 Ill. 318.

[55] Elmore v. Overton, 104 Ind. 548, 4 N. E. 197. See further Reed v. Conway, 20 Mo. 22; Edwards v. Ferguson, 73 Mo. 686; Chamberlain v. Clayton, 56 Ia. 331; Spitznogle v. Ward, 64 Ind. 30; McOsker v. Burrell, 55 Ind. 425; Gregory v. Brooks, 37 Conn. 365; Brown v. Lester, 21 Miss. 392. Also, Wasson v. Mitchell, 18 Ia. 153 (case of supervisors); Walker v. Halleck, 32 Ind. 239 (members of common council); Culver v. Avery, 7 Wend. 380, 22 Am. Dec. 586 (loan officer); Downing v. McFadden, 18 Pa. St. 334 (canal commissioner); Gregory v. Brown, 4 Bibb, 28, 7 Am. Dec. 731 (justice of the peace); Parmalee v. Baldwin, 1 Conn. 313; Shoemaker v. Nesbit, 2 Rawle, 201; Macon v. Cook, 2 N. & McC. 379; Stewart v. Cooley, 23 Minn. 347, 23 Am. Rep. 690.

[56] Pike v. Megoun, 44 Mo. 491.

[57] Morris v. Carey, 27 N. J. L. 377; Wilson v. New York, 1 Denio, 595, 43 Am. Dec. 719; Weaver v. Devendorf, 3 Denio, 117; East River G. L. Co. v. Donnelly, 93 N. Y. 557; Steele v. Dunham, 26 Wis. 393.

[58] Mechem, Pub. Officers, § 640.

[59] Sullivan v. Shanklin, 63 Cal. 247, 251; State v. Johnson, 4 Wall. 475, 498; Grider v. Tally, 77

Where the duty imposed upon an officer is purely ministerial, he will be held liable for an injury to another which results from his failure to perform it, or from his performance of it in a negligent or unskillful manner.[60] A ministerial duty is not changed in character because a necessity exists for the ascertainment from personal knowledge, or by information derived from other sources, of the state of facts on which the performance of an act becomes a clear and specific duty.[61]

§ 215. **Election officers.** Whether officers having charge of elections, and of the preliminary registration and other proceedings, should be shielded by the same immunity that protects judicial officers in general, is a disputed question. In the leading case of *Ashby v. White*,[62] the returning officer who refused to admit a qualified elector to vote was held liable in damages at his suit.[63] This ruling was followed in Massachu-

Ala. 422, 425, 54 Am. Rep. 65; People v. Bartels, 138 Ill. 322, 328, 27 N. E. 1091.

[60] People v. Bartels, 138 Ill. 322, 328, 27 N. E. 1091; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Sullivan v. Shanklin, 63 Cal. 247; Mock v. Santa Rosa, 126 Cal. 330, 58 Pac. 826; Wright v. Shanahan, 149 N. Y. 495, 44 N. E. 74; Anderson v. Park, 57 Ia. 69; Nowell v. Wright, 3 Allen, 166; State v. Anderson, 101 Mo. App. 468; Jenner v. Joliffe, 9 Johns. 381; Bartlett v. Crozier, 17 Johns. 439, 8 Am. Dec. 428; Robinson v. Rohr, 73 Wis. 436, 40 N. W. 668, 9 Am. St. Rep. 810; State v. Johnson, 4 Wall. 475; Ferguson v. Earl of Kennoull, 9 Cl. & Fin. 251. "The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender." Amy v. Supervisors, 11 Wall. 136, 138. In 95 Am. St. Rep. pp. 72 to 134 will be found an extensive note under the title: "Liability of ministerial officers to private individuals for the nonperformance and misperformance of official duties." And see Mechem, Pub. Officers, §§ 654–682.

[61] Grider v. Tally, 77 Ala. 422, 426, 54 Am. Rep. 65; People v. Bartels, 138 Ill. 322, 330, 27 N. E. 1091.

[62] Ld. Raym. 938; 1 Salk. 19; 8 State Trials, 89. Compare Drew v. Coulton, 1 East, 563, note.

[63] It is proper to say that this decision has been qualified by later cases, and the election officer is now held not liable for an erroneous rejection, of a vote provided he acted *bona fide*. See Cullen v. Morris, 2 Stark. 577. The same rule applied to a

setts at an early day and the law of that state is that election officers are liable in such cases, if their action is wrongful, though there was no malicious or corrupt motive.[64] So in Ohio.[65] In other states this doctrine is denied, and inspectors of election are put upon the footing of *quasi*-judicial officers, and are protected when they act within the limits of good faith, but are made to respond in damages when they maliciously deny the voter's right.[66] And the principle applies as well to the officers who have charge of the registration of voters preliminary to an election as to the judges or inspectors who receive the ballots.[67] In some states it has been deemed

church warden as officer of a parish election. Tozer v. Child, 6 El. & Bl. 289; S. C. in Exchequer Chamber, 7 El. & Bl. 377, 381, where the question is made whether Lord Holt did not insist on malice as essential to the action.

[64] Lincoln v. Hapgood, 11 Mass. 350, 355; Gardner v. Ward, 2 Mass. 244, note; Kilham v. Ward, 2 Mass. 236; Henshaw v. Foster, 9 Pick. 312; Capen v. Foster, 12 Pick. 485; Keith v. Howard, 24 Pick. 292; Blanchard v. Stearns, 5 Met. 298; Larned v. Wheeler, 140 Mass. 390, 5 N. E. 290, 54 Am. Rep. 283.

[65] Jeffries v. Ankenny, 11 Ohio 372; Anderson v. Milliken, 9 Ohio St. 568; Monroe v. Collins, 17 Ohio St. 665. See Long v. Long, 57 Ia. 497, 10 N. W. 875; Gillespie v. Palmer, 20 Wis. 544.

[66] Hyde v. Brush, 34 Conn. 454; Perry v. Reynolds, 53 Conn. 527, 3 Atl. 555; State v. McDonald, 4 Harr. 555; State v. Porter, 4 Harr. 556; Carter v. Harrison, 5 Blackf. 138; Morgan v. Dudley, 18 B. Mon. 693, 68 Am. Dec. 735; Chrisman v. Bruce, 1 Duv. 63, 85 Am. Dec. 603; Patterson v. D'Auterive, 6 La. Ann. 467, 54 Am. Dec. 564; Kelly v. Bragg, 76 Me. 207; Bevard v. Hoffman, 18 Md. 479, 81 Am. Rep. 618; Friend v. Hamill, 34 Md. 298; Gordon v. Farrar, 2 Doug. Mich. 411; Jenkins v. Waldron, 11 Johns. 114, 6 Am. Dec. 359; Goetchens v. Matthewson, 61 N. Y. 420; Peavy v. Robbins, 3 Jones, 339; Weckerly v. Geyer, 11 S. & R. 35; Keenan v. Cook, 12 R. 1, 52; Rail v. Potts, 8 Humph. 225; Fausler v. Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

[67] Fausler v. Parsons, 6 W. Va. 486, 20 Am. Rep. 431; Pike v. Megoun, 44 Mo. 492; Murphy v. Ramsey, 114 U. S. 15; Larned v. Wheeler, 140 Mass. 390, 54 Am. Rep. 483. If registration officers refuse to register a voter, but afterwards, and before the election, reconsider their action, and place his name on the list so that he may vote if he shall present himself at the polls, which he fails to do, they are not liable. Bacon v. Benchley, 2 Cush. 100. For the evidence receivable to show improper motives in the election officers in rejecting votes, see Elbin v. Wilson, 33 Md. 135; Friend v. Hamill, 34 Md. 298.

wise to make the voter himself the conclusive judge of his right to vote. If his right is questioned, an oath which embraces the several requisites of qualification is tendered to him, and if he will take this, and thus give evidence that he answers all the conditions, he must be registered for voting—if registration is required—and his ballot must be received when offered. Whenever the law thus makes a man the final judge of his own right, the election officers have only a ministerial duty to perform; they must receive the vote if the oath is taken, and they are responsible as in other cases of ministerial duties if they refuse.[68]

§ 216. **Recorder of deeds.** This office may be said to be created because it is for the general public good that all titles should appear of record, and that all purchasers should have some record upon which they may rely for accurate information. But although a public officer is chosen to keep such a record, the duties imposed upon him are for the most part duties only to the persons who have occasion for his official services. He is simply required to record for those who apply to him their individual conveyances, and to give to them abstracts or copies from the record if they request them and tender the legal fees. All these are duties to individuals, to be performed for a consideration; the state is not expected to enforce the performance, nor does it generally provide for punishing as a breach of the public duty the failure in performance. But the right to a private action on breach of the duty follows as of course.[69] The breach is an individual wrong, and resulting damage must be presumed, whether it is or is not susceptible of proof. The authorities are not agreed on the question who should sustain the loss when the grantee in a deed has duly left it for record, and the recorder has failed to record it correctly. The question in such a case would commonly arise between the grantee in such a deed

[68] See Spragins v. Houghton, 3 Ill. 377; State v. Robb, 17 Ind. 536; Gillespie v. Palmer, 20 Wis. 544; People v. Pease, 30 Barb. 588; Chrisman v. Bruce, 1 Duv. 63, 85 Am. Dec. 603; People v. Gordon, 5 Cal. 235.

[69] Clark v. Miller, 54 N. Y. 528; Keith v. Howard, 24 Pick. 292; Commissioners v. Duckett, 20 Md. 468.

and some person claiming under a subsequent conveyance by the same grantor, which has been put upon record while the error in the other remained uncorrected. In some cases it has been held that the grantee in the first deed is not to be prejudiced by the recorder's error.[70] On the other hand, there are many cases in which it has been decided that every one has a right to rely upon the record actually made as being correct, and that, if it is erroneous, the peril is upon him whose deed has been incorrectly recorded.[71] The differences in these decisions may be accounted for, in part by differences in the statutes involved.

Sometimes the error of the recorder consists in not indexing the conveyance, or in indexing it incorrectly. Here, also the effect of error must depend upon the statute, and the purpose it has in view in requiring an index to be made. In general, the purpose probably is to facilitate the examination of the records by the officer; not to protect the interests of those whose conveyances are recorded;[72] and where such is the fact, an error in the index, or a failure to index a deed, would not prejudice the title of the grantee.[73] But some statutes require

[70] Merrick v. Wallace, 19 Ill. 486; Garrard v. Davis, 53 Mo. 322; Polk v. Cosgrove, 4 Biss. 437; Riggs v. Boylan, 4 Biss. 445; Mims v. Mims, 35 Ala. 23; McGregor v. Hall, 3 Stew. & P. 397.

[71] Frost v. Beekman, 1 Johns. Ch. 288, 298; Beekman v. Frost, 18 Johns. 544, 9 Am. Dec. 246; N. Y. Life Ins. Co. v. White, 17 N. Y. 469; Sanger v Craigue, 10 Vt. 555; Baldwin v. Marshall, 2 Humph. 116; Heister's Lessee v. Fortner, 2 Binn. 40, 4 Am. Dec. 417; Lally v. Holland, 1 Swan. 396; Shepherd v. Burkhalter, 13 Geo. 444; Miller v. Bradford, 12 Iowa, 14; Chamberlain v. Bell, 7 Cal. 292; Parrett v. Shaubhut, 5 Minn. 323; Barnard v. Campau, 29 Mich. 162; Terrell v. Andrew County, 44 Mo. 309; Brydon v. Campbell, 40 Md. 331; Jenning's Lessee v. Wood, 20 Ohio, 261. The defects in these cases were various. In the Ohio case the name of the grantor was incorrectly given, and in the Minnesota case the name of one of the witnesses was not copied in the record. Where a recorder negligently recorded a lien for $500 as one for $200, it was held the plaintiff was entitled to only nominal damages unless he showed that the difference could not be collected from the person obligated to pay the amount. State v. Davis, 117 Ind. 307, 20 N. E. 159.

[72] See Schell v. Stein, 76 Penn. St. 398, 18 Am. Rep. 416.

[73] Curtis v. Lyman, 24 Vt. 338, 58 Am. Dec. 174; Commissioners

the index to give information of the contents of the deed, and particularly what land is conveyed by it; and where this is the case, the record is not constructive notice of the conveyance of anything which the index does not indicate.[74]

The recorder of deeds may also injure some person by giving him an erroneous certificate. The liability for this is clear if the giving of the certificate was an official act; otherwise not. It was an official act if it was something the person obtaining it had a right to, and which it was the recorder's duty to give.[75] Thus one has a right to call for copies to be made from the records, and for official statements of what appears thereon; and he is entitled to have these certified to him correctly. But he is not entitled to call upon the recorder for a certificate that a particular title is good or bad; and such certificate if given would not be official. The recorder is liable only to the person with whom he contracts and not to a third person who may have relied upon his certificate and been injured thereby.[76] The recorder may also be responsible for recording papers not entitled to record, provided the record, when made, may cause legal injury, and, provided further, he is aware that the record is unauthorized. Thus, a paper he knows to be forged he has no right to record, and if he puts it upon record to the damage of any one, the misfeasance is actionable.[77]

§ 217. Inspectors. The case of inspector of provisions is also one in which duties are imposed in respect to the public

v. Babcock, 5 Ore. 472; Schell v. Stein, 76 Penn. St. 398, 18 Am. Rep. 416; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533.

[74] Scoles v. Wilsey, 11 Iowa, 261; Breed v. Conley, 14 Iowa, 269, 81 Am. Dec. 485; Gwynn v. Turner, 18 Iowa, 1. Recorder is liable for failure to index to one injured thereby. Reeder v. Harlan, 98 Ind. 114; Norton v. Kumpe, 121 Ala. 446, 25 So. 841; First Nat. Bank v. Clements, 87 Ia. 542, 54 N. W. 197.

[75] Liable for search certified by his clerk. Van Schaick v. Sigel, 60 How. Pr. 122. Liable for negligence in abstracting under contract. Smith v. Holmes, 54 Mich. 104.

[76] Housman v. Girard Building etc., Association, 81 Pa. St. 256. Compare Ware v. Brown, 2 Bond, 267. If, however, the certificates were purposely and knowingly made false with fraudulent intent, no doubt the recorder might be liable to one defrauded by it. Wood v. Ruland, 10 Mo. 143.

[77] Ramsey v. Riley, 13 Ohio 157.

and also in respect to individuals. The requirement of inspection is an important sanitary regulation, and to some extent the public depend upon it for protection against the diseases that might be engendered or disseminated by the sale of unwholesome food. But it is also important to individual purchasers; they have a right to rely upon it, and if they are betrayed by such reliance they may have their action.[78] Other officers performing similar services come under the same liability.[79]

§ 218. **Postmasters.** The case of the postmaster affords a similar illustration. It was decided at an early date that the duties of the postmaster-general were exclusively public; that the postoffice was an institution of the government, established and regulated by law; that all of its officers and agents were officers and agents of the government and not of the postmaster-general; that as between the postmaster-general or any officer or agent of the postoffice on the one hand, and the public accommodated by it on the other, there were no implied contract relations; and that while each officer and agent might be liable in a proper form of action to any individual who suffered from his neglect of duty, no one of them was liable for the default of another and therefore the postmaster-general could not be held responsible for the loss of a letter containing exchequer bills which was opened and the bills taken out in the London postoffice.[80] But the local postmaster unques-

[78] Hayes v. Porter, 22 Me. 371; Nickerson v. Thompson, 33 Me. 433; Tardos v. Bozant, 1 La. Ann. 199. In Seaman v. Patten, 2 Caines, 312, it is held that the inspector is only liable when malice or corruption is alleged and proved. The fact that the statute imposes a penalty on the officer for neglect of duty will not preclude a private action. Hayes v. Porter, 22 Me. 371.

[79] So held of a building inspector who negligently permitted the construction of a building adjoining the plaintiff's house, not in accordance with the ordinance, in consequence of which it fell on the plaintiff's house and killed his infant child. Merritt v. McNally, 14 Mont. 228, 36 Pac. 44. A statute made an oil inspector civilly and criminally liable if "guilty of any fraud, deceit, misconduct or culpable neglect in the discharge of his official duties." He was held not liable for the false branding of oils unless it was intentionally done. Hatcher v. Dunn, 102 Ia. 411, 70 N. W. 603, 36 L. R. A. 689.

[80] Lane v. Cotton, 1 Ld. Raym. 646; S. C. 12 Mod. 471, 1 Salk. 17. See Smith v. Powditch, Cowp.

tionably has imposed upon him duties to individuals as well as to the public. He is to receive and forward mail to other offices; to keep correct accounts with the department, and perhaps with contractors; to draw money orders, etc. But in respect to mail matter received at his office for delivery, a duty is fixed upon him in behalf of the several persons to whom each letter, paper or parcel is directed. When the proper person calls for what is there for delivery, the postmaster must deliver it, and his refusal to do so is a tort.[81] The postmaster is also liable to the person entitled to it for the loss, through his own carelessness or that of any of his clerks or servants, of any letter or other mail matter which shall have come to his official custody.[82] But it has been held in several cases that the postmaster is not liable for the loss or abstraction of a letter by one of his sworn assistants, whose appointment must be approved and can at any time be terminated by the department.[83] Neither is a mail carrier responsible for the loss of mail matter through the carelessness or dishonesty of one of his sworn assistants,[84] but he is liable if the loss is attributable to his own servant, or to any unsworn assistant.[85]

§ 219. Sheriffs. The case of a sheriff is also that of an officer upon whom the law imposes duties to individuals as well as to the public. In so far as he acts as a peace officer, and in the service of criminal process, individuals are concerned only that he shall commit no trespass upon them or their property. In the service of civil process, however, the sheriff is

182; Rowning v. Goodchild, 2 W. Bl. 906; Whitfield v. Le DeSpencer, Cowp. 754, 765; Hutchins v. Brackett, 22 N. H. 252.

[81] Teall v. Felton, 1 N. Y. 537, 49 Am. Dec. 325; S. C. in error, 12 How. 284.

[82] Bishop v. Williamson, 11 Me. 495; Bolan v. Williamson, 1 Brev. 181; Coleman v. Frazier, 4 Rich. 146; Christy v. Smith, 23 Vt. 663; Ford v. Parker, 4 Ohio St. 576; Raisler v. Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213.

[83] Schroyer v. Lynch, 8 Watts, 453; Wiggins v. Hathaway, 6 Barb. 632; Bolan v. Williamson, 2 Bay, 551; Raisler v. Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213.

[84] Hutchens v. Brackett, 22 N. H. 252; Conwell v. Voorhees, 13 Ohio, 523, 42 Am. Dec. 206.

[85] Sawyer v. Corse, 17 Grat. 230, 99 Am. Dec. 445. See Barnes v. Foley, 1 W. Bl. 643; S. C. Burr. 2149.

charged with duties only to the party to the proceedings. Thus, he is liable to the plaintiff for refusal or neglect to serve process, or want of diligence in service;[86] for the escape of a defendant who was lawfully arrested on civil process, either mesne or final;[87] for neglect or refusal to return process;[88] for making a false return;[89] for negligently caring for goods, whereby some of them are lost;[90] for neglect to pay

[86] Howe v. White, 49 Cal. 658; State v. Lawrence, 64 N. C. 483; State v. Porter, 1 Harr. 126; Hinman v. Borden, 10 Wend. 367, 25 Am. Dec. 563; Todd v. Hoagland, 36 N. J. L. 352; Hoagland v. Todd, 37 N. J. L. 544; Kearney v. Fenn, 87 Mo. 310; Adams v. Spangler, 17 Fed. 133; Smith v. Heineman, 118 Ala. 195, 24 So. 364; Hamberger v. Seavey, 165 Mass. 505, 43 N. E. 297; People v. Colerick, 67 Mich. 362, 34 N. W. 683; State v. Planet Property, etc., Co., 41 Mo. App. 439; Steele v. Crabtree, 40 Neb. 420, 58 N. W. 1022; Bachelder v. Chaves, 5 N. M. 562, 25 Pac. 783; Commonwealth v. Comrey, 174 Pa. St. 355, 34 Atl. 581. If the officer cannot serve process he can only excuse himself by turning it over to another officer for service. Freudenstein v. McNier, 81 Ill. 208.

[87] Farnsworth v. Tilton, 1 D. Chip. 297; Middlebury v. Haight, 1 Vt. 423; Wait v. Dana, Brayt. 37; Kellogg v. Gilbert, 10 Johns. 220, 6 Am. Dec. 335; Currie v Worthy, 3 Jones (N. C.), 315; Lash v. Ziglar, 5 Ired. 702; Faulkner v. State, 6 Ark. 150; Hopkinson v. Leeds, 78 Penn. St. 396; Browning v. Rittenhouse, 38 N. J. L. 279; Crane v. Stone, 15 Kan. 94; Brown Co. v. Butt, 2 Ohio, 348; Hootman v. Shriner, 15 Ohio St. 43; State v. Mullen, 50 Ind. 598; Pease v. Hubbard, 37 Ill. 257; Swan v. Bridgeport, 70 Conn. 143, 39 Atl. 110; Hoagland v. State, 22 Ind. App. 204, 40 N. E. 931, 72 Am. St. Rep. 298. Every liberty given to a prisoner, not authorized by law is an escape. Colby v. Sampson, 5 Mass. 310; Hoagland v. State, 22 Ind. App. 204, 40 N. E. 931, 72 Am. St. Rep. 298. So is a removal of the prisoner out of the county without authority. McGruder v. Russell, 2 Blackf. 18. Only the act of God or of the public enemy can excuse an escape. Saxon v. Boyce, 1 Bailey, 66; Cook v. Irving, 4 Strob. 204; Smith v. Hart, 2 Bay, 395; Shattuck v. State, 51 Miss. 575, 24 Am. Rep. 624; Eads v. Wynne, 79 Hun, 463, 29 N. Y. S. 983.

[88] State v. Schar, 50 Mo. 393. Not liable in Missouri for failure to return unless damage is shown. State v. Case, 77 Mo. 247. But to the contrary see Bachman v. Fenstermacher, 112 Penn. St. 331; Atkinson v. Heer, 44 Ark. 174.

[89] Duncan v. Webb, 7 Ga. 178; Kearney v. Fenn, 87 Mo. 310, even though no damage is shown; State v. Case, 77 Mo. 247; Dunham v. Reilly, 110 N. Y. 366, 18 N. E. 89.

[90] Jenner v. Joliffe, 9 Johns. 381; Conover v. Gatewood, 2 A. K. Marsh. 568; Cresswell v. Burt, 61

over moneys collected,[91] and the like.[92] The rules applicable to the case of a constable are the same, and need not be separately examined.[93]

The same act or neglect of a sheriff may sometimes afford ground for an action on behalf of each party to the writ; as where having levied upon property, he suffers it to be lost or destroyed through his negligence. In such a case the plaintiff may be wronged, because he is prevented from collecting his debt, and the defendant may be wronged because a surplus that would have remained after satisfying the debt is lost to him. The officer owed to each the duty to keep the property with reasonable care; and there is a breach of duty to each when he fails to do so.

Ia. 590; Burns v. Lane, 138 Mass. 350. So for negligently giving up goods attached. Mooney v. Broadway, 2 Arizona, 107, 11 Pac. 114; De Yampert v. Johnson, 54 Ark. 165, 15 S. W. 363. Where goods are destroyed by fire while in the possession of the sheriff under a writ of attachment, he is not liable unless negligent. State ex rel. Barnett v. Dalton, 69 Miss. 611, 10 So. 578.

[91] Norton v. Nye, 56 Me. 211. Even if collected after the return of the writ. Nash v. Muldoon, 16 Nev. 404. If he delivers the goods, he is liable for the price whether he has received money or not. Robinson v. Brennan, 90 N. Y. 208; Disston v. Strauck, 42 N. J. L. 546; and although plaintiff's attorney consents to a delay in payment. Disston v. Strauck, 42 N. J. L. 546. See State v. Spencer, 74 Mo. 314.

[92] An action lies against an officer for negligently approving an insufficient replevin bond. Stern v. Knowlton, 184 Mass. 29, 67 N. E. 869; Shull v. Barton, 56 Neb. 716, 77 N. W. 132, 71 Am. St. Rep. 698. Where a sheriff paid over money on an order of court, which was void for lack of jurisdiction in the court to make it, the order is no defense to a suit for the money. Linck v. Troll, 84 Mo. App. 49.

[93] The following cases consider the liability of a jailor for escapes: Alsept v. Eyles, 2 H. Bl. 108; Elliott v. Norfolk, 4 T. R. 789; Fuller v. Davis, 1 Gray, 612; Way v. Wright. 5 Metc. 380; Wilkins v. Willet, 1 Keyes, 521; Shattuck v. State, 51 Miss. 575.

[94] Jenner v. Joliffe, 9 Johns. 381, 385; Bank of Rome v. Mott, 17 Wend. 554; Bond v. Ward, 7 Mass. 123, 129; Purrington v. Loring, 7 Mass. 388; Barrett v. White, 3 N. H. 210, 224, 14 Am. Dec. 352; Weld v. Green, 10 Me. 20; Franklin Bank v. Small, 24 Me. 52; Mitchell v. Commonwealth, 37 Pa. St. 187; Hartleib v. McLane, 44 Pa. St. 510, 84 Am. Dec. 464; Gilmore v. Moore, 30 Ga. 628; Banker v. Caldwell, 3 Minn. 94; Tudor v. Lewis, 3 Met. (Ky.) 378; Abbott v. Kimball, 19 Vt. 551, 47 Am. Dec. 708; Fay v

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It would be an abuse of proc

goods sold under it;[97] or if he should make sale w
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attract the attention and invite the presence of pa
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isfy the demand and costs,[99] or if he makes an exce

Wrongs by a sheriff to others than the parties t
generally a consequence of his mistakes or his c
Thus, he may on an execution against one person
seize the goods of another. He must at his peril ma
takes here.[2] The sheriff in seizing property upon his
always respect the liens of third persons. Thus, if
thorized on a writ against a mortgagor, to levy upon
mortgaged, he can only take them subject to th

[97] Giberson v. Wilber, 2 N. J. L. 410, though it is through a dummy. Downey v. Lyford, 57 Vt. 507.

[98] Carrier v. Esbaugh, 70 Penn. St. 239; Hayes v. Buzzell, 60 Me. 205; Sawyer v. Wilson, 61 Me. 529. The plaintiff may hold him for such sale. Sheehy v. Graves, 58 Cal. 449. Or should he sell at a different time from that stated in the notice. Smith v. Gates, 21 Pick. 55; Pierce v. Benjamin, 14 Pick. 356, 25 Am. Dec. 396. Or at meantime, the officer ble to the defendant f of the property if he turn it as required. Hammer, 120 Ala. 463 74 Am. St. Rep. 43.

[2] Moores v. Winte 189, 53 S. W. 1057; Jacobs, 10 Colo. 449, Johnson v. Jones, 16 Pac. 584; Holton v. T 508, 6 S. E. 15; Wa mond, 94 Ga. 623, 19 Hanchett v. Williams,

rights of the mortgagee, and all his subsequent proceedings must be in subordination to such right.[3] So, where mechanics' or any other liens exist, he must recognize and take in subordination to them, and whatever he may do that prejudices the lien is wrongful.

Where a prisoner is entitled to be discharged upon giving sufficient bail to the sheriff and the latter refuses to permit him to obtain bail, he is liable in case.[4] A sheriff is not liable for an assault upon a prisoner by a fellow prisoner,[5] nor for his death at the hands of a mob [6] if he was guilty of no fraud or negligence in the matter. No action lies against the sheriff for taking the photograph of a prisoner, his height, weight, description, etc., if no physical violence is used.[7]

It has been stated in another place that a sheriff is responsible for the misfeasance and nonfeasance of his deputies. This is the general rule.[8] Where, however, the deputy is employed to do something not connected with his office although he may be employed because of the office, he must be regarded as a mere private agent, and the sheriff is not responsible for his conduct. An illustration is where a chattel mortgage is delivered to the deputy to foreclose by seizing the property mortgaged. As any agent might do this, it is plainly not an official act.[9] The same is true of a deputy serving a distress warrant,[10] or doing any other act which the law does not require the sheriff officially to perform.[11]

[3] Hobart v. Frisbie, 5 Conn. 592; O'Neal v. Wilson, 21 Ala. 588; Merritt v. Niles, 25 Ill. 282; Worthington v. Hanna, 23 Mich. 530; Saxton v. Williams, 15 Wis. 292; Schrader v. Wolfin, 21 Ind. 238; Wootton v. Wheeler, 22 Tex. 338; Jordan v. Wells, 104 Ala. 383, 16 So. 23; Koch v. Peters, 97 Wis. 492, 73 N. W. 25.

[4] Taylor v. Smith, 104 Ala. 537, 16 So. 629.

[5] Gunther v. Johnson, 36 App. Div. 437, 55 N. Y. S. 869.

[6] State v. Wade, 87 Md. 529, 40 Atl. 104, 40 L. R. A. 628.

[7] State v. Clausmeier, 154 Ind. 599, 57 N. E. 541, 77 Am. St. Rep. 511, 50 L. R. A. 73.

[8] See Frizzell v. Duffer, 58 Ark. 612, 25 S. W. 1111; Foley v. Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123; Elwell v. Reynolds, 6 Kan. App. 545, 51 Pac. 578; Shields v. Pflanz, 101 Ky. 407, 41 S. W. 267; *ante*, § 35.

[9] Dorr v. Mickley, 16 Minn. 20.

[10] Moulton v. Norton, 5 Barb. 286.

[11] Harrington v. Fuller, 18 Me. 277, 36 Am. Dec. 719, citing

Nor is the sheriff liable where, by consent of the plaintiff in the writ, the deputy does something not within his official authority, such as giving credit on an execution sale;[12] or accepting in payment something besides money;[13] nor in any case is he liable to the plaintiff for acts of the deputy which the plaintiff himself or his attorney, directed or advised,[14] or in respect to which they gave discretionary authority to the deputy, within which he confined his action.[15]

§ 220. **Notaries public.** A notary public, by assuming to perform any official duty on request of a party concerned, impliedly undertakes to discharge it faithfully, and is liable to the extent of any resulting injury if he fails to do so.[16] An illustration is, where commercial paper is delivered to him for protest and notice to the endorsers;[17] or where he undertakes to certify to the acknowledgement of a conveyance.[18] Where,

Knowlton v. Bartlett, 1 Pick. 271; Cook v. Palmer, 6 B. & C. 739.

[12] Gorham v. Gale, 7 Cow. 739, 17 Am. Dec 549; Armstrong v. Harrow, 6 Cow. 465.

[13] Moore v. Jarrett, 10 Tex. 210.

[14] Cook v. Palmer, 6 B. & C. 739; Marshall v. Hosmer, 4 Mass. 60; Tobey v. Leonard, 15 Mass. 200; Smith v. Berry, 37 Me. 298; Acker v. Ledyard, 8 Barb. 514; Humphrey v. Hathorn, 24 Barb. 278; Stevens v. Colby, 46 N. H. 163; Eastman v. Judkins, 59 N. H. 576; Odom v. Gill, 59 Ga. 180.

[15] DeMoranda v. Dunkin, 4 T. R. 120; Strong v. Bradley, 14 Vt. 55.

[16] Stork v. Am. Surety Co., 109 La. 713, 33 So. 742.

[17] Bank of Mobile v. Marston, 7 Ala. 108; Bowling v. Arthur, 34 Miss. 41; May v. Jones, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637. But the notary is not liable if he obeys directions, even though they prove erroneous. Commercial Bank v. Varnum, 49 N. Y. 269. Nor where by the neglect of the holder of the note to keep good his rights as they then existed, the notary lost a valuable right of subrogation. Emmerling v. Graham, 14 La. Ann. 389. Nor where the endorser has voluntarily made payment after the neglect of the notary to fix his liability. Warren Bank v. Parker, 8 Gray, 221. Nor where, independent of the notice which the notary has failed to give to the endorser, the holder of the paper can hold the endorser on other grounds. Franklin v. Smith, 21 Wend. 623.

[18] Joost v. Craig, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 374; State v. Grundon, 90 Mo. App. 266. Notary held responsible for not certifying to the facts requisite to make out a sufficient acknowledgment. Fogarty v. Finlay, 10 Cal. 239, 70 Am. Dec. 714. See Bank v. Murfey, 68 Cal. 455. No recovery under California statute when if no mistake had been made the deed would have been worthless

by reason of the failure of a notary to properly attest a will, the will was declared void and the plaintiff lost a legacy, he was held liable.[19]

§ 221. Taxing officers. Officers whose duty requires them to levy a tax to satisfy a judgment, and who refuse or neglect to do so, though commanded to proceed by competent judicial authority, are liable to the judgment creditor for their failure. "The rule," it is said, in such a case, "is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty, and honest intentions, will not excuse the offender."[20] Where assessors erroneously assessed a poll tax against the plaintiff, in consequence of which he was arrested and compelled to pay the tax and costs, the assessors were held liable for the arrest and damages.[21]

§ 222. Highway officers. There seems to be a little difficulty in determining whether, where an officer is charged with the

because the land was. McAllister v. Clement, 75 Cal. 182, 16 Pac. 775. None in Iowa, unless he acted knowingly as well as negligently. Scotten v. Fegan, 61 Ia. 236. Intentional dereliction must appear, the act is a judicial one. Com. v. Haines, 97 Pa. St. 228, 39 Am. Rep. 805. His motive must have been malicious or corrupt. Henderson v. Smith, 26 W. Va. 829. The notary who gives a false certificate of acknowledgment is liable to the grantee only; not to a subsequent purchaser under him, who may find his title defective in consequence. Ware v. Brown, 2 Bond, 267. When a notary takes the acknowledgment of a person unknown to him, he can protect himself from liability only by complying strictly with the statute. Joost v. Craig, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 374; People v. Bartels, 138 Ill. 322, 27 N. E. 1091; State v. Grundon, 90 Mo. App. 266.

[19] Weintz v. Kramer, 44 La. Ann. 35, 10 So. 416.

[20] Swayne, J., in Amy v. Supervisors, 11 Wall. 136, 138; St. Joseph, etc., Co. v. Leland, 90 Mo. 177, 59 Am. Rep. 9. In the case of an official neglect, the delinquent officer could only be liable for the actual damages. Tracy v. Swartwout, 10 Pet. 80. And if the duty consisted in giving credit for moneys, he would not be chargeable in damages beyond the interest on the moneys. Kendall v. Stokes, 3 How. 87.

[21] Allison v. Hobbs, 96 Me. 26, 51 Atl. 245.

duty of making and repairing highways and public bridges, this duty can be regarded as a duty to individuals who may have occasion to use the public way, or whether, on the other hand, it is to be considered a duty to the public only. In New York it was decided in an early case, that an action would not lie against an overseer of highways, at the suit of a party injured in consequence of a bridge within his jurisdiction being out of repair.[22] The doctrine of that case has been fully approved in South Carolina,[23] Indiana,[24] Ohio,[25] and other states.[26] Later New York cases, where suits have been brought against commissioners of highways, lay down a different doctrine, and hold them responsible for injuries caused by their neglect to keep the public ways in repair, provided they have the means of doing so.[27] So in some other states.[28]

§ 223. **Clerks of courts and other officers.** The clerk of a court may be liable to the party damnified for neglecting to put a case on the docket when his duty required it;[29] for failure to enter up a judgment upon the roll;[30] for neglect to issue a summons to the sheriff on a petition and *praecipe* to review a judgment;[31] for taking upon himself without the sanction

[22] Bartlett v. Crozier, 17 Johns. 439, 8 Am. Dec. 428, reversing same case, 15 Johns. 250.

[23] McKenzie v. Chovin, 1 McMul. 222. See Young v. Commissioners, 2 Nott & McCord, 537.

[24] Lynn v. Adams, 2 Ind. 143.

[25] Dunlap v. Knapp, 14 Ohio St. 64, 82 Am. Dec. 468.

[26] McConnell v. Dewey, 5 Neb. 385; Worden v. Witt, 4 Ida. 404, 39 Pac. 1114, 95 Am. St. Rep. 70; Schooler v. Arrington, 106 Mo. App. 607, 81 S. W. 468. See Neville v. Viner, 115 Ill. App. 364; Daniel v. Hathaway, 65 Vt. 247, 26 Atl. 970.

[27] Hoover v. Barkhoof, 44 N. Y. 113; Bennett v. Whitney, 94 N. Y. 302; Bryant v. Randolph, 133 N. Y. 70, 30 N. E. 657.

[28] Butler v. Ashworth, 102 Cal. 663, 36 Pac. 922; Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; Gould v. Schermer, 101 Ia. 582, 70 N. W. 697; Robinson v. Rohr, 73 Wis. 436, 40 N. W. 668, 9 Am. St. Rep. 810. See Bowden v. Derby, 97 Me. 536, 55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223; Bowden v. Derby, 99 Me. 208, 58 Atl. 993; Bates v. Horner, 65 Vt. 471, 27 Atl. 134, 22 L. R. A. 824; Hathaway v Hinton, 1 Jones, N. C. 243.

[29] Brown v. Lester, 21 Miss. 392.

[30] Douglass v. Yallop, Burr. 722. To certify and send up record on appeal. Collins v. McDaniel, 66 Ga. 203.

[31] Baltimore, etc., R. R. Co. v Weeden, 78 Fed. 584, 24 C. C. A. 249.

of the court to issue an order for the release of a judgment debtor;[32] for wrongfully approving of an appeal bond, the penalty in which was less than that required by law;[33] for negligently approving an insufficient bond;[34] for wrongfully issueing a *supersedeas* upon an improper bond;[35] and for any similar misfeasance or nonfeasance.[36] So a highway commissioner is liable who willfully neglects to return as paid a highway tax which has been paid in labor.[37] So a commissioner of customs is liable to an importer for refusal to sign a bill of entry except upon payment of excessive fees.[38] So an action will lie against a supervisor who, being required by law to report a claim to the county board for allowance, neglects to do so.[39]

§ 224. **Want of means to perform a duty.** Where a ministerial officer is charged with a duty which is only performed by an expenditure of public funds, he cannot be in fault unless the funds are provided for the purpose, or unless, by virtue of his office, he may raise the necessary means by levying

[32] Robinson v. Gell, 12 C. B. 191.

[33] Billings v. Lafferty, 31 Ill. 318; or stay bond. Hubbard v. Switzer, 47 Ia. 681.

[34] Field v. Wallace, 89 Ia. 597, 57 N. W. 303.

[35] Wade v. Miller, 104 Ala. 604, 16 So. 517. And see Eslava v. Jones, 83 Ala. 139, 3 So. 317, 3 Am. St. Rep. 699.

[36] See, further, Wright v. Wheeler, 8 Ired. 184; Anderson v. Johett, 14 La. Ann. 614. A father may not recover from a clerk for issuing without his assent a license for the marriage of his daughter under the age of 18. Holland v. Beard, 59 Miss. 161, 42 Am. Rep. 360. For a deputy's filing a paper, properly indorsed, in the wrong place, whereby a creditor lost a dividend from an insolvent estate, the clerk is liable. Rosenthal v. Davenport, 38 Minn. 543, 38 N. W. 618. As to liability of clerk of district court for false certificate as to liens on real estate, as shown by the records in his office, see United States Wind Engine & P. Co. v. Linville, 43 Kan. 455, 23 Pac. 597; Mallory v. Ferguson, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99. Where a clerk negligently left the record books out of the vault during the vacation of court and the same were injured by fire, he was held liable to the county for expense of transcribing them. Toncray v. Dodge County, 33 Neb. 802, 51 N. W. 235.

[37] Strickfadden v. Zipprick, 49 Ill. 286.

[38] Barry v. Arnaud, 10 Ad. & El. 646, citing and relying upon Schinotti v. Bumsted, 6 T. R. 646; Lacon v. Hooper, 6 T. R. 224.

[39] Clark v. Miller, 54 N. Y. 528

a tax, or in some other mode.[40] But when the funds are at his command, and the duty is still neglected, there is no reason why he should not be held responsible to parties injured. In New York, on this ground, the superintendent of canal repairs, who neglected to perform his duty, was held liable to parties who were prevented from making use of the canal, or delayed in its use in consequence.[41] So commissioners who have charge of cutting and keeping open public drains, while they could not be liable to individuals for any neglect to cause drains to be cut, inasmuch as they could not be chargeable with a duty to any particular individual in respect thereto, yet when the drains are actually cut, they are chargeable with a duty to every person who would be injured by neglect to keep them open; and if they suffer them to become obstructed, to the injury of neighboring lands, when they have the means at their command for keeping them open, the right of action against them is complete.[42]

§ 225. **De facto officers.** What has been said respecting the liability of officers will apply to those who are such *de facto* only, as well as to those who hold the office of right.[43] Indeed so far as one has actually exercised the functions of a public officer, he would be estopped to deny that he was properly filling it, for the purpose of escaping liability,[44] though

[40] Garlinghouse v. Jacobs, 29 N. Y. 297, 303; Newell v. Wright, 3 Allen, 166, 80 Am. Dec. 62; Hoover v. Palkhoof, 44 N. Y. 113; Hines v. Lockport, 50 N. Y. 236, 238; Threadgill v. Board of Commissioners, 99 N. C. 352, 6 S. E. 89.

[41] Adsit v. Brady, 4 Hill, 630, 40 Am. Dec. 305; Shepherd v. Lincoln, 17 Wend. 250; Griffith v. Follett, 20 Barb. 620; Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Insurance Co. v. Baldwin, 37 N. Y. 648.

[42] See Child v. Boston, 4 Allen, 41, 81 Am. Dec. 680; Parker v. Lowell, 11 Gray, 353; Barton v. Syracuse, 37 Barb. 292; Hover v. Barkhoof, 44 N. Y. 113; Wallace v. Muscatine, 4 Greene (Iowa) 373; Phillips v. Commonwealth, 44 Pa. St. 197.

[43] Mechem, Pub. Officers, §§ 326, 338; Allen v. Archer, 49 Me. 346; Bearce v. Fossett, 34 Me. 575; Courser v. Powers, 34 Vt. 517.

[44] Longacre v. State, 3 Miss. 637; Marshall v. Hamilton, 41 Miss. 229; Borden v. Houston, 2 Texas, 594; Billingsley v. State, 14 Md. 369. The principle has often been applied to persons who have assumed the functions of collectors of the public revenue. Sandwich v. Fish, 2 Gray. 298.

doubtless he might abandon the office into which he had intruded at any time, on claim being made by the rightful party entitled, or even without such claim, unless he had given bonds to perform the duties. Such abandonment, however, could not excuse him from liabilities already incurred.

301; Williamstown v. Willis, 15 Gray, 427; Johnston v. Wilson, 2 N. H. 202, 206; Horn v. Whittaker, 6 N. H. 88; Jones v. Scanland, 6 Humph. 195, 44 Am. Dec. 300; Trescott v. Moan, 50 Me. 347; Wentworth v. Gove, 45 N. H. 160.

CHAPTER XIV.

WRONGS IN RESPECT TO PERSONAL PROPERTY.

§ 226. Personal property defined. According to Chancellor Kent, personal property "includes all subjects of property not of a freehold nature, nor descendable to the heirs at law."[1] For the purposes of this chapter, personal property may be defined as anything movable and capable of manual possession. Ordinarily there is no difficulty in assigning a thing to its proper class as real or personal property, except in case of some things attached to the land, which may be real or personal, according to circumstances. Movable things may be so attached to the land as to become real property and trees and crops may be become personal property, without severance. These cases will be briefly considered, before taking up the subject of injuries to personal property.

§ 227. Fixtures. The actual or presumed intent on the part of the party attaching a chattel to the realty, that it shall constitute a part of the realty, or, on the other hand, that it shall remain a chattel, is usually the most important circumstance to be considered in determining the fact,[2] and if no one were concerned with the question but the party by whom the annexation was made, it might well be suffered to be controlling in all cases. But as the question of ownership often

[1] Kent, Com. Lec. 35, p. 418.

[2] Ewell on Fixtures, pp. 21, 23; McConnell v. Blood, 123 Mass. 47; State Savings Bank v. Kercheval, 65 Mo. 682, 686, 27 Am. Rep. 310; Wheeler v. Bedell, 40 Mich. 693; Jenkins v. McCurdy, 48 Wis. 628, 33 Am. Rep. 841; Manwaring v. Jenison, 61 Mich. 117, 27 N. W. 899, and cases cited; Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N. W. 280; Lansing Iron, etc., Works v. Wilbur, 111 Mich. 413, 69 N. W. 667; Cranston v. Beck, 70 N. J. L. 145, 56 Atl. 121; Causey v. Empire Plaid Mills, 119 N. C. 180, 25 S. E. 863; Alberson v. Elk Creek Min. Co., 39 Ore. 552, 65 Pac. 978; Canning v. Owing, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858; Jones v Bull, 85 Tex. 136, 19 S. W. 1031.

depends on the question whether a fixture is removable or not, and men make purchases and accept liens upon property, supposing it to be of that nature, either real or personal, that appearances would indicate, it would be not only impolitic, but in many cases unjust, to suffer a secret intent to control where appearances would indicate the existence of an intent of a different nature.[3] The law, therefore, usually acts upon the presumed rather than upon any actual intent and, consequently, where a building or other structure is erected upon the land, or a chattel is attached to a building, by the owner, which are apparently for permanent use and enjoyment in connection with the land or building and which are calculated to increase the permanent value of the estate, a reasonable presumption arises that the owner intended to make them a part of the realty, and the law accepts this intent as conclusive, and considers them real estate from the time they are constructed or affixed.[4] On the other hand, annexations made by a tenant for the more convenient and profitable enjoyment of his estate for the term, or even by way of ornament,

[3] Horne v. Smith, 105 N. C. 322, 3 S. E. 373, 18 Am. St. Rep. 903.

[4] Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603; Cafehout v. Foster, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582; Canning v. Owing, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858; Johnston v Philadelphia, M. & T. Co., 129 Ala. 515, 30 So. 15, 87 Am. St. Rep. 75; Lansing Iron, etc., Works v. Wilbur, 111 Mich. 413, 69 N. W. 667; Haskin Wood etc., Co. v. Cleveland Ship Building Co., 94 Va. 439, 447, 26 S. E. 878; Shepard v. Blossom, 66 Minn. 421, 69 N. W. 221, 61 Am. St. Rep. 431; Cavis v. Beckford, 62 N. H. 229, 13 Am. St. Rep. 554; Langdon v. Buchanan, 62 N. H. 657; Horne v. Smith, 105 N. C. 322. 3 S. E. 373, 18 Am. St. Rep. 903; Jones v. Bull, 85 Tex. 136 19 S. W. 1031; Gunderson v. Swarthout, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860; Homestead land Co. v. Becker, 96 Wis. 206; 71 N. W. 117; Padgett v. Cleveland, 33 S. C. 339; 11 S. E. 1069; McFadden v. Crawford, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894. Compare National Bank v. North, 160 Pa. St. 303, 28 Atl. 694; Hall v. Law Guarantee, etc., Soc., 22 Wash, 305, 60 Pac. 643, 79 Am. St. Rep. 935; Cranston v. Beck, 70 N. J. L. 145, 56 Atl. 121; Philadelphia Mort. & T. Co. v. Miller, 20 Wash. 607, 56 Pac. 382, 72 Am. St. Rep. 138, 44 L. R. A. 559; Kendall v. Hathaway, 67 Vt. 122, 30 Atl. 859. Machinery disconnected and taken apart to be repaired and then replaced, does not lose its character as a part of the realty. Grant v. Wilson, 17 N. C. 144.

if not inconsistent with the purpose for which the estate is leased to him, remain his, and of course remain personal property. This is the general rule.[5] So when abuilding is erected under a mere license given by the owner of the freehold, and which is subject to be recalled at any time, a like presumption arises that the licensee intended to preserve his property in the structure, and it will remain personal property accordingly.[6]

But there are some cases in which, though the erection is made by one not the owner of the freehold, an intent to retain a property in the fixtures as a chattel could not be presumed, and others in which the policy of the law could not suffer effect to be given to it if it actually existed. Thus, if one, though not the owner, is in possession under an executory contract of purchase, it is a reasonable presumption that he expects to complete the purchase, and that whatever he attaches to the realty in such a manner that if it were so attached by the owner of the freehold it would become a part of it, he intends shall be a part of it.[7] So, if one, without license,

[5] Elwes v. Maw, 3 East, 38; S. C. 2 Smith, Lead. Cas. 228; Lancaster v. Eve, 5 C. B. (N. S.) 717; Van Ness v. Pacard, 2 Pet. 137; Holmes v. Tremper, 20 Johns. 29, 11 Am. Dec. 238; Meigs' Appeal, 62 Penn. St. 28, 1 Am. Rep. 372; O Donnell v. Hitchcock, 118 Mass. 401; Thomas v. Crout, 5 Bush, 37; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Cooper v. Johnson, 143 Mass. 108; Cubbins v. Ayres, 4 Lea, 329; Robertson v. Corsett, 39 Mich. 777; Stout v. Stoppel, 30 Minn. 56; Deane v. Hutchinson, 40 N. J. Eq. 83; Broaddus v. Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; Overman v. Sasser, 107 N. C. 432, 12 S. E. 64, 10, L. R. A. 722; Wright v. Macdonald, 88 Tex. 140, 30 S. W. 907; Leigh v. Taylor, (1902) A. C. 157.

[6] Cowin v. Cowan, 12 Ohio St. 629; Wagner v. Cleveland, etc., R. R. Co., 22 Ohio St. 563, 10 Am. Rep. 770; Ricker v. Kelly, 1 Me. 117, 10 Am. Dec. 38; Hinckley v. Baxter, 13 Allen, 139; Noble v. Sylvester, 42 Vt. 146; Wilgus v. Gettings, 21 Ia. 177; Weathersby v Sleeper, 42 Miss. 732; Fenlason v. Rackliff, 50 Me. 362; Nor. Cent. R. Co. v. Canton Co., 30 Md. 347; Pope v. Skinkle, 47 N. J. L. 39; Griffin v. Ransdell, 71 Ind. 440; Fischer v. Johnson, 106 Ia. 181, 76 N. W. 658; Brown v. Turner, 113 Mo. 27, 20 S. W. 660; Laird v. Railroad Co., 62 N. H. 254, 13 Am. St. Rep. 564; Hughes v. Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2; Page v. Urick, 31 Wash. 601, 72 Pac. 454, 96 Am. St. Rep. 924; Seibel v. Bath, 5 Wyo. 409, 40 Pac. 756.

[7] Crane v. Dwyer, 9 Mich. 350, 80 Am. Dec. 87; Lapham v. Norton, 71 Me. 83; Taylor v. Collins,

express or implied, on the part of the owner of the freehold, shall enter and make permanent erections thereon, the law will not reward his conduct or encourage others in that of like character, by allowing him to remove what he has thus unlawfully attached.[8] So, if any one having a right to attach a removable fixture to the freehold owned by another shall so attach it that it cannot be removed without serious injury to the realty, the law will not suffer him to reserve a right of removal to the prejudice of the owner of the inheritance.[9] One cannot, by attaching to his real estate the movables of another without the latter's consent, make them a part of the realty.[10] Parties may, as between themselves, make things at-

51 Wis. 123; Westgate v. Wixon, 128 Mass. 304; Kingsley v. McFarland, 82 Me. 231, 19 Atl. 442, 3 L. R. A. 230; McCrillis v. Cole, 25 R. I. 156, 55 Atl. 196. But see Com'rs Rush Co. v. Stubbs, 25 Kan. 322. Where a railroad company dug a well on what it supposed to be its right of way and put up a boiler house, pump and boiler, but by mistake the location was on the plaintiff's land, it was held that they did not become a part of the realty and that the company could remove them. Atchison, etc., R. R. Co. v. Morgan, 42 Kan. 23, 21 Pac. 809, 16 Am. St. Rep. 471, 4 L. R. A. 284.

[8] Ewell, Fixtures, ch. 2; Doscher v. Blackstone, 7 Ore. 143; Prescott, etc., R. R. Co. v. Rees, 3 Arizona, 317, 28 Pac. 1134; Dutton v. Ensley, 21 Ind. App. 46, 51 N. E. 380; Snell v. Meacham, 80 Ia. 53, 45 N. W. 398. Even if the entry is in good faith. Honzik v. Delaglise, 65 Wis. 494, 56 Am. Rep. 634; Kimball v. Adams, 52 Wis. 554. See, also, Morrison v. Berry, 42 Mich. 389, 36 Am. Rep. 446. So where a depot was built on condemned land and the proceedings were afterward set aside. Hunt v. Miss., etc., Ry. Co., 76 Mo. 115. But see Railroad Co. v. Deal, 90 N. C. 110. If a railroad is constructed without right on land, the iron and material do not pass to the land owner. Justice v. Nesquehoning Valley R. R. Co., 87 Pa. St. 28; Jones v. New Orleans, etc., Co., 70 Ala. 227; Searl v. School District, 133 U. S. 553, 10 S. C. Rep. 374; Preston v. Sabine, etc., Ry. Co., 70 Tex. 375, 7 S. W. 825; 2 Lewis. Em. Dom. § 507, and cases cited.

[9] Ewell, Fixtures, p. 107; McLaughlin v. Nash, 14 Allen, 136, 92 Am. Dec. 741; Walker v. Grand Rapids F. & M. Co., 70 Wis. 92. The injury, however, which will preclude removal, when the structure is erected or attached by a tenant or licensee, must be something more than merely nominal. See Avery v. Cheslyn, 3 Ad. & El. 75; Whiting v. Brastow, 4 Pick. 310; Seeger v. Pettit, 77 Pa. St. 437.

[10] Cochran v. Flint, 57 N. H. 514; D'Eyncourt v. Gregory, L. R. 3 Eq. 382, 394; Central, etc., R. R.

tached to the land, real or personal property as they may agree.[11] But such agreements cannot be enforced to the prejudice of innocent third parties.[12] Thus, the owner of machinery may consent that it be put up in the mill of another under a contract of conditional sale, and with the understanding that his title therein as personalty shall be retained; and this understanding will be enforced as against the owner of the land, or any other person who has not been deceived by appearances into a purchase of the land or taking a mortgage upon it, on the supposition that his deed or mortgage covered the machinery as well as the land and building.[13] But the equity of a subsequent vendee or mortgagee, without notice of

Co. v. Fritz, 20 Kan. 430; Walker v. Grand Rapids, etc., R. R. Co., 70 Wis. 92, 35 N. W. 332.

[11] Chalifoux v. Potter, 113 Ala. 215, 21 So. 322; Broaddus v. Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; Case Mfg. Co. v. Garven, 45 Ohio St. 289, 13 N. E. 493; Landigan v. Mayer, 32 Ore. 245, 51 Pac. 649, 67 Am. St. Rep. 521; German Savings & L. Soc. v. Weber, 16 Wash. 95, 47 Pac. 224, 38 L. R A. 267; Keefe v. Furlong, 96 Wis. 219, 70 N. W. 1110. A house may be mortgaged or sold separate from the land. Sampson v. Graham, 96 Pa. St. 405; Docking v. Frazell, 34 Kan. 29, 17 Pac. 160; Aldrich v. Husband, 131 Mass. 480; Dudley v. Foote, 63 N. H. 57, 56 Am. Rep. 489; Lacustrine, etc., Co. v. Lake, etc., Co., 82 N. Y. 476.

[12] Burk v. Hollis, 98 Mass. 55; Poor v. Oakman, 104 Mass. 309; Gibbs v. Estey, 15 Gray, 587; Richardson v. Copeland, 6 Gray, 536. Drawers in a house: Connor v. Squires, 50 Vt. 680; Fences: Rowland v. Anderson, 33 Kan. 261; Machinery in a mill: Knowlton v. Johnson, 37 Mich. 47; Hamilton v. Huntley, 78 Ind. 521, 41 Am. Rep. 593; so as to purchaser on mortgage foreclosure though the thing was personalty as between parties to the mortgage. Lyle v. Palmer, 42 Mich. 314; Stillman v. Flenneken, 58 Ia. 450.

[13] Crippen v. Morrison, 13 Mich. 23, and cases cited; Shell v. Haywood, 16 Pa. St. 523; Ford v. Cobb, 20 N. Y. 344; Cross v. Marston, 17 Vt. 533, 44 Am. Dec. 353; Russell v. Richards, 10 Me. 429, 25 Am. Dec. 254; Smith v. Benson, 1 Hill, 176; Haven v. Emery, 33 N. H. 66; Wood v. Hewett, 8 Q. B. 913; Walker v. Grand Rapids, etc., Co., 70 Wis. 92, 35 N. W. 332; Ingersoll v. Barnes, 47 Mich. 104; Walker v. Schindel, 58 Md. 360; Priestley v. Johnson, 67 Mo. 632; Hawkins v. Hersey, 86 Me. 394, 30 Atl. 14; Palmateer v. Robinson, 60 N. J. L. 433, 38 Atl. 957; Case Mfg. Co. v. Garven, 45 Ohio St. 289, 13 N. E. 493; Henkle v. Dillon, 15 Ore. 610, 17 Pac. 148; Cherry v. Arthur, 5 Wash. 787, 32 Pac. 744.

the vendor's claim and in reliance upon the vendee's title being absolute, is paramount to that of the conditioned vendor.[14]

When a licensee has a right to remove fixtures, he will lose them unless he removes them within a reasonable time, to be determined by the circumstances, after his license has been revoked.[15] A tenant must take away his removable fixtures at or before the expiration of his term, or at least within such reasonable time thereafter as he may, by consent or otherwise, lawfully continue in possession.[16] But if the tenancy is for an uncertain period, as where it is for life or at will, fixtures may be removed within a reasonable time after the tenancy is ended. If the tenant commits an act of forfeiture, this is a forfeiture of his interest in the land only;[17] but when enforced against him, and possession obtained, by ejectment or other proceeding, his right to such fixtures as are not already removed, is gone.[18] It has been held, in some cases, that one who accepts a renewal of a lease without stipulating to reserve his rights in existing fixtures, abandons his right to them as he would on surrendering possession without removing them,[19] but this seems unreasonable, and has been questioned.[20]

[14] McCrillie v. Cole, 25 R. I. 156, 55 Atl. 196. See Davenport v. Shants, 43 Vt. 546; Landigan v. Mayer, 32 Ore. 245, 51 Pac. 649, 67 Am. St. Rep. 521; Wade v. Donan Brewing Co., 10 Wash. 284, 38 Pac. 1009; Reynolds v. Ashby & Son, (1903) 1 K. B. 87; Reynolds v. Ashby & Son, (1904) A. C. 466.

[15] Fischer v. Johnson, 106 Ia. 181, 76 N. W. 658; Antoni v. Belknap, 102 Mass. 193; Ombony v. Jones, 19 N. Y. 234, 238. See Overton v. Williston, 31 Penn. St. 155; Sullivan v. Carberry, 67 Me. 531.

[16] Penton v. Robart, 2 East, 88; Ombony v. Jones, 19 N. Y. 234; Conner v. Coffin, 22 N. H. 538, 541; Stokoe v. Upton, 40 Mich. 581; Griffin v. Ransdell, 71 Ind. 440; Smith v. Park, 31 Minn. 70; Youngblood v. Eubank, 68 Ga. 630; Darrah v. Baird, 101 Pa. St. 265; Chalifoux v. Potter, 113 Ala. 215, 21 So. 322; Thorn v. Sutherland, 123 N. Y. 236, 25 N. E. 362.

[17] See Davis v. Eyton, 7 Bing. 154.

[18] Weeton v. Woodcock, 7 M. & W. 14; Minshall v. Lloyd, 2 M. & W. 450; Pugh v. Arton, L. R. 8 Eq. Cas. 626; Whipley v. Dewey, 8 Cal. 36; Kutter v. Smith, 2 Wall. 491.

[19] Merritt v. Judd, 14 Cal. 59; Marks v. Ryan, 63 Cal. 107; Loughran v. Ross, 45 N. Y. 792;

[20] Kerr v. Kingsbury, 39 Mich. 150.

§ 228. **Right to crops.** Growing crops are presumptively the property of the owner of the soil; but this is only a presumption, and often proves to be unfounded. A more general rule is that growing crops are the property of the person who rightfully has planted and grown them.[21] Therefore, crops grown by a tenant are his property. He may sell or mortgage them as such while they are growing, and he may harvest and appropriate them when ripened.[22] The exception to this general statement is this: that if the tenant shall sow or plant crops which, in the ordinary course of nature, will not ripen during his term, he will lose them. If the rule were otherwise, he would be enabled, by his own act and without the consent of the lessor, to prolong beyond the duration of his term his possession of the land planted.[23] But where the duration of the lease is uncertain, as where it is a lease at will, or for the life of some person designated, or its duration depends upon some contingency, and it is terminated otherwise than by the voluntary act of the tenant himself, the tenant or his personal representative is entitled to the growing crops as emblements,[24] and may enter upon the land to cultivate them and to

Wright v. Macdonald, 88 Tex. 140, 30 S. W. 907. So where the second lease contains different terms. Watriss v. National Bank, 124 Mass. 571, 26 Am. Rep. 694; McIver v. Estabrook, 134 Mass. 550.

[21] Grass is personalty for the purpose of sale and a purchaser has constructive possession and may maintain trespass against one cutting and taking it without right. Avitt v. Farrell, 68 Mo. App. 665. Crops matured and severed are personal property. Wakefield v. Dyer, 14 Okl. 92, 76 Pac. 151.

[22] Doremus v. Howard, 23 N. J. L. 390; Brown v. Turner, 60 Mo. 21; Clark v. Harvey, 54 Pa. St. 142; Fobes v. Shattuck, 22 Barb. 568. If tenant surrenders possession during term, the crops pass to the landlord. Shahan v. Herzberg, 73 Ala. 59.

[23] Bain v. Clark, 10 Johns. 424; Harris v. Carson, 7 Leigh. 632, 30 Am. Dec. 510; Kingsbury v. Collins, 4 Bing. 202. So if tenant is bound to know that his landlord's title will be lost under execution sale before ripening. Wheeler v. Kirkendall, 67 Ia. 612. But see Hecht v. Dettman, 56 Ia. 679, 41 Am Rep. 131. It makes no difference that lease was for a year with privilege of three if tenant abandons within first year. Dircks v. Brant, 56 Md. 500. In Pennsylvania the outgoing tenant owns the way-going crop. Shaw v. Bowman, 91 Pa. St. 414.

[24] Bevans v. Briscoe, 4 Har. & J. 139; Davis v. Thompson, 13 Me. 209; Davis v. Brocklebank, 9 N.

remove them when ready for harvest. The landlord, if he refuses to recognize this right and excludes him, is liable on the special case; and if he harvests the crop and appropriates it to his own use he may be sued either in trespass or trover for the value.[25] So when one who sows crops on the land of another under a license has rights after the license is revoked corresponding to those of a tenant at will whose estate has been terminated by the landlord.[26] Where crops are raised "on shares," the owner of the land and the person raising them are tenants in common of the crop until it has been harvested and divided.[27] Trees, plants, and crops sowed or planted on land by a stranger to the title, and without authority, belong to the owner of the soil.[28]

H. 73; Orland's Case, 5 Co. 116. See Towne v. Bowers, 81 Mo. 491; Dobbins v. Lusch, 53 Ia. 304; King v. Foscue, 91 N. C. 116; Hendrixson v. Cardwell, 9 Bax. 389; Felch v. Harriman, 64 N. H. 472, 13 Atl. 418.

[25] Stewart v. Doughty, 9 Johns. 108; Forsythe v. Price, 8 Watts, 282; Robinson v. Kruse, 29 Ark. 575; Harris v. Frink, 49 N. Y. 24.

[26] Smith v. Jenks, 1 Denio, 580; Jencks v. Smith, 1 N. Y. 90; Harris v. Frink, 49 N. Y. 24.

[27] Daniels v. Daniels, 7 Mass. 136; Delaney v. Root, 99 Mass. 546, 97 Am. Dec. 52; Foote v. Colvin, 3 Johns. 216, 3 Am. Dec. 478; Putnam v. Wise, 1 Hill, 234, 37 Am. Dec. 309; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415; Harris v. Frink, 49 N. Y. 24, 10 Am. Rep. 310; Daniels v. Brown, 34 N. H. 454, 69 Am. Dec. 505; Hatch v. Hart, 40 N. H. 93; Carr v. Dodge, 40 N. H. 403; Hurd v. Darling, 14 Vt. 214; Betts. v. Ratliff, 50 Miss. 561; Doty v. Heth, 52 Miss. 530; Briggs v. Thompson, 9 Pa. St. 338; Alwood v. Ruckman, 21 Ill. 200; Marlowe v. Rogers, 102 Ala. 510, 14 So. 790; Belser v. Youngblood, 103 Ala. 545, 15 So. 863. But the relation of landlord and tenant may exist, although the rent is to be paid by a portion of the crop, in which case the parties are not tenants in common of the crop raised. Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312. See, further, on what relation is created by such arrangement, Walworth v. Jenness, 58 Vt. 670; Chicago, etc., Co. v. Linard, 94 Ind. 319; Frout v. Hardin, 56 Ind. 165, 26 Am. Rep. 18; Texas, etc., Ry. Co. v. Bayliss, 62 Tex. 570; Yates v. Kinney, 19 Neb. 275; Atkins v. Womeldorf, 53 Ia. 150; Orcutt v. Moore, 134 Mass. 48, 45 Am. Rep. 278.

[28] Ewell on Fixtures, 64; Simpkins v. Rogers, 15 Ill. 397; Mitchell v. Billingsley, 17 Ala. 391; Reid v. Kirk, 12 Rich. 54; Madigan v. McCarthy, 108 Mass. 376, 11 Am. Rep. 371. Even if the trespasser remains and harvests them. Freeman v. McLennan, 26 Kan. 151; *contra*, Adams v. Leip, 71 Mo. 597.

§ 229. Right to trees. According to some authorities standing trees may be treated as personalty and may be sold and conveyed without the formalities required in case of a transfer of real estate. A sale of standing trees to be removed is held to convert them into chattels, which may then be conveyed, mortgaged and sued for the same as other chattels.[29] But there is much difference of opinion among the authorities and the weight of authority is that trees are a part of the real estate until severed.[30]

§ 230. Wild animals. There is no property in wild animals until they have been subjected to the control of man. If one secures and tames them, they are his property; if he does not tame them, they are still his so long as they are kept confined and under his control.[33] In the case of wild bees, these rules are somewhat qualified. Bees have a local habitation, more often in a tree than elsewhere, and while there they may be said to be within control, because the tree may at any time be felled. But the right to cut it is in the owner of the soil, and, therefore, such property as the wild bees are susceptible of is in him also. A hunter's custom may recognize a right to the tree in the first finder, but the law of the land knows nothing of this, and he will be a trespasser if, without permission, he enters upon the land to cut it.[34] Even a license given by the owner of the soil to enter and cut the tree may be revoked at any time before it has been acted on.[35] But if the bees have once been domesticated and have then escaped, the loser re-

[29] Byasse v. Reese, 61 Ky. 372, 83 Am. Dec. 481; Whitman v. Walker, 1 Met. 313; Claflin v. Carpenter, 4 Met. 580, 38 Am. Dec. 381; Sterling v. Baldwin, 42 Vt. 306.

[30] Huth v. Graham, 57 Ohio St. 65, 19 L. R. A. 721, and cases cited in report and note to case; 33 Cent. Dig. p. 1522, § 9.

[33] Amory v. Flynn, 10 Johns. 102, 6 Am. Dec. 316; Rex v. Brooks, 4 C. & P. 131; Regina v. Shickle, L. R. 1 C. C. 158; S. C. 11 Cox, C. C. 189; Commonwealth v. Chace, 9 Pick. 15, 19 Am. Dec. 348; Manning v. Mitcherson, 69 Ga. 447. See State v. Krider, 78 N. C. 481.

[34] Merrill v. Goodwin, 1 Root, 209; Pierson v. Post, 3 Caines, 175, 2 Am. Dec. 264; Gillet v. Mason, 7 Johns. 16; Buster v. Newkirk, 20 Johns. 75; Ferguson v. Miller, 1 Cow. 243, 13 Am. Dec. 519; Idol v. Jones, 1 Dev. 162; Cock v. Weatherby, 5 S. & M. 333.

[35] Ferguson v. Miller, 1 Cow. 243, 13 Am. Dec. 519. See Adams v. Benton, 43 Vt. 30.

tains his property therein, and may reclaim them if he pursues after them with reasonable promptness.[36] As regards beasts of the chase, the English rule is that if the hunter starts and captures a beast on the land of another, the property in him is in the owner of the land.[37] Under the civil law the property passed to the captor,[38] and such is believed to be the recognized rule in America even when the capture has been effected by means of a trespass on another's land.[39]

§ 231. **Trespass to personalty.** A trespass to property consists in the unlawful disturbance by force of another's possession,[40] and to maintain the action the plaintiff must show possession or right of possession.[41] Therefore, that is not a trespass which consists merely in some wrong done to property by one to whom, for any purpose, the possession has been transferred by the owner, and who at the time of the wrong was lawfully holding it.[42] But a possession obtained by fraud and for the very purpose of the wrong, is not a lawful possession, and an injury by force, while it continues, must be deemed a trespass on the possession of the owner.[43]

The possession disturbed by a trespass may be either, 1, that

[36] Goff v. Kilts, 15 Wend. 550.

[37] Riggs v. Earl of Lonsdale, 1 H. & N. 923; Blades v. Higgs, 12 C. B. (N. S.) 501; 13 C. B. (N. S.) 844; S. C. in Error, 11 H. L. Cas. 621.

[38] Justinian, Inst. Lib. 2, t. 1, § 12.

[39] Fish are the property of those who take them, and a whale belongs to the captors. Taber v. Jenny, 1 Sprague, 315. That there is no property in fish swimming in tide water, see Matthews v. Treat, 75 Me. 594, nor in a fresh water pond unless so enclosed as to be entirely within control of the owner of surrounding land. State v. Roberts, 59 N. H. 484. See also Lincoln v. Davis, 53 Mich. 375, 57 Am. Rep. 116. One who owns the fee of soil covered by navigable fresh water, has the exclusive right to shoot wild fowl over the water. Sterling v. Jackson, 69 Mich. 488, 37 N. W. 845.

[40] Pollock, Torts, 7th Ed., p. 342; Lunt v. Brown, 13 Me. 236; Cook v. Thornton, 109 Ala. 523, 20 So. 14.

[41] Lunt v. Brown, 13 Me. 236; Staples v. Smith, 48 Me. 470; Bulkley v. Dolbeare, 7 Conn. 235; Musgridge v. Eveleth, 9 Met. 233; Clarke v. Carleton, 1 N. H. 110; Putnam v. Wyley, 8 Johns. 432, 5 Am. Dec. 346; Becker v. Smith, 59 Pa. St. 469.

[42] Furlong v. Bartlett, 21 Pick. 401; Bradley v. Davis, 14 Me. 44, 30 Am. Dec. 729; Henderson v. Marx, 57 Ala. 169.

[43] Butler v. Collins, 12 Cal. 457.

of a general owner of the property; or, 2, that of one having a special property therein as mortgagee, bailee, or officer;[44] or, 3, that of a mere possessor, by which is meant one who has a peaceable possession, but who shows in himself no other right. The latter is sufficient as against a mere intermeddler, who shows no right in himself.[45] Possession may be either actual or constructive. The right to the possession of chattels draws to it, in contemplation of law, the possession itself, so that one party may sometimes be entitled to sue on his actual possession, while another may sue on his constructive possession. Thus, though a bailee or a mortgagor of chattels who is left in possession thereof may bring trespass against one who disturbs his possession, still if the mortgagee or bailor is of right entitled to demand and take possession at any time, this right draws to it the possession, and the wrong-doer is a trespasser upon him also.[46] So, if one cut wood on the land of another, he has, as to all third persons, the possession of the wood cut, and may bring suits as possessor against intermeddlers; but if he has cut without right, the wood belongs to the owner of the land, and is deemed to be in his possession.[47] So the finder of a chattel has rightful possession of what he finds, except as against the owner; but the latter has constructive possession, and if the finder intentionally or carelessly abuses or injures it, he becomes himself a trespasser, and cannot, in a suit by the owner, justify even the original taking.[48]

[44] Brownell v. Manchester, 1 Pick. 232; Casher v. Peterson, 4 N. J. L. 317; Browning v. Skillman, 24 N. J. L. 351; Taylor v. Manderson, 1 Ashm. 130; Whitney v. Ladd, 10 Vt. 165; Sewell v. Harrington, 11 Vt. 141, 34 Am. Dec. 675; St. Louis, etc., Ry. Co. v. Norton, 71 Ark. 314, 73 Pac. 1095.

[45] Hyde v. Stone, 7 Wend. 354; Beecher v. Crouse, 19 Wend. 306; Bass v. Pierce, 16 Barb. 595; Faulkner v. Brown, 13 Wend. 63; Cowing v. Snow, 11 Mass. 415.

[46] White v. Brantley, 37 Ala. 430; Overby v. McGee, 15 Ark. 459, 63 Am. Dec. 49; Staples v. Smith, 48 Me. 470; Strong v. Adams, 30 Vt. 221, 73 Am. Dec. 305; White v. Webb, 15 Conn. 302.

[47] Ward v. Andrews, 2 Chit. 636; Bulkley v. Dolbeare, 7 Conn. 232. One who so cut and stacked hay cannot recover from a railroad company through whose negligence it is burned. Murphy v. Sioux City, etc., Co. 55 Ia. 473, 39 Am. Rep. 175.

[48] Oxley v. Watts, 1 T. R. 12. A horse was taken up as an estray and afterwards worked. *Held* to constitute the party taking him

A trespass may be intentional or unintentional. If one goes upon the land of another to take away his own sheep, and by mistake takes some which do not belong to him, his mistake cannot excuse the trespass.[49] The force that constitutes trespass may be applied either, 1, by the party himself who is responsible for it; or, 2, by some other person for whose conduct, as servant or otherwise, he is accountable, or, 3, by his domestic animals. The principle on which the party is held responsible in the second and third cases is explained elsewhere.[50] The force may be express or implied. Setting a fire which directly communicates with the property of another and destroys it, has been held to be a trespass in respect to such property.[51] But this seems questionable. The degree of force is immaterial to the right of action. If one's horse is hitched where he has a right to hitch him, it is a trespass if another, without permission, unhitches and removes him to another post, however near.[52] But one may justify unhitching a horse from his own fence or shade tree, and removing him, provided it is to a place of safety.[53]

As regards the directness of the injury which will distinguish a case of trespass from one in which the remedy must be sought on the special case, there seems to be no better test than this: That if the unlawful force caused the injury before it was spent, this injury must be deemed direct; but if, after the unlawful force was spent, the injury occurred, as a collateral or secondary consequence, it is to be considered indirect.[54] A forcible injury to property, in which the plaint-

up a trespasser *ad initio*. See Clark v. Moloney, 3 Harr. 68; Brandon v. Huntsville Bank, 1 Stew. (Ala.) 320, 18 Am. Dec. 48; McLaughlin v. Waite, 9 Cow. 670.

[49] Dexter v. Cole, 6 Wis. 319, 70 Am. Dec. 465; Hobart v. Hagget, 12 Me. 67; Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234. And see Higginson v. York, 5 Mass. 341.

[50] See *ante*, chap. 11; *post*, chap. 16.

[51] Jordan v. Wyatt, 4 Gratt. 151, 47. Am. Dec. 720.

[52] Burch v. Carter, 32 N. J. L. 554.

[53] Gilman v. Emery, 54 Me. 460.

[54] See *ante*, § 176; 21 Encly. Pl. & Pr. p. 786. If one carelessly drives against another, this is a trespass. Leame v. Bray, 3 East, 593. See, to same effect, Sheldrick v. Abery, 1 Esp. 55; Day v. Edwards, 5 T. R. 648; Savignac v. Roome, 6 T. R. 125. But if his

iff has only a reversionary interest, is not a trespass, since he can have in such property no constructive possession.[55]

Anything is the subject of trespass in which the law recognizes any property, complete or partial. Therefore, to kill one's dog or cat, or even a wild beast kept in confinement, is a trespass, unless it can be justified.[56]

The remedies for a trespass are either, 1, an action for the recovery of damages, which will lie in all cases; 2, recaption of the goods, when the trespasser has taken them into his possession, and they can be retaken without breach of the peace; and, 3, replevin or recapture of the goods by legal process.[57] A trespass may also generally be treated as a conversion.

§ 232. Indirect injuries. These are generally injuries of negligence, and are committed by a failure to observe that care in respect to the rights of others which is their due. But they may be injuries intended, and differing from trespasses only in this: that they are secondary, and not a direct result of the unlawful act.[58]

§ 233. Trover and conversion. The injury which is redressed in an action of trover is technically called conversion, and the declaration counts upon the real or supposed fact that

servant is guilty of the like want of care the action should be case. Haggett v. Montgomery, 5 Esp. (2 N. R.) 446. Compare Williams v. Holland, 6 C. & P. 23, and Ogle v. Barnes, 8 T. R. 187, explained in Leame v. Bray, 3 East, 593, 595.

[55] Hall v. Pickard, 3 Camp. 187. The case was one in which horses had been let by the plaintiff for a certain time, and one of them was run against and killed before the time had expired. And see Lunt v. Brown, 13 Me. 236, Shepherd v. Taylor, 105 Ala. 507, 17 So. 88; McCarty v. Roswald, 105 Ala. 511, 17 So. 120.

[56] Parker v. Mise, 27 Ala. 480, 62 Am. Dec. 776; Dodson v. Mock, 4 Dev. & Bat. 146, 32 Am. Dec. 677; Wheatley v. Harris, 4 Sneed, 468, 70 Am. Dec. 258; Dunlap v. Snyder, 17 Barb. 561; Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175, Perry v. Phipps, 10 Ired. 259, 51 Am. Dec. 387; Lentz v. Strosh, 6 S. & R. 34.

[57] In trespass the defendant may show in mitigation of damages that the property has been restored to the plaintiff or that it has been applied for his benefit. Stephenson v. Wright, 111 Ala. 579, 20 So. 622; Hamilton v. Phillips, 120 Ala. 177, 24 So. 587, 74 Am. St. Rep. 29; Grisham v. Bodman, 111 Ala. 194, 20 So. 514. Where the trespass is wanton and malicious punitive damages may be given. Avakian v. Noble, 121 Cal. 216, 53 Pac. 559.

[58] See *ante*, § 176.

the plaintiff casually lost his goods, and the defendant found and appropriated them. "In form the action is a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use."[60] There are two principal differences between the actions of trespass and trover for personalty appropriated by defendant; the first of which is, that in trespass there is always either an original wrongful taking, or a taking made wrongful *ab initio* by subsequent misconduct,[61] while in trover, the original taking is supposed or assumed to be lawful, and often the only wrongs consist in a refusal to surrender a possession which was originally rightful, but the right to which has terminated. The second is, that trespass lies for any wrongful force, but the wrongful force is no conversion where it is employed in recognition of the owner's right, and with no purpose to deprive him of his right, temporarily or permanently. Thus, if one take up the beast of another, in order to prevent his straying away, and afterwards turn him out again, he may be liable in trespass for so doing, but his act is no conversion, because the owner's dominion is not disputed, and the intent to make a wrongful appropriation is absent.[62] In many cases either trover or trespass will lie.[63]

[60] Lord Mansfield, Ch. J. in Cooper v. Chitty, Burr. 3. See the nature of the action explained in Burroughs v. Bayne, 5 H. & N. 296, 309 The gist of the action is the conversion. Payne v. Elliot, 54 Cal. 339, 340; Davis v. Hunt, 114 Ala. 146, 150, 21 So. 468; Platt v. Tuttle, 23 Conn. 233, 237. The allegation as to losing and finding cannot be traversed. Burroughs v. Bayne, 5 H. & N. 296. And may even be omitted. Royce v. Oakes, 20 R. I. 252, 254, 38 Atl. 371, 39 L. R. A. 345. If the plaintiff prefers to recover back the specific property, he brings replevin instead of trover, provided the goods are still in the defendant's possession, and he might formerly have brought the now nearly obsolete action of detinue.

[61] Van Brunt v. Schenck, 11 Johns. 377; Parker v. Walrod, 13 Wend. 296; S. C. in error, 16 Wend. 514, 30 Am. Dec. 124.

[62] Wilson v. McLaughlin, 107 Mass. 587. But see Tobin v. Deal, 60 Wis. 87. No conversion if a lot owner removes from one part of it to another goods there by his permission, if no ownership claimed or dominion assumed. Shea v. Milford, 145 Mass. 525, 14 N. E. 769.

[63] Bigelow on Torts (7th Ed.), 510; 2 Jaggard, Torts, pp. 707, 708; Dexter v. Cole, 6 Wis. 319.

§ 234. The plaintiff's right or title. It is commonly said that "to sustain trover, the plaintiff must show a legal title; he must have property, general or special, and actual possession or the right to immediate possession at the time of the conversion."[64] In some cases the defendant has been allowed to defeat a recovery by merely showing property in a third person, without at all connecting himself with the right of such person.[65] But the weight of authority is to the contrary and possession alone is held to be sufficient as against a mere wrongdoer.[66] Title alone is not sufficient, without possession or right of possession.[67]

[64] Drury v. Mutual, etc., Ins. Co., 38 Md. 242, 249, per Miller, J.; Stephenson v. Little, 10 Mich. 433, 439, per Manning, J.; Owens v. Weedman, 82 Ill. 409, 417, per Dickey, J.; Johnson v. Wilson, 137 Ala. 468, 34 So. 392, 97 Am. St. Rep. 52; Atlantic Coast Line R. R. Co. v. Baker, 118 Ga. 809, 45 S. E. 673, Frink v. Pratt, 130 Ill. 327, 22 N. E. 819; Kennett v. Peters, 54 Kan. 119, 37 Pac. 999, 45 Am. St. Rep. 274, Citizens' Bank v. Tiger Tail, etc., Co, 152 Mo. 145, 53 S. W. 902. "To maintain trover, the plaintiff must have property in himself, and a right to possession at the time of the conversion, and must recover on the strength of his own title." Moore v. Walker, 124 Ala. 199, 202, 26 So. 984.

[65] Rotan v. Fletcher, 15 Johns. 206; Tuthill v. Wheeler, 6 Barb. 362; Camp v. Glidden, 39 Me. 448, 151, Boyce v. Williams, 84 N. C. 275. See Grady v. Newby, 6 Blackf 442; Glenn v. Garrison, 17 N. J. L. 1, 4. Defendant may show that he has surrendered possession to the true owner. Ogle v. Atkinson, 5 Taunt. 759; King v. Richards, 6 Wh· 418· or that he has been notified by the owner to retain the property for him. Thorne v. Tilbury, 3 H. & N. 534.

[66] Armory v. Dalamire, Stra. 505; McLaughlin v. Waite, 9 Cow. 670; Brandon v. Planters, etc., Bank, 1 Stew. 320; Clark v. Maloney, 3 Harr. 68; Jeffries v. Great Western R. R. Co., 5 El. & Bl. 802; Wheeler v. Lawson, 103 N. Y. 40, Bartlett v. Hoyt, 29 N. H. 317, Knapp v. Winchester, 11 Vt. 351; Harris v. Smith, 71 N. H. 330, 52 Atl. 854; Carter v. Bennett, 4 Fla. 283, 355; Burke v. Savage, 13 Allen, 408; Hubbard v. Lyman, 8 Allen, 520; Magee v. Scott, 9 Cush. 148, 55 Am. Dec. 49; Cook v. Patterson, 35 Ala. 102, Vining v. Baker, 53 Me. 544; Coffin v. Anderson, 4 Blackf. 395; Greenbaum v. Taylor, 102 Cal. 624, 36 Pac. 957, Anderson v. Agnew, 38 Fla. 30, 20 So. 766; Mitchell v. Thomas, 114 Ala. 459, 21 So. 991.

[67] Gordon v. Harper, 7 T. R. 9; Wheeler v. Train, 3 Pick. 255, 258; Fairbank v. Phelps, 22 Pick. 535; Caldwell v. Cowan, 9 Yerg. 262; Clark v. Draper, 19 N. H. 419; Forth v. Pursley, 82 Ill. 152; Winship v. Neale, 10 Gray, 382. See

On the principle that where one has the right of property this draws to it the right of possession, if one's goods are held without right by another, and a third person converts them to his own use, the owner may maintain trover for such conversion.[68] So a mortgagee of chattels who, under his mortgage, is entitled to immediate possession, may sue in trover for a conversion while they remained in the hands of the mortgagor;[69] but a servant cannot bring trover for the conversion of his master's goods, since his possession is the possession of his master.[70] A factor, on the other hand, or a bailee, or any other person with a right of his own, however special or trivial, has a property sufficient for the purposes of this action, and as against a mere wrong-doer may recover the whole value of the property, being accountable over to the general owner.[71] A pledgee may recover for the conversion of the property pledged,[72] and an officer for property in his custody

Montgomery v. Brush, 121 Ill. 513, 13 N. E. 230; Owens v. Weedman, 82 Ill. 409; Newhall v. Kingsbury, 131 Mass. 445.

[68] Clark v. Rideout, 39 N. H. 238; Eggleston v. Mundy, 4 Mich. 295; Carter v. Kingman, 103 Mass. 518.

[69] McConeghy v. McCaw, 31 Ala. 447; Robinson v. Kruse, 29 Ark. 575; Coles v. Clark, 3 Cush. 399; Chamberlain v. Clemence, 8 Gray, 389; Bellune v. Wallace, 2 Rich. 80; Spriggs v. Camp, 2 Speers, 181; Badger v. Batavia Manuf. Co., 70 Ill. 302; Melody v. Chandler, 12 Me. 282; Broughton v. Atchison, 52 Ala. 62; Grove v. Wise, 39 Mich. 161; Warder-Bushnell & Glessner Co. v. Harris, 81 Ia. 153, 46 N. W. 859; Brown v. Campbell Co., 44 Kan. 237, 22 Pac. 1020, 21 Am. St. Rep. 274; Howard v. First Nat. Bank, 44 Kan. 549, 24 Pac. 983, 10 L. R. A. 537; Reynolds v. Fitzpatrick, 23 Mont. 52, 57 Pac. 452. Otherwise where he has not right to immediate possession. Johnson v. Wilson, 137 Ala. 468, 34 So. 392, 97 Am. St. Rep. 52; Dawes v. Rosenbaum, 179 Ill. 112, 53 N. E. 585; Bank of Little Rock v. Fisher, 55 Mo. App. 51. But see Hudman Brothers v. Du Bose, 85 Ala. 446, 5 So. 162, 2 L. R. A. 475; Woods v. Rose, 135 Ala. 297, 33 So. 41; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Nichols v. Barnes, 3 Dak. 148, 14 N. W. 110.

[70] Lehigh Co. v. Field, 8 W. & S. 232; Farmers' Bank v. McKee, 2 Penn. St. 318.

[71] Beyer v. Bush, 50 Ala. 19; Gillette v. Goodspeed, 69 Conn. 363, 37 Atl. 973; Allen v. Barrett, 100 Ia. 16, 69 N. W. 272; Lord v. Buchanan, 69 Vt. 320, 37 Atl. 1048, 60 Am. St. Rep. 933; Chamberlain v. West, 37 Minn. 54, 33 N. W. 114; Taber v. Lawrence, 134 Mass. 94.

[72] Cramer v. Marsh, 5 Colo. App. 302, 38 Pac. 612; Citizens' Banking Co. v. Peacock, 103 Ga.

under process of court.[73] One having a mere right to a lien but no right to possession cannot maintain trover.[74] The owner of property in the hands of an agent may sue for its conversion.[75] An owner may abandon his property and so divest himself of his title thereto and, having done so, he cannot thereafter sue for its conversion.[76] The finder of lost property may have trover therefor as against any person but the true owner,[77] but when property is put by the owner in a particular place and is inadvertently left there and forgotten, the occupant of the premises is entitled to its possession and not the finder.[78]

§ 235. **What may be converted.** Anything which is the subject of property, and is of a personal nature, is the subject of conversion, even though it have no value except to the owner.[79] Trover lies for promissory notes,[80] drafts,[81] certificates of

171, 29 S. E. 752; Beebe v. Latimer, 59 Neb. 305, 80 N. W. 904.

[73] Vanosdall v. Hamilton, 118 Mich. 533, 77 N. W. 9; Penland v. Leatherwood, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38. And see Goodrow v. Buckley, 70 Mich. 513, 38 N. W. 454.

[74] Jordan v. Lendsay, 132 Ala. 567, 31 So. 484; Frink v. Pratt, 130 Ill. 327, 22 N. E. 819. But see Thornton v. Dwight Mfg. Co., 137 Ala. 211, 34 So. 187; Merchants & Planters Bank v. Meyer, 56 Ark. 499, 20 S. W. 406; Goodrow v. Buckley, 70 Mich. 513, 38 N. W. 454.

[75] Montgomery v. Brush, 121 Ill. 513, 13 N. E. 230; Boehr v. Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444.

[76] Kansas City, etc., R. R. Co. v. Wagand, 134 Ala. 388, 32 S. W. 744. Joint owners should all be joined as plaintiffs, and, if any refuse, they should be made parties under the statute. Bolton v. Cuthbert, 132 Ala. 403, 31 So. 358, 90 Am. St. Rep. 914.

[77] *Ante*, p. 419, n. 66; Hoagland v. Forest Park, etc., Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

[78] Loucks v. Galloghy, 1 Misc. 22, 23 N. Y. S. 126.

[79] State v. Omaha Nat. Bank, 59 Neb. 483, 81 N. W. 319.

[80] Detwiler v. Bainbridge Grocery Co., 119 Ga. 981, 41 S. E. 553; Thomson v. Gortner, 73 Md. 474, 21 Atl. 371; Brown v. St. Charles, 66 Mich. 71, 32 N. W. 926; Carter v. Lehman, 90 Ala. 126, 7 So. 735; Dean v. Nichols, etc., Co., 95 Ia. 89, 63 N. W. 582; Walley v. Deseret Nat. Bank, 14 Utah, 305, 47 Pac. 107; Buck v. Kent, 3 Vt. 99; Murray v. Burling, 10 Johns. 172; Otisfield v. Mayberry, 63 Me. 197. Held to lie for refusal to surrender a paid note. Pierce v. Gilson, 9 Vt. 216; Spencer v. Dearth, 43

[81] Lawatsch v. Cooney, 86 Hun, 546, 33 N. Y. S. 775.

stock,[71] and for specific money, which it was defendant's duty to turn over to the plaintiff,[72] but not for money which was given to the defendant to be used for a particular purpose and which the defendant converts to his own use,[73] or which is found due upon an accounting.[74] So it has been held to lie for an insurance policy, which the insurer wrongfully obtained and refused to surrender,[75] and for a certificate of membership in a board of trade which the corporation obtained and canceled.[76] And where the defendant was authorized to collect a judgment in favor of the plaintiff and he wrongfully discharged it for a nominal sum, he was held liable in trover for a conversion of the judgment.[77]

One may bring trover for a building or other fixture owned by him on the land of another, which the owner of the land refuses to permit him to take away, and converts to his own use.[78] So where timber, crops or mineral are wrongfully sev-

Vt. 98; Stone v. Clough, 41 N. H. 290. *Contra*, Todd v. Crookshanks, 3 Johns. 432; Lowremore v. Berry, 19 Ala. 130, 54 Am. Dec. 188.

[71] Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91; Hine v. Commercial Bank, 119 Mich. 448, 78 N. W. 471; Kahaley v. Haley, 15 Wash. 678, 47 Pac. 23; Newman v. Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6; Payne v. Elliott, 54 Cal. 339, 35 Am. Rep. 80; Budd v. Multnomah, etc. Co., 12 Ore. 271, 53 Am. Rep. 355.

[72] Benson v. Eli, 16 Colo. App. 494, 66 Pac. 450; Farmers' Alliance, etc., Co. v. McElhannon, 98 Ga. 394, 25 S. E. 558; McElhannon v. Farmers' Alliance, etc., Co., 95 Ga. 670, 22 S. E. 686; Cook v. Bryant, 103 Ga. 727, 30 S. E. 435; Grand Pacific Hotel Co. v. Rowland, 88 Ill. App. 519; Bearss v. Preston, 66 Mich. 11, 32 N. W. 912; Shrimpton v. Culver, 109 Mich. 577, 67 N. W. 507; State v. Omaha Nat Bank, 59 Neb. 483, 81 N. W. 319; Salem Traction Co. v. Anson, 41 Ore. 562, 67 Pac. 1015, 69 Pac. 675; Larson v. Dawson, 24 R. I. 317, 53 Atl. 93, 96 Am. St. Rep. 716; Tucker v. Nebeker, 2 App. D. C. 326. But see Farrelly v. Hubbard, 84 Hun, 391, 32 N. Y. S. 440.

[73] Shrimpton v. Culver, 109 Mich. 577, 67 N. W. 507; Larson v. Dawson, 24 R. I. 317, 53 Atl. 93, 96 Am. St. Rep. 716.

[74] Cooke v. Bryant, 103 Ga. 727, 30 S. E. 435.

[75] Hayes v. Mass. Mut. Life Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303.

[76] Olds v. Chicago Open Board of Trade, 33 Ill. App. 445.

[77] Rivinus v. Langford, 75 Fed. 959, 21 C. C. A. 581.

[78] Osgood v. Howard, 6 Me. 452, 20 Am. Dec. 322; Smith v. Benson, 1 Hill, 176; Dame v. Dame, 38 N. H. 429, 75 Am. Dec. 195; Crippen v. Morrison, 13 Mich. 23. So if one detaches a fixture and sets it

ered from the land, anyone buying, selling or otherwise appropriating the same will be liable in trover.[79] But it is held that trover will not lie for oil mined by one in adverse possession and delivered to the defendant.[80]

§ 236. **What constitutes a conversion.** Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion.[81] "Conversion, which will sustain trover, must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment or dominion over it; an appropriation of it by the defendant to his own use, or to the use of a third person, in disregard or defiance of the owner's rights; or a withholding of possession under a claim of title inconsistent with the title of the owner.[82] It is, therefore, a plain case of conversion, where one takes the plaintiff's property and sells it,

up on his own land. Woods v. McCall, 67 Ga. 506.

[79] Brooks v. Rogers, 101 Ala. 111, 13 So. 386; Central Coal & Coke Co. v. John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49; Omaha, etc., Refining Co. v. Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; Wright v. Skinner, 34 Fla. 453, 16 So. 335; Powers v. Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; Wing v. Milliken, 91 Me. 387. 40 Atl. 138, 64 Am. St. Rep. 238; Hunt v. Boston, 183 Mass. 303, 67 N. E. 244.

[80] Griffin v. S. W. Pa. Pipe Lines, 172 Pa. St. 580, 33 Atl. 578; National Transit Co. v. Weston, 121 Pa. St. 485, 15 Atl. 569.

[81] Hudman Bros. v. DuBose, 85 Ala. 446, 5 So. 162, 2 L. R. A. 475; Mitchell v. Thomas, 114 Ala. 459, 21 So. 991; Sunny South L. Co. v. Neemeyer L. Co., 63 Ark. 268, 38 S. W. 902; Dodge v. Meyer, 61 Cal. 405; Gordon v. Stockdale, 89 Ind. 240; Weber v. Davis, 44 Me. 147, 69 Am. Dec. 87; Scollard v. Brooks, 170 Mass. 445, 49 N. E. 741; McDonald v. Bayha, 93 Minn. 139, 100 N. W. 679; Interurban Con. Co. v. Hays, 191 Mo. 248, — S. W. —; Tuttle v. Hardenberg, 15 Mont. 219, 38 Pac. 1070; State v. Omaha Nat. Bank, 59 Neb. 483, 81 N. W. 319; Gilman v. Hill, 36 N. H. 311; Brown v. Ela, 67 N. H. 110, 30 Atl. 412; West Jersey R. R. Co. v. Trenton, etc., Co., 32 N. J. L. 517; Bigelow Co. v. Heintse, 53 N. J. L. 69, 21 Atl. 109; Liptrot v. Holmes, 1 Kelly, 381; Boyce v. Brockway, 31 N. Y. 490; Reid v. Colcock, 1 Mott & McC. 592, 9 Am. Dec. 729; Waller v. Bowling ,108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261; Putnam Sons v. MacLeod, 23 R. I. 373, 50 Atl. 646; Burnham v. Marshall, 56 Vt. 365 ; Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. 778; Lucas v. Sheridan, 124 Wis. 567, 102 N. W. 1077.

[82] Bolling v. Kirby, 90 Ala. 215, 7 So. 914, 24 Am. St. Rep. 789.

or otherwise disposes of it, in disregard of the plaintiff's right.[83] Conversion is a positive, tortious act. Nonfeasance or neglect of legal duty whereby the property is lost to the owner, will not support the action.[84] When property is delivered to one to be used or disposed of in a particular way, it is a conversion to use or dispose of it in a different way.[85] Thus, if one hire a horse to go to one place, and drive him to another, this is a conversion, though he return him to the owner.[86] So one having property entrusted to him to sell, is liable in trover if he exchanges it for other property, this being beyond his authority.[87] A misdelivery by a bailee is a

[83] Thompson v. Currier, 24 N. H. 237; Pickering v. Coleman, 12 N. H. 148; Shaw v. Peckett, 25 Vt. 423; Blood v. Sayre, 17 Vt. 609; Merchants' and Planters' Bank v. Meyer, 56 Ark. 499, 20 S. W. 406; Wright v. Skinner, 34 Fla. 453, 16 So. 335; Howe v. Munson, 65 Ill. App. 674; Brown v. Campbell Co., 44 Kan. 237, 22 Pac. 1020, 21 Am. St. Rep. 274; Powers v. Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; Wing v. Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238.

[84] Bowling v. Kirby, 90 Ala. 215, 7 So. 914, 24 Am. St. Rep. 789; Bowlin v. Nye, 10 Cush. 416; Rembaugh v. Phipps, 75 Mo. 422; Nelson v. Whetmore, 1 Rich. 318; Briggs v. New York, etc., R. R. Co., 28 Barb. 515; Walmsley v. Atlas S. S. Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699.

[85] Laverty v. Snethen, 68 N. Y. 522; Haynes v. Patterson, 95 N. Y. 1; Badger v. Hatch, 71 Me. 562; Boldewahn v. Schmidt, 89 Wis. 444, 62 N. W. 177; Hawkins v. Hoffman, 6 Hill, 586, 41 Am. Dec. 767; Packard v. Getman, 4 Wend. 613. A livery stable keeper, having possession of the plaintiff's horses under a lien for board, may use them in his business to the extent necessary for proper exercise and such use does not amount to a conversion. Brintnall v. Smith, 166 Mass. 253, 44 N. E. 223.

[86] Homer v. Thwing, 3 Pick. 492; Rotch v. Hawes, 12 Pick. 136, 22 Am. Dec. 414; Horsely v. Branch, 1 Humph. 199; Crocker v. Guillifer, 44 Me. 491, 69 Am. Dec. 118; Fisher v. Kyle, 27 Mich. 454; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Cartlidge v. Sloan, 124 Ala. 596, 26 So. 918; Welch v. Mohr, 93 Cal. 371, 28 Pac. 1060; Malone v. Robinson, 77 Ga. 719. A short delay on the way is not. Evans v. Mason, 64 N. H. 98, 5 Atl. 766. Nor is delay caused by missing the road. Spooner v. Manchester, 133 Mass. 270, 43 Am. Rep. 514. Where one hired a team and driver and substituted another driver it was held a conversion. Kellar v. Garth, 45 Mo. App. 332. The doctrine of the text is repudiated in Doolittle v. Shaw, 92 Ia. 348, 60 N. W. 621, 54 Am. St. Rep. 562, 26 L. R. A. 366.

[87] Hass v. Damon, 9 Iowa 589. The agent to loan on good real

conversion.[88] Where one holds possession of property as the agent or servant of another, his refusal to deliver it on demand is not a conversion.[89] If one in possession of property asserts ownership in himself it is a conversion as to the true owner,[90] but otherwise if he never had possession.[91] And so it is a conversion, if one asserts his intent to hold property until a certain condition is fulfilled, if he has no right to insist upon the condition.[92] An unauthorized sale of pledged property,[93] or any unauthorized dealing therewith in antagonism to the rights of the pledgor,[94] is a conversion. So where the pledgee of a note took a renewal note payable to his own order and surrendered the old note.[95] A delivery of goods by a carrier to the wrong party is a conversion.[96] So is delivery to the consignee after notice of stoppage *in transitu*.[97] So if delivery is wrongfully withheld.[98]

estate converts money if he retains it and procures the transfer to his principal of a security which he knows to be worthless. King v. Mackellar, 109 N. Y. 215, 16 N. E. 201. Where an agent had authority to sell for cash only, a sale on credit was held not a conversion. Loveless v. Fowler, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407.

[88] Dearborn v. Union Nat. Bank, 58 Me. 273; Markoe v. Tiffany, 26, App. Div. 95, 49 N. Y. S. 751.

[89] Hensey v. Howland, 10 Misc. 756, 31 N. Y. S. 823; Phillips v. Shackford, 21 R. I. 422, 44 Atl. 306.

[90] Oakley v. Randolph, 54 Kan. 779, 39 Pac. 699.

[91] Shaw v. Swope, 8 Pa. Supr. Ct. 491.

[92] Claflin v. Gurney, 17 R. I. 185, 20 Atl. 932.

[93] Woodworth v. Hascall, 59 Neb. 124, 80 N. W. 483; Griggs v. Day, 136 N. Y. 152, 32 N. E. 612, 32 Am. St. Rep. 704, 18 L. R. A. 120; Glidden v. Mechanics Nat. Bank, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737; Blood v. Erie Dime S. & L. Co., 164 Pa. St. 95, 30 Atl. 362.

[94] Schaaf v. Fries, 90 Mo. App. 111. The pledgor, in order to maintain trover, must tender the amount of the debt. Ibid.

[95] Stevens v. Wiley, 165 Mass. 402, 43 N. E. 177. The fact that the pledgee collects pledged notes and insists upon retaining more than he is entitled to does not make out a conversion of the notes. De Clark v. Bell, 10 Wyo. 1, 65 Pac. 852.

[96] Louisville, etc., R. R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534; Hamilton v. Chicago, etc., Ry. Co., 103 Ia. 325, 72 N. W. 536; Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855.

[97] Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527.

[98] Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117; Louisville, etc., R. R. Co., v. Lawson, 88 Ky. 496, 11 S. W. 511.

One who buys property must, at his peril, ascertain the ownership, and if he buys of one who has no authority to sell, his taking possession, in denial of the owner's right, is a conversion.[99] The vendor is equally liable, whether he sells the property as his own or as officer or agent; and so is the party for whom he acts, if he assists in or advises the sale.[1] So it is no protection to one who has received property and disposed of it in the usual course of trade, that he did so in good faith, and in the belief that the person from whom he took it was owner, if in fact the possession of the latter was tortious.[2] One selling stolen cattle as an innocent agent of the thief is liable in trover.[3] So is the purchaser of fruit, stolen from the plaintiff's land.[4]

One who obtains possession of property by fraud, is guilty of a conversion.[5] Thus where a purchase of property has been

[99] Marx v. Nelms, 95 Ala. 304, 10 So. 551; Central Coal & Coke Co. v. John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49; Omaha, etc., Refining Co. v. Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; Miller v. Thompson, 60 Me. 322; Powers v. Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; Solton v. Gerdon, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843; McDaniel v. Adams, 87 Tenn. 756, 11 S. W. 939; Cundy v. Lindsay, L. R. 3 App. Cas. 459; Hamet v. Letcher, 37 Ohio St. 356, 41 Am. Rep. 513; Alexander v. Swackhamer, 105 Ind. 81, 55 Am. Rep. 180.

[1] Billiter v. Young, 6 El. & Bl. 1; Cooper v. Chitty, Burr. 3; Garland v. Carlisle, 4 Cl. & F. 693; Moore v. Eldred, 42 Vt. 13; Calkins v. Lockwood, 17 Conn. 155, 42 Am. Dec. 729.

[2] Hardman v. Booth, 1 H. & C. 803; Hollins v. Fowler, L. R. 7 H. L. Cas. 757; Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332; Shearer v. Evans, 89 Ind. 400; Marx v. Nelms, 95 Ala. 304, 10 So. 551; Omaha, etc., Refining Co. v. Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; Powers v. Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304.

[3] Laughlin v. Barnes, 76 Mo. App. 258. So is an auctioneer who sells property by direction of one who had no right to sell it. Robinson v. Bird, 158 Mass. 357, 33 N. E. 523, 35 Am. St. Rep. 495.

[4] Freeman v. Underword, 66 Me. 229. And see Eaton v. Munroe, 52 Me. 63.

[5] Dudley v. Abner, 52 Ala. 572; Strauss v. Schwab, 104 Ala. 669, 16 So. 692; Dean v. Ross, 178 Mass. 397, 60 N. E. 119. In the latter case the defendant obtained the plaintiff's property by falsely representing that the plaintiff's deceased husband had directed through a medium that she should give it to the defendant. Trover for the property was sustained.

effected by means of false representations and the vendee has obtained possession of the property, it is held that the vendor can maintain trover without demand.[6] So where property was obtained by purchase from the plaintiff while intoxicated.[7]

A mortgagor of chattels may sell the same subject to the mortgagee's rights and this is no conversion.[8] But a sale of the entire property in the chattels in denial or disregard of the mortgagee's rights is a conversion by the mortgagor,[9] and may be by the purchaser also,[10] but not if he purchased without notice of the mortgage and has done nothing but receive possession of the goods.[11] Neither the first mortgagee, nor one to whom he has sold the property, is liable in trover to the second mortgagee. Having the right of possession defeasible only on performance of the condition of the mortgage, he may assign his mortgage and sell his mortgaged property to a third person, subject only to the right of redemption of the mortgagor and those who claim under him.[12] But it seems that he cannot sell out the property in parcels, and if he should, trover would

[6] Thurston v. Blanchard, 22 Pick. 18; Green v. Russell, 5 Hill 183; Thompson v. Roe, 16 Conn. 71; Noble v. Adams, 7 Taunt. 59; Bristol v. Wilsmore, 2 D. & R. 755.

[7] Baird v. Howard, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846.

[8] White v. Phelps, 12 N. H. 382; Davis v. Rosenbaum, 179 Ill. 112, 53 N. E. 585.

[9] Church v. McLeod, 58 Vt. 541; Woods v. Rose, 135 Ala. 297, 33 So. 41; Belser v. Youngblood, 103 Ala. 545, 15 So. 863; Beall v. Folhnar, 122 Ala. 414, 26 So. 1; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Nichols v. Barnes, 3 Dak. 148, 14 N. W. 110; Lafayette County Bank v. Metcalf, 40 Mo. App. 494; Merchants & Planters Bank v. Meyer, 56 Ark. 499, 20 S. W. 406. An auctioneer or broker who makes the sale is guilty of conversion. Brown v. Campbell Co., 44 Kan. 237, 22 Pac. 1020, 21 Am. St. Rep. 274; Lafayette Co. Bank v. Metcalf, 40 Mo. App. 494; *contra*, Dawes v. Rosenbaum, 179 Ill. 112, 53 N. E. 585.

[10] See Millar v. Allen, 10 R. I. 49.

[11] Dean v. Cushman, 95 Me. 454, 50 Atl. 85, 85 Am. St. Rep. 425, 55 L. R. A. 959. A refusal to deliver the chattel to the mortgagee after the mortgage is due is a conversion. Mattingly v. Paul, 88 Ind 95. So is the refusal of a mortgagee to accept a tender and his sale of the chattel. Rice v. Kahn, 70 Wis. 323, 35 N. W. 465; or, of a pledgee to deliver stock upon tender of the debt. McIntire v. Blakely, 12 Atl. Rep. 325 (Penn.).

[12] Landon v. Emmons, 97 Mass. 37, citing Homes v. Crane, 2 Pick. 610. He may be liable if he assumes to sell the complete title. Ashmead v. Kellogg, 23 Conn. 70.

lie, as this would impair, and perhaps defeat the right to redeem.[13] If a mortgagee takes possession of mortgaged chattels and asserts absolute ownership over them, it is a conversion, though the mortgage authorizes him to take possession at any time for the purpose of foreclosure.[14] If a mortgage authorizes a public sale only, a private sale is a conversion.[15] So the sale of more than enough to satisfy the mortgagee's claim, is a conversion as to the excess.[16]

If an officer levies on property which is exempt from execution, and proceeds to a sale of the same, the owner may treat this as a conversion.[17] So if he levy on the property of the plaintiff under a writ against another party,[18] or on property in the possession of a mortgagee under a writ against the mortgagor.[19] But a levy upon and sale of mortgaged chattels subject to the mortgage when the mortgage is not due and the mortgagee is not entitled to possession, is held not a conversion by the officer, when nothing is done by him to put the property

[13] Spaulding v. Barnes, 4 Gray, 330. Trover will lie against mortgagee who sells before condition broken. Eslow v. Mitchell, 26 Mich. 500.

[14] Howery v. Hoover, 97 Ia. 581, 66 N. W. 772; Mitchell v. Thomas, 114 Ala. 459, 21 So. 991. If a second mortagee participates in sale by mortgagor he is liable in trover to first mortgagee. Henderson v. Foy, 96 Ala. 205, 11 So. 441, 38 Am. St. Rep. 94.

[15] Colby v. W. W. Kimball Co., 99 Ia. 321, 68 N. W. 786.

[16] Omaha Auction, etc., Co. v. Rogers, 35 Neb. 61, 52 N. W. 826.

[17] Sanborn v. Hamilton, 18 Vt. 590. So if he seize A's goods on a writ against B although they are not removed. Johnson v. Farr, 60 N. H. 426. See Scudder v. Anderson, 54 Mich. 122; so when A has warned him that his wheat is mingled with B's in a bin. Behler v. Drury, 51 Mich. 111. A conversion is complete at the sale when a proper levy has been made on growing crops. Howard v. Rugland, 35 Minn. 388. See Molm v. Barton, 27 Minn. 530. If an officer of his own motive retains after a trial a drum of the prisoner to prevent future disturbance it is a conversion Thatcher v. Weeks, 79 Me. 547, 11 Atl. 599.

[18] Milner & Kettig Co. v. De Loach Mill Mfg. Co., 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63; Yockey v. Smith, 181 Ill. 564, 54 N. E. 1058, 72 Am. St. Rep. 286. So is a levy on partnership property on a writ against one partner. Russell v. Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432.

[19] Lander v. Propper, 6 Dak. 64, 50 N. W. 400; Jones v. Kellogg, 51 Kan. 263, 33 Pac. 997, 37 Am. St. Rep. 278.

beyond the reach of the mortgagee.[20] Where the plaintiff had a right to remove his property from the defendant's premises and the defendant forbade it, it was held a conversion.[21] One who assists in a wrongful taking of goods is liable, though he acted as agent merely, for agency cannot be recognized as a protection in wrongs.[22] Where one wrongfully converts a chiffonier, he is liable for articles locked in it, whether he knew they were there or not.[23] Where a clerk of court deposited trust funds in his own name without special authority so to do, he was held guilty of a conversion.[24] It is not a conversion for the defendant to put his brand upon the calves of the plaintiff, if they remain in the plaintiff's possession.[25] A bank which receives a draft with a bill of lading for flour attached, and collects the draft and pays over the proceeds as directed by the consignor, is not liable in trover for the flour, though the consignee had no title thereto.[26] Merely receiving property from the wrongful possessor, and returning it before notice of his want of title, is no conversion.[27] So it is no conversion by a common carrier or other bailee who has received property from one not rightfully entitled to possession, to deliver it in pursuance of the bailment, if this is done before notice of the rights of the real owner.[27a] After such notice he acts at his peril. A delivery to the party entitled

[20] Locke v. Streck, 54 Neb. 472, 74 N. W. 970.

[21] Erskine v. Savage, 96 Me. 57, 51 Atl. 242.

[22] McPartland v. Read, 11 Allen, 231; Edgerly v. Whalen, 106 Mass. 307; Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. 778; Banfield v. Whipple, 10 Allen, 27, 87 Am. Dec. 618.

[23] Jesurun v. Kent, 45 Minn. 222, 47 N. W. 784.

[24] Dirks v. Juel, 59 Neb. 353, 80 N. W. 1045. It is a conversion to draw off part of a cask of liquor and fill it up with water. Richardson v. Atkinson, 1 Stra. 576. And while one, the identity of whose property is lost by being commingled with something different, may claim the whole, so he may treat the commingling as a conversion, at his election. See Martin v. Mason, 78 Me. 452; Morningstar v. Cunningham, 116 Ind. 328, 59 Am. Rep. 211.

[25] Sawyer v. Kenan, 95 Ga. 552, 22 S. E. 324.

[26] Walker v. First Nat. Bank, 43 Ore. 102, 72 Pac. 635.

[27] Hill v. Hayes, 38 Conn. 532; Nelson v. Iverson, 17 Ala. 216; Marks v. Robinson, 82 Ala. 69; Hudman Brothers v. DuBose, 85 Ala. 446, 5 So. 162, 2 L. R. A. 475.

[27a] Nelson v. Iverson, 17 Ala. 216; Burditt v. Hunt, 25 Me. 419, 43 Am. Dec. 665. See Nelson v.

to the possession will be a protection to him, and he may defend in the right of such party.[27b]

§ 237. Demand and refusal. Where the defendant has come into the possession of property lawfully or without fault, it is in general necessary to make demand of possession of him before suit will lie.[28] A demand is unnecessary if a conversion is otherwise shown,[29] or if possession is obtained by fraud.[30] Thus, if a bailee disposes of the property contrary to the terms of the bailment, or misuses the property, or otherwise abuses his trust, trover will lie without demand.[31] Where one buys

Anderson, 1 B. & Ad. 450; Morris v. Hall, 41 Ala. 510; Nanson v. Jacob, 93 Mo. 331, 6 S. W. 246.

[27b] Sheridan v. New Quay Co., 4 C. B. (N. S.) 619; Ogle v. Atkinson, 5 Taunt. 759; Thorne v. Tilbury, 3 H. & N. 534; Biddle v. Bond, 6 Best & S. 225; Hardman v. Willcock, 9 Bing. 382; King v. Richards, 6 Whart. 418; Bates v. Stanton, 1 Duer. 79; Bliven v. Hudson R. R. R. Co., 36 N. Y. 403; Young v. East Ala., etc., Co., 80 Ala. 100.

[28] Moore v. Monroe Refrigerator Co., 128 Ala. 621, 29 So. 447; Dieterle v. Bekin, 143 Cal. 683, 77 Pac. 664; Phelps, Dodge & Palmer Co. v. Halsell, 11 Okl. 1, 65 Pac. 340.

[29] Ensley Lumber Co. v. Lewis, 121 Ala. 94, 25 So. 729; Boutwell v. Parker, 124 Ala. 341, 27 So. 309; Woods v. Rose, 135 Ala. 297, 33 So. 41; Anderson v. Agnew, 38 Fla. 30, 20 So. 766; Howitt v. Estelle, 92 Ill. 218; Hayes v. Mass. Mut. Life Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Union Stock Yards & T. Co. v. Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341; Buntin v. Pritchett, 85 Ind. 247; Hake v. Buell, 50 Mich. 89; Kenrick v. Rogers, 26 Minn. 344; Adams v. Castle, 64 Minn. 505, 67 N. W. 637; Gross v. Scheel, 67 Neb. 223, 93 N. W. 418; Porell v. Cavanaugh, 69 N. H. 364, 41 Atl. 860; Willard v. Monarch El. Co., 10 N. D. 400, 87 N. W. 996; Railroad Co. v. Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117; Velzian v. Lewis, 15 Ore. 539, 16 Pac. 631; Claflin v. Gurney, 17 R. I. 185, 20 Atl. 932.

[30] Thompson v. Roe, 16 Conn. 71; Thurston v. Blanchard, 22 Pick. 18; Moody v. Drown, 58 N. H. 45; Green v. Russell, 5 Hill, 183; Powell v. Powell, 71 N. Y. 71; Baird v. Howard, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846; Warner v. Vallily, 13 R. I. 483. But if before contract is avoided goods have passed to vendee's assignee in insolency, demand must be made of him. Goodwin v. Wertheimer, 99 N. Y. 149.

[31] Scott v. Hodges, 62 Ala. 337; Haas v. Taylor, 80 Ala. 459, 2 So. 633; Bunger v. Roddy, 70 Ind. 26; Rodick v. Coburn, 68 Me. 170; Liptrot v. Jones, 1 Kelly 381; Dean v. Turner, 31 Md. 52; Bloxam v. Hubbard, 5 East 407; Rosenweig v. Frazer, 82 Ind. 342; Syeds v. Hay, 4 T. R. 260.

or leases property in good faith of one who has no title, he is not liable in trover therefor until demand and refusal or until he has done some other act with respect to the property that amounts to a conversion.[32] A man acquires rightful possession of chattels if they are upon land at the time he recovers it in ejectment, and trover will not lie for their conversion until after demand and refusal to allow the plaintiff to take them away.[33] There need, however, be no formal demand in such a case, for if the owner attempts to remove his property, and is not suffered to do so, his attempt is equivalent to a demand.[34]

The refusal to surrender possession in response to a demand is not of itself a conversion; it is only evidence of a conversion, and like other inconclusive acts is open to explanation.[35] It may, for instance, be shown that the property has perished, or been lost without the bailee's fault, and that he does not surrender possession simply because it has become impossible.[36] In any case where at the time of the demand the de-

[32] Metcalfe v. Dickman, 43 Ill. App. 284; Hovey v. Bromley, 85 Hun, 540, 33 N. Y. S. 400. If he sells the property or otherwise treats it as his own, no demand is necessary. Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 571; Gilmore v. Newton, 9 Allen, 171, 85 Am. Dec. 749; Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Prime v. Cobb, 63 Me. 200.

[33] Thorogood v. Robinson, 6 Q. B. 769. See Witherspoon v. Blewett, 47 Miss. 570.

[34] Badger v. Batavia Paper Co. 70 Ill. 302. See, also, Woodis v. Jordan, 62 Me. 490. Merely selling and giving a deed of land by the landlord is no conversion of the tenant's fixtures; the tenant's right to take them away is not affected by the conveyance. Davis v. Buffum, 51 Me. 160, citing Burnside v. Twitchell, 43 N. H. 390.

[35] Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Coffin v. Anderson, 4 Blackf. 395; Beckman v. McKay, 14 Cal. 250; Dietus v. Fuss, 8 Md. 148; Gordon v. Stockdale, 89 Ind. 240; Sprague Collecting Agency v. Spiegel, 107 Ill. App. 508. But it is sufficient evidence if one holds wrongfully. Weston v. Carr, 71 Me. 356; Sunny South Lumber Co. v. Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. 902; Bigelow Co. v. Heintz, 53 N. J. L. 69, 21 Atl. 109; Towne v. St. Anthony, etc., El. Co., 8 N. D. 200, 77 N. W. 608.

[36] Davis v. Hunt, 114 Ala. 146, 21 So. 468; Dearbourn v Union National Bank, 58 Me. 273; Jefferson v. Hale, 31 Ark. 286. As where it was taken from him by an armed force without his fault. Abraham v. Nunn, 42 Ala. 51. See Griffith v. Zippenwick, 28 Ohio St. 388.

fendant has neither the actual nor constructive possession, and, therefore, cannot deliver the property in response to the demand, his liability is in no manner affected by the demand and refusal; for if he had been guilty of a conversion before, the demand was unnecessary, and if he had not been, a failure to do what for any reason he was unable to do, could not render him so.[37] Still the demand may, even under such circumstances, have this importance: it may put the defendant apparently in the wrong, and throw upon him the burden of showing why he fails to surrender the property.[38]

§ 238. **Conversion by tenant in common.** The authorities are irreconcilably at variance as to what may constitute a conversion by one tenant in common of his co-tenant's interest, agreeing only in this, that a culpable loss or destruction by one will render him liable.[39] The rule in England is that neither a claim to exclusive ownership by one, nor the exclusion of the other from possession, nor even the sale of the whole, can be treated in the law as the equivalent of loss or

[37] Dawes v. Rosenbaum, 179 Ill. 112, 53 N. E. 585. If the defendant has not the property he should put his refusal on that ground. An unqualified refusal is *prima facie* evidence of conversion. Hartford Ice Co. v. Greenwoods Co., 61 Conn. 166, 23 Atl. 91, 29 Am. St. Rep. 189.

[38] Davis v. Buffum, 51 Me. 160. Refusal to comply with a premature demand is no evidence of conversion. Hagar v. Randall, 62 Me. 439. If demand is made by an agent, and is not complied with because the agent gives no evidence of authority, this does not make out a conversion. Watt v. Potter, 2 Mason, 77. Compare Ingalls v. Bulkley, 15 Ill. 224; Robinson v. Burleigh, 5 N. H. 225. So, if demand is made on an agent for property held by him for his principal, his refusal to deliver does not render him liable in trover. Carey v. Bright, 58 Penn. St. 70. A qualified reasonable refusal for the purpose of ascertaining ownership is not enough. Buffington v. Clarke, 15 R. I. 437, 8 Atl. 247; Flannery v. Brewer, 66 Mich. 509, 33 N. W. 522; Butler v. Jones, 80 Ala. 436. A demand and refusal need not be alleged, but may be proved, if necessary, under the allegation that the defendant converted and disposed of the property to his own use. Daggett v. Gray, 110 Cal. 169, 42 Pac. 568.

[39] Moore v. Walker, 124 Ala. 199, 26 So. 884; Mayhew v. Herrick, 7 C. B. 229; Hyde v. Stone, 9 Cow. 230; White v. Brooks, 43 N. H. 402; Reed v. McRill, 41 Neb. 206, 59 N. W. 775; Gates v. Bowers, 168 N. Y. 14, 60 N. E. 1043; McCarthy v. McCarthy, 40 Misc. 180, 81 N. Y. S. 660.

destruction, or be considered a conversion;[40] and this rule is adopted in some cases in Vermont,[41] and in North Carolina it is also followed, but with this qualification, that a sale of the property out of the state may be treated as a loss or destruction.[42] But in other cases any sale of the whole interest by one tenant in common has been held a conversion.[43] And in still others it has been held that even a sale is not necessary to make out a conversion; that the doctrine that one tenant in common cannot maintain trover against his co-tenant without proving a loss, destruction, or sale of the article, applies only to things in their nature so far indivisible that the share of one cannot be distinguished from that of the other. It can have no reasonable application to such commodities as are readily divisible, by tale or measure, into portions absolutely alike and in quality, such as grain or money.[44] And later cases hold generally that if one tenant in common in posses-

[40] Mayhew v. Herrick, 7 C. B. 229. See Barnardistone v. Chapman, Bull. N. P. 34.

[41] Tubbs v. Richardson, 6 Vt. 442, 27 Am. Dec. 570; Sanborn v. Morrill, 15 Vt. 700, 40 Am. Dec. 701; Barton v. Burton, 27 Vt. 93; Lewis v. Clark, 59 Vt. 363. So levy of attachment where possession is not changed. Spaulding v. Orcutt, 56 Vt. 218. In Maine, the mere claim to the exclusive ownership of a horse is held to be no conversion. Dain v. Cowing, 22 Me. 347, 39 Am. Dec. 585. See Symonds v. Harris, 51 Me. 14, 81 Am. Dec. 533; Osborn v. Schenck, 83 N. Y. 201. But if one distinctly appropriates the whole to his own use, it is. Needham v. Hill, 127 Mass. 133. See Bayles v. Cronkhite, 39 Mich. 413. And in Gilbert v. Dickerson, 7 Wend. 449, 22 Am. Dec. 592, the same ruling was made where the property was not only detained from the co-tenant, but locked up. Mere detention is not enough. Heller v. Hufsmith, 102 Pa. St. 533.

[42] Pitt v. Petwey, 12 Ired. 69. Or if perishable, has so acted that the other cannot recover it. Grim v. Wicker, 80 N. C. 343. See Shearin v. Rigsbee, 97 N. C. 216, 1 S. E. 770.

[43] Wilson v. Reed, 3 Johns. 175 Gilbert v. Dickerson, 7 Wend. 449 22 Am. Dec. 592; Mumford v. McKay, 8 Wend. 442, 24 Am. Dec. 34; Dyckman v. Valiente, 42 N. Y. 549; Weld v. Oliver, 21 Pick. 559; White v. Brooks, 43 N. H. 402; Neilson v. Slade, 49 Ala. 253; Courts v. Happle, 49 Ala. 254; Wheeler v. Wheeler, 33 Me. 347; Sullivan v. Lawler, 72 Ala. 74; Goell v. Morse, 126 Mass. 480; Person v. Wilson, 25 Minn. 189; Shepard v. Pettit, 30 Minn. 119; Ballentine v. Joplin, 105 Ky. 70, 48 S. W. 417; Fleming v. Katahdin Pulp & P. Co., 93 Me. 110, 44 Atl. 378.

[44] Gates v. Bowers, 168 N. Y 14, 60 N. E. 1043; Fiquet v. Alli-

sion of the common property, claims exclusive ownership and denies any right in the other tenant in common, he is guilty of a conversion without regard to whether the property is severable.[45]

§ 239. **Return of property.** Trover is most commonly brought when a complete conversion of the property has taken place, but as it lies in all cases where one makes an unlawful use of another's personalty, the injury is sometimes very small. Thus, if one hires a horse for one journey, and starts with him in an opposite direction on another, a conversion has then taken place, and the owner may bring suit. But here, if the bailee returns the horse before the trial, as he may, the owner is not injured to the extent of his value, since the horse has only temporarily been converted to the wrong-doer's use, and the injury is likely to be small, perhaps nominal. But where a conversion has taken place, the owner is not bound to receive back the property, if tendered, either before or after suit,[46] and if he does take it back, this does not bar his suit, but goes in mitigation of damages only.[47]

son, 12 Mich. 328, 86 Am. Dec. 54; Ripley v. Davis, 15 Mich. 75, 90 Am. Dec. 262; Clark v. Griffith, 24 N. Y. 595; Stall v. Wilbur, 77 N. Y. 158. The rule has been applied to cattle. Felts v. Collins, 46 App. Div. 332, 61 N. Y. S. 482; hogs, Gates v. Bowers, 168 N. Y. 14, 60 N. E. 1043; shares of stock, Doyle v. Burns, 123 Ia. 488, 99 N. W. 195; and to manure on a farm, Pickering v. Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698.

[45] Grove v. Wise, 39 Mich. 161; Lawatsch v. Cooney, 86 Hun, 546, 33 N. Y. S. 775; Waller v. Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261; Rosenan v. Syring, 25 Ore. 386, 35 Pac. 844.

[46] Whittingham v. Owen, 8 Mackey, 277; Hamilton v. Chicago, etc., Ry. Co., 103 Ia. 325, 72 N. W. 536; Louisville, etc., R. R Co. v. Lawson, 88 Ky. 496, 11 S W. 511; Carpenter v. Am. B. & L. Ass'n, 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345; Allen v. Am. B. & L. Ass'n, 55 Minn. 86, 56 N. W. 577; Gilbert v. Peck, 43 Mo. App. 577; Hanmer v. Wilsey, 17 Wend. 91; Brewster v. Silliman, 38 N. Y. 423; Stephens v. Koonce, 103 N. C. 266, 9 S. E. 315; Waller v. Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261; Railroad Co.

[47] Ibid.; Cartlidge v. Sloan, 124 Ala. 596, 26 So. 918; Watson v. Coburn, 35 Neb. 492, 53 N. W. 477; Coburn v. Watson, 48 Neb. 257, 67 N. W. 171; Gibbs v. Chase, 10 Mass. 125; Brewster v. Silliman, 38 N. Y. 423; Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. 778.

§ 240. Damages. In most cases where the circumstances are not such as to warrant exemplary damages, a just indemnity will consist in the value of the property at the time of the conversion, with interest thereon to the time of trial.[48] Some cases hold that the plaintiff is entitled to the highest market price between the time of conversion and the time of

v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117. But see Bigelow Co. v. Heintz, 53 N. J. L. 69, 21 Atl. 109, where it is held that, if the property remains in the same condition and the defendant offers to restore it, the plaintiff is bound to receive it. And see Ames, Cases on Torts, p. 378, note.

[48] Jefferson v. Hale, 31 Ark. 286; Omaha, etc., Refining Co. v. Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. A. R. 236; Hurd v. Hubbell, 26 Conn. 389; Vaughn v. Webster, 5 Harr. 256; Robinson v. Hartridge, 13 Fla. 501; Newton, etc., Co. v. White, 53 Ga. 395; Keaggy v. Hite, 12 Ill. 99; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Yater v. Mullen, 24 Ind. 277; Gensburg v. Field, 104 Ia. 599, 74 N. W. 3; Lillard v. Whitaker, 3 Bibb, 92; Powers v. Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; Wing v. Melliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; Heinekamp v. Beaty, 74 Md. 388, 21 Atl. 1098; Sargeant v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; Pierce v. Benjamin, 14 Pick. 356, 25 Am. Dec. 396; Russell v. Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432; Ripley v. Davis, 15 Mich. 75, 90 Am. Dec. 262; Allen v. Kinyon, 41 Mich. 281; Polk v. Allen, 19 Mo. 467; Whitfield v. Whitfield, 40 Miss. 352; Barlass v. Brash, 27 Neb. 212, 42 N. W. 1028; Carlyon v. Lannan, 4 Nev. 156; Sledge v. Reid, 73 N. C. 440; Neiler v. Kelley, 69 Pa. St. 403; McGill v. Chilhowee L. Co., 111 Tenn. 552, 82 S. W. 210; Blotch v. Sweeney, 63 Tex. 419; Thrall v. Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Tenney v. State Bank, 20 Wis. 152. Cases for the conversion of notes or choses in action. Ray v. Light, 34 Ark. 421; Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91; Moody v. Drown, 58 N. H. 45; Powell v. Powell, 71 N. Y. 71. Cases of mortgaged chattels, or chattels in which one has a special property. Becker v. Dunham, 27 Minn. 32; Fowler v. Haynes, 91 N. Y. 346; Rosenweig v. Frazer, 82 Ind. 342; Seibold v. Rogers, 110 Ala. 438, 18 So. 312; California Cured Fruit Co. v. Ainsworth, 134 Cal. 461, 66 Pac. 586; Stanley v. Citizens C. & C. Co., 24 Colo. 103, 49 Pac. 35; Lander v. Propper, 6 Dak. 64, 50 N. W. 400; Holmes v. Langston, 110 Ga. 861, 36 S. E. 251; Mantonya v. Emerich Outfitting Co., 172 Ill. 92, 49 N. E. 721; Jones v. Cobb, 84 Me. 153, 24 Atl. 798; Vandiver v. O'Gorman, 57 Minn. 64, 58 N. W. 831; Harvey v. Morse, 69 N. H. 475, 45 Atl. 239; Lord v. Buchanan, 69 Vt. 320, 37 Atl. 1048, 60 Am. St. Rep. 933.

trial.[49] Or, at least, that the jury may give this in their discretion.[50] A rule applied in some cases, where the article converted is always to be had in the market, is the value at the time of the conversion and any advance that may have taken place within such time thereafter as was reasonably necessary for replacing it.[51] If the property is largely increased in value by the action of the wrong-doer himself, as where he takes heavy articles a long distance to market, or expends time and labor in preparing them for market, it seems he should be charged only with the value at the time of the wrongful taking, and interest thereon, unless there were bad faith or circumstances of aggravation.[52] But if he acted willfully, the

[49] Markham v. Jaudon, 41 N. Y. 235; Burt v. Dutcher, 34 N. Y. 493; Romaine v. Van Allen, 26 N. Y 309; Morgan v. Gregg, 46 Barb. 183; Wilson v. Matthews, 24 Barb. 295; Carter v. Du Pre, 18 S. C. 179; Boutwell v. Parker, 124 Ala. 341, 27 So. 309; Panoski v. Gollberg, 80 Wis. 339, 50 N. W. 191.

[50] Greening v. Wilkinson, 1 C. & P. 625; Ewing v. Blount, 20 Ala. 694; Jenkins v. McConico, 26 Ala. 213; Loeb v. Flash, 65 Ala. 526; Douglass v. Kraft, 9 Cal. 562; Hamer v. Hathaway, 33 Cal. 117.

[51] Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507; Mathews v. Coe, 49 N. Y. 57; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Weymouth v. Chicago, etc., R. R. Co., 17 Wis. 567, 84 Am. Dec. 763; Meixell v. Kirkpatrick, 33 Kan. 282; Seymour v. Ives, 46 Conn. 109. The damages for the conversion of a paper of no intrinsic value, but which is the evidence of a valuable right or interest, as against the one from whom such right or interest is derived who converts the paper and denies the right, is the value of the right or interest itself. Olds v. Chicago Open Board of Trade, 33 Ill. App. 445; Hayes v. Mass. Mut. Life Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303.

[52] Winchester v. Craig, 33 Mich. 205; Barton Coal Co. v. Cox, 39 Md. 1, 17 Am. Rep. 525; Hinman v. Heyderstadt, 32 Minn. 250; Whitney v. Huntington, 37 Minn. 197, 33 N. W. 561, 57 Am. Rep. 68; Tuttle v. Wilson, 52 Wis. 643; Ivy Coal & Coke Co. v. Ala. Coal & Coke Co., 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46; Omaha, etc., Refining Co. v. Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; St. Claire v. Cash Gold M. & M. Co., 9 Colo. App. 235, 47 Pac. 466; Anderson v. Besser, 131 Mich. 481, 91 N. W. 737; Whitney v. Huntington, 37 Minn. 197, 33 N. W. 561; Bond v. Griffin, 74 Miss. 599, 22 So. 187; Illinois Cent. R. R. Co. v. Le Blanc, 74 Miss. 626, 21 So. 748; Dyke v. National Transit Co., 22 App. Div. 360, 49 N. Y. S. 180; United States v. Homestake Min. Co 117 Fed. 481, 54 C. C. A. 303.

true owner may demand the property in its changed condition and, in case of refusal, recover its value at the time and place of demand, without any deduction for the defendant's labor.[53]

§ 241. Effect of judgment on title to the property. It was decided in *Adams v. Broughton*[54] that judgment in trover or trespass for the value of the property vested the title in the defendant; and this decision has been followed in this country to some extent.[55] But the present English rule is, that it is not the judgment alone, but judgment and the satisfaction thereof, that passes the title to the defendant;[56] and this may be said to be the accepted doctrine in this country at the present time.[57] The title by relation vests as of the time when the conversion took place; but this relation is not effectual for all purposes; it could not render a third party a trespasser upon the rights of the defendant for anything done by him intermediate the conversion and the judgment;[58] and if, after conversion, the plaintiff has sold his interest in the property,

[53] Woodenware Co. v. U. S., 106 U. S. 432; Everson v. Seller, 106 Ind. 266; Tuttle v. White, 46 Mich. 485; Skinner v. Pinney, 19 Fla. 42; Alta, etc., Co. v. Benson, etc., Co., 2 Ariz. 362, 16 Pac. 565. But see Railroad Co. v. Hutchins, 37 Ohio St. 282; Wright v. Skinner, 34 Fla. 453, 16 So. 335; Powers v. Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; Wing v. Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; Moret v. Mason, 106 Mich. 340, 64 N. W. 193; King v Merriman, 38 Minn. 47, 35 N. W. 570; Holt v. Hayes, 110 Tenn. 42, 73 S. W. 111; Fisher v. Brown, 70 Fed. 570, 17 C. C. A. 225; United States v. Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303.

[54] Stra. 1078; S. C. Andrews, 18.

[55] Carlisle v. Burley, 3 Me 250; Rogers v. Moore, Rice (S. C.), 90; Bogan v. Wilburn, 1 Speers, 179; Floyd v. Browne, 1 Rawle, 121, 18 Am. Dec. 602; Marsh v. Pier, 4 [illegible] v. Northern Liberties, 3 Watts & S. 103; Merrick's Estate, 5 W. & S. 9; Curtis v. Groat, 6 Johns. 168; Fox v. Prickett, 34 N. J. L. 13.

[56] Brinsmead v. Harrison, L. R. 6 C. P. 584.

[57] Lovejoy v. Murray, 3 Wall. 1; Elliott v. Hayden, 104 Mass. 180; United Society v. Underwood, 11 Bush, 265, 21 Am. Rep. 214; Smith v. Smith, 51 N. H. 571; Hyde v. Noble, 13 N. H. 494; Bell v. Perry, 43 Iowa, 368; Bacon v. Kimmell, 14 Mich. 201; Atwater v. Tupper, 45 Conn. 144, 29 Am. Rep. 674; Thayer v. Manley, 73 N. Y. 305; Miller v. Hyde, 161 Mass. 472, 37 N. E. 760, 42 Am. St. Rep. 424, 25 L. R. A. 42; John A. Tolman Co. v. Waite, 119 Mich. 341, 78 N. W. 124, 75 Am. St. Rep. 400; Singer Mfg. Co. v. Skillman, 52 N. J. L. 263, 19 Atl. 260.

[58] Bacon v. Kimmel, 14 Mich. 201.

the purchaser will not be affected by the suit, and the plaintiff will be entitled to recover nominal damages only, since, by the sale, he has disabled himself from passing title to the defendant.[59] And in neither trover nor trespass will the title be changed if the recovery was only for an injury to the property, or for a temporary use, and not for the value.

§ 242. **Justification under process.** An interference with property may be justified under process. By process is meant any writ, warrant, order, or other authority which purports to empower a ministerial officer to arrest the person, or to seize or enter upon the property of an individual, or to do any act in respect to such person or property which if not justified, would constitute a trespass.[60] In order to be a protection, the process must, to use the customary legal expression, be *fair on its face.* By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it.[61] But if the officer, in the service of process,

[59] Brady v. Whitney, 24 Mich. 154.

[60] For illustrations see McGuinty v. Herrick, 5 Wend. 240; Loomis v. Spencer, 1 Ohio St. 153; Thames Mfg. Co. v. Lathrop, 7 Conn. 550; Ives v. Lucas, 1 C. & P. 7; Hill v. Figley, 25 Ill. 156; Gott v. Mitchell, 7 Blackf. 270; Watkins v. Wallace, 19 Mich. 57; Erskine v. Hohnbach, 14 Wall. 613; Shaw v. Dennis, 10 Ill. 405; Noland v. Bushby, 28 Ind. 154; Kelley v. Savage, 20 Me. 199; Caldwell v. Hawkins, 40 Me. 526; Nowell v. Tripp, 61 Me. 426, 14 Am. Rep. 572; Clark v. Axford, 5 Mich. 182. An order of court appointing a receiver and directing him to take possession of property protects the receiver in the same manner. Steele v. Walker, 115 Ala. 485, 21 So. 942, 67 Am. St. Rep. 62; Walling v. Miller, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400. So of a trustee in bankruptcy. Turrentine v. Blackwood, 125 Ala. 436, 28 So. 95, 82 Am. St. Rep. 254.

[61] Parsons v. Lloyd, 3 Wils. 341; Ives v. Lucas, 1 C. & P. 7; Erskine v. Hohnbach, 14 Wall. 613; Lott v. Hubbard, 44 Ala. 593; Stephens v. Head, 138 Ala. 455, 35 So. 565; Budder v. Spangler, 12 Colo. 216, 20 Pac. 760; Watson v. Watson, 9 Conn. 140, 23 Am. Dec. 324; Neth v. Crofut, 30 Conn. 580; Brother v. Cannon, 2 Ill. 200; Hill v. Figley, 25 Ill. 156; Gott v. Mitch-

proceeds unlawfully or misuses or misappropriates the property taken by him, he will become a trespasser *ab initio*.[62] For a mere non-feasance an officer does not become a trespasser *ab initio*. As where he fails to keep safely property taken in execution by him,[63] or to proceed to a sale as in duty bound to do;[64] or to restore property attached after the debt has been satisfied.[65] But in each of these cases he will be liable on the special case; but not in trespass, because in none of his

ell, 7 Blackf. 270; Noland v. Bushby, 28 Ind. 154; Heath v. Halfhill, 106 Ia. 133, 76 N. W. 522; Chambers v. Oehler, 107 Ia. 155, 77 N. W. 853; Brainard v. Head, 15 La. Ann. 489; Ford v. Clough, 8 Me. 334, 23 Am. Dec. 513; State v. McNally, 34 Me. 210, 66 Am. Dec. 650; Nowell v. Tripp, 61 Me. 426, 14 Am. Rep. 572; Seekins v. Goodale, 61 Me. 400, 14 Am. Rep. 568; Jaques v. Parks, 96 Me. 268, 52 Atl. 763; Colman v. Anderson, 10 Mass. 105; Underwood v. Robinson, 106 Mass. 296; Martin v. Collins, 165 Mass. 256, 43 N. E. 91; Bird v. Perkins, 33 Mich. 28; Schultz v. Huebner, 108 Mich. 274, 66 N. W. 57; Miller v. Hahn, 116 Mich. 607; Orr v. Box, 22 Minn. 485; Johnson v. Randall, 74 Minn. 44, 76 N. W. 791; Turner v. Franklin, 29 Mo. 285; Walden v. Dudley, 49 Mo. 419; Kelsey v. Klobunde, 54 Neb. 760, 74 N. W. 1066, 1099; Henry v. Sargeant, 13 N. H. 321, 40 Am. Dec. 146; State v. Weed, 21 N. H. 262, 53 Am. Dec. 188; Hann v. Lloyd, 50 N. J. L. 1, 11 Atl. 346; Jennings v. Thompson, 54 N. J. L. 56, 22 Atl. 1008; Savacool v. Boughton, 5 Wend. 171, 21 Am. Dec. 181; Wilcox v. Smith, 5 Wend. 231, 21 Am. Dec. 213; Reynolds v. Moore, 9 Wend. 35. 36 24 Am. Dec. 116; Webber v. 2 Denio, 643. 3 Am. Dec. 763; Chegaray v. Jenkins, 5 N. Y. 376; State v. Lutz, 65 N. C. 503; Gore v. Martin, 66 N. C. 371; Loomis v. Spencer, 1 Ohio St. 153; Moore v. Alleghany City, 18 Pa. St. 55; Cunningham v. Mitchell, 67 Pa. St. 78; State v. Jervey, 4 Strob. 304; Rice v. Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630; McLean v. Cook, 23 Wis. 364; Holz v. Rediska, 116 Wis. 353, 92 N. W. 1105.

[62] Blake v. Johnson, 1 N. H. 91; Purrington v. Loring, 7 Mass. 388; Williamson v. Dow, 32 Me. 559; Wentworth v. Sawyer, 76 Me. 434; Cone v. Forest, 126 Mass. 97; Wallis v. Truesdell, 6 Pick. 455; Snydacker v. Breese, 51 Ill. 357, 99 Am. Dec. 551; Brackett v. Vining, 49 Me. 356; Melville v. Brown, 15 Mass. 81; Michalover v. Moses, 19 App. Div. 343, 46 N. Y. S. 456; Spaulding v. Allred, 23 Utah, 355, 64 Pac. 1000; Burton v. Kennedy, 63 Vt. 350, 21 Atl. 529, 25 Am. St. Rep. 769.

[63] Waterbury v. Lockwood, 4 Day, 257; Stoughton v. Mott, 25 Vt. 668.

[64] Bell v. North, 4 Lit. (Ky.) 133.

[65] Gardner v. Campbell, 15 Johns. 401. See Baker v. Fales, 16 Mass. 147, 153; Hale v. Clark, 19 Wend. 498; Stoughton v. Mott, 25 Vt. 668.

conduct has there been any wrongful force. If an officer levies upon the property of a person not named in the writ, his process will be no protection.[66]

Process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority.[67] Whether, where an officer knows that back of process fair on its face are facts which render it void, he is nevertheless protected in serving it, is a point upon which the authorities are not agreed, but the weight of authority is that he will be protected in such case.[68]

[66] West v. Hayes, 120 Ala. 92, 23 So. 727, 74 Am. St. Rep. 24; Moores v. Winter, 67 Ark. 189, 53 S. W. 1057; Johnson v. Jones, 16 Colo. 138, 26 Pac. 584; Waldrop v. Almand, 94 Ga. 623, 19 S. E. 994; Sears v. Lydon, 5 Idaho, 358, 49 Pac. 122; Thomas v. Markman, 43 Neb. 823, 62 N. W. 206; Southern Ry. Co. v. Scarrett, 58 S. C. 98, 36 S. E. 504.

[67] Cooley on Taxation, 559, 562; Rousey v. Wood, 47 Mo. App. 465; Rousey v. Wood, 57 Mo. App. 650; State v. King, 30 Ind App. 389, 66 N. E. 85.

[68] Webber v Gay, 24 Wend. 485; People v. Warren, 5 Hill, 440; Wilmarth v. Burt, 7 Met. 257; Twitchell v Shaw, 10 Cush. 46; Watson v. Watson, 9 Conn. 140; Brainard v. Head, 15 La. Ann. 489; Wall v. Trumbull, 16 Mich. 228; Bird v. Perkins, 33 Mich. 28; Johnson v. Randall, 74 Minn. 44, 76 N. W. 791; Richards v. Nye, 5 Ore. 382; Cunningham v. Mitchell, 67 Pa. St. 78; Tierney v. Frasier, 57 Tex. 437; Rice v. Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630. *Contra*, McDonald v. Wilkie, 13 Ill. 22, 54 Am. Rep. 423; Leachman v. Dougherty, 81 Ill. 324; Tellefson v. Fee, 168 Mass. 188, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481; Sprague v. Birchard, 1 Wis. 457, 464, 60 Am. Dec. 393; Grace v. Mitchell, 31 Wis. 533, 539, 11 Am. Rep. 613.

CHAPTER XV.

FRAUDS OR WRONGS ACCOMPLISHED BY DECEPTION.

§ 243. Definition. Fraud or deceit, as recognized in a court of common law, consists in deception practiced in order to induce another to part with property, to surrender some legal right or otherwise to act to his prejudice, and which accomplishes the end designed.[1] In order to constitute actionable fraud the following facts should appear: *First*—That the defendant made a representation in regard to a material fact. *Second*—That it was made in order to influence the plaintiff's conduct. *Third*—That relying upon the representation, the plaintiff acted as was desired or intended. *Fourth*—That the representation was untrue. *Fifth*—That the defendant knew it was untrue, or made it recklessly without knowing whether it was true or false. *Sixth*—That the plaintiff sustained damage, which was the proximate consequence of his action.[2]

[1] Alexander v. Church, 53 Conn. 561, Fottler v. Moseley, 179 Mass. 295, 60 N. E. 788; Beard v. Bliley, 3 Colo. App. 479, 34 Pac. 271; Green v. Nixon, 23 Beav. 530, 535; Detroit v. Weber, 26 Mich. 284, 288; Tong v. Marvin, 15 Mich. 60.

[2] Sellar v. Clelland, 2 Colo. 532, 544; Byard v. Holmes, 34 N. J. L. 296; Lummis v. Stratton, 1 Pen. & W. 245; Tryon v. Whitmarsh, 1 Met. 1, 35 Am. Dec. 339. In Southern Development Co. v. Silva, 125 U. S. 247, 8 S. C. Rep. 881, 31 L. Ed. 678, the court says: "In order to establish a charge of this character the complainant must show by clear and decisive proof—*First*. That the defendant has made a representation in regard to a material *fact;* Secondly, that such representation is false; *Thirdly*, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; *Fourthly*, that it was made with intent that it should be acted on; *Fifthly*, that it was acted on by complainant to his damage; and, *Sixthly*, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true." p. 250. The plaintiff must show that the damage complained of was the necessary result of the wrongful act. Nelson County v. Northcote, 6 Dak. 378, 43 N. W. 897.

§ 244. How representations may be made. In order to make out deception, it is not essential that false assertions should be made in words. A nod, a wink, a shake of the head, or a smile artfully contrived to induce the other party to believe in a non-existent fact which might influence the negotiations may have all the effect of false assertions, and be equally deceptive and fraudulent.[3] "If, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."[4] So one may accomplish a fraud by encouraging and taking advantage of a delusion known to exist in the mind of the other, though nothing is directly asserted which is calculated to keep it up.[5] So it is a gross deception and fraud to pass off a note as duly endorsed upon a person who cannot read, when in fact the endorsement is one made without recourse.[6]

§ 245. When silence is fraudulent. In general mere silence, a mere failure to apprise the party with whom one is dealing of facts important for him to know for the protection of his own interest in the particular transaction, is no fraud. *Caveat emptor* is the motto of commercial law, and in other dealings, as well as in sales, every person is expected to look after his own interest, and is not at liberty to rely upon the other party to protect him against the consequences of his own

[3] Walters v. Morgan, 3 DeG., F. & J. 718.

[4] Stewart v. Wyoming Ranch Co., 128 U. S. 383, 9 S. C. 101, 32 L. Ed. 439. See Union Mfg. Co. v. East Ala. Nat. Bank, 129 Ala. 292, 29 So. 781.

[5] Hill v. Gray, 1 Stark. 434; Trigg v. Read, 5 Humph. 529, 42 Am. Dec. 447; Busch v. Wilcox, 82 Mich. 315, 46 N. W. 940; Lomerson v. Johnston, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. Rep. 410.

[6] Decker v. Hardin, 6 N. J. L. 579.

blunders or heedlessness. Therefore, where the sources of information are equally open to both parties to any dealings, and the one obtains an advantage of the other without resort to any trick or artifice of concealment calculated to throw the other off his guard, or to any false presentation of facts, the advantage he gains is deemed legitimate, and the losing party must bear such loss as has resulted from his own want of vigilance or prudence.[7] The rule extends to all those facts and circumstances which would be likely to influence the minds of the contracting party if they were known to him when the contract was entered into. Therefore, if one who is insolvent buys goods of another without disclosing his circumstances to his vendor, who is ignorant of them, but makes no inquiries, and is not deceived by misrepresentation or artifice, there is in law no fraud, although the vendor when he sold, fully believed the vendee to be responsible and entitled to credit.[8] Some cases hold the contrary.[9] But practi-

[7] Jordan v. Pickett, 78 Ala. 331; Mitchell v. McDougall, 62 Ill. 498; Mooney v. Miller, 102 Mass. 217; Starr v. Bennett, 5 Hill, 303; Brown v. Leach, 107 Mass. 364; Hobbs v. Parker, 31 Me. 143; Williams v. Spurr, 24 Mich. 335; Law v. Grant, 37 Wis. 548; Harris v. Tyson, 24 Pa. St. 347; Smith v. Countryman, 30 N. Y. 665; Hanson v. Edgerly, 29 N. H. 343. Some cases hold that if there is a secret defect, which the vendor knows, but the vendee does not, the former is bound to disclose it. McAdams v. Cates, 24 Mo. 223; Cecil v. Spurger, 32 Mo. 462, 82 Am. Dec. 140; Paddock v. Strobridge, 29 Vt. 470; Lunn v. Shermer, 93 N. C. 164. But see Hill v. Balls, 2 H. & N. 299; Singleton v. Kennedy, 9 B. Mon. 222.

[8] Nichols v. Pinner, 18 N. Y. 295; Rodman v. Thalheimer, 75 Pa. St. 232; Cross v. Peters, 1 Me. 376, 10 Am. Dec. 78; Gavin v. Armistead, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262; Watson v. Silsby, 166 Mass. 57, 43 N. E. 1117; Illinois Leather Co. v. Flynn, 108 Mich. 91, 65 N. W. 519; Sprague, Warner & Co. v. Kempe, 74 Minn. 465, 77 N. W. 412; Dalton v. Thurston, 15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905. There is if the insolvent buyer practices some deceit. Des Farges v. Pugh, 93 N. C. 31, 53 Am. Rep. 446.

[9] Maxwell v. Brown Shoe Co., 114 Ala. 304, 308, 309, 21 So. 1009; McKenzie v. Rothschild, 119 Ala. 419, 24 So. 716; Diggs v. Denny, 86 Md. 116, 37 Atl. 1037; Standard Horseshoe Co. v. O'Brien, 88 Md. 335, 41 Atl. 898; Courtney v. Knabe & Co. Mfg. Co., 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456; Elsass v. Harrington, 28 Mo. App. 300. But if a buyer does not know or think that he is insolvent and intends to pay, the fact that he was insolvent and that he had

cally all the authorities are agreed that, if the insolvent, at the time he purchases the goods, intends to take advantage of his insolvency and not to pay for them, the concealment is a gross fraud, and the title to the goods will not pass.[10] So where a worthless check is given in payment.[11] So, if negotiations are had on the basis of certain facts known to the parties, but before they are concluded a change material to the negotiations takes place to the knowledge of one party, but not of the other, the latter has a right to be informed by the former of this change, and if he is not informed, he is deceived and defrauded.[12] So, where one is making a pur-

good reason to think so does not render his purchase fraudulent. Diggs v. Denny, 86 Md. 116, 37 Atl. 1037. Where goods are obtained upon credit by means of false representation, it is no defense to an action for the fraud that the defendant intended and expected to pay for them. Judd v. Weber, 55 Conn. 267, 11 Atl. 40.

[10] Ferguson v. Carrington, 9 B. & C. 59; Load v. Green, 15 M. & W. 216; Donaldson v. Farwell, 93 U. S. 631; Nichols v. Michael, 23 N. Y. 264; 80 Am. Dec. 259; Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Ayres v. French, 41 Conn. 142; Dow v. Sanborn, 3 Allen, 181; Stewart v. Emerson, 52 N. H. 301; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366; Powell v. Bradlee, 9 Gill. & J. 220; Shipman v. Seymour, 40 Mich. 274; Oswego, etc., Co. v. Lendrum, 57 Iowa, 573, 42 Am. Rep. 53; Wilk v. Key, 117 Ala. 285, 23 So. 6; McKenzie v. Rothschild, 119 Ala. 419, 24 So. 716; Gavin v. Armistead, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262; People v. Healy, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90; Deere v. Morgan, 114 Ia. 287, 86 N. W. 271; Watson v. Silsby, 166 Mass. 57, 43 N. E. 1117; Illinois Leather Co. v. Flynn, 108 Mich. 91, 65 N. W. 519; Slagle v. Goodnow, 45 Minn. 531, 48 N. W. 402; Sprague, Warner & Co. v. Kempe, 74 Minn. 465, 77 N. W. 412; McCready v. Phillips, 56 Neb. 446, 76 N. W. 885; Whitton v. Fitzwater, 129 N. Y. 626, 29 N. E. 298; Luhrig Coal Co. v. Ludlum, 69 Ohio St. 311, 69 N. E. 562, 100 Am. St. Rep. 675; Dalton v. Thurston, 15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905; Swift v. Rounds, 19 R. I. 527, 35 Atl. 45, 61 Am. St. Rep. 791. There are cases to the contrary. Smith v. Smith, 21 Penn. St. 367; Backentos v. Speicher, 31 Penn. St. 324; Rodman v. Thalheimer, 75 Penn. St. 232; Bell v. Ellis, 33 Cal. 620, 630.

[11] Harner v. Fisher, 58 Pa. St. 453; Mizner v. Kussell, 29 Mich. 229; True v. Thomas, 16 Me. 36; Earl of Bristol v. Wilsmore, 1 B. & C. 514; or worthless paper. Smith v. Click, 4 Humph. 186; Parrish v. Thurston, 87 Ind. 437.

[12] Traill v. Baring, 4 DeG., J. & S. 318; Underhill v. Harwood, 10 Ves. 225; Nichols v. Pinner, 18 N.

chase for a specific purpose, which is disclosed to the seller, and the latter knows that what he offers for sale is wholly unfit for that purpose by reason of some defect not manifest, it is his duty to make known to the purchaser that fact.[13] A case of this sort is where one having diseased meats or other unwholesome provisions, and knowing the fact, nevertheless exposes them for sale as provisions to those who will be expected to take them for consumption into their own households. The offer of provisions to consumers is of itself a warranty that they are fit for consumption as such;[14] but if the seller knows they are unfit, a sale without disclosing the facts is a gross fraud, because the offer is of itself a representation of suitableness for use.[15] The rule has been applied to the sale of food for domestic animals.[16] On the same reasons it would seem that the sale of animals which the seller knows, but the purchaser does not, have a contagious disease, should be regarded as a fraud when the fact of disease is not disclosed;

Y. 295; Van Campen v. Bruns, 54 App. Div. 86, 66 N. Y. S. 344.

[13] Maynard v. Maynard, 49 Vt. 297. See Paddock v. Strobridge, 29 Vt. 470; Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 339; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440.

[14] Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210; Croft v. Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; Van Brocklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 339; Moses v. Mead, 1 Denio, 378, 43 Am. Dec. 676; Hoe v. Sanborn, 21 N. Y. 552. The rule does not apply to wholesale dealers. Emerson v. Brigham, 10 Mass. 196, 6 Am. Dec. 109; Moses v. Mead, 1 Denio, 378, 43 Am. Dec. 676; Hart v. Wright, 17 Wend. 267; Hargous v. Stone, 5 N. Y. 73; Ryder v. Neitge, 21 Minn. 70.

[15] Emerson v. Brigham, 10 Mass. 196, 6 Am. Dec. 109; Peckham v. Holman, 11 Pick. 484; Van Brocklin v. Fonda, 12 Johns. 468; Devine v. McCormick, 50 Barb. 116; Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210; Croft v. Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139. There is an implied warranty of fitness in sale by manufacturer to retailer of a piano. Snow v. Schomacher, etc., Co., 69 Ala. 111, 44 Am. Rep. 509; in sale of article as paris green to kill worms. Jones v. George, 61 Tex. 345. So where sale was of leather by one who did not manufacture it to a shoe manufacturer and a latent defect was not seen by latter on examination though known by the former. Downing v. Dearborn, 77 Me. 457. And see Poag v. Charlotte Oil, etc., Co., 61 S. C. 190, 39 S. E. 345.

[16] French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Provost v. Cook, 184 Mass. 315, 68 N. E. 336. *Contra.* Lukens v. Freiund, 27 Kan. 644, 41 Am. Rep. 429.

and so it has been held in New York.[17] Cases not different in principle sometimes arise in the law of suretyship, where the surety is induced to assume his obligation by the concealment of facts which, under the circumstances he had a right to have disclosed to him by the obligor or creditor.[18]

Where the defendant knows that the plaintiff is relying upon his knowledge and judgment in a matter and does not reveal material facts within his knowledge, it is held to be a fraud, though no confidential relation exists.[19] But if the defendant does not know of such reliance and has done nothing intentionally to induce it, his silence is not fraudulent.[20] Where the defendant sold a note to the plaintiff and kept silent as to the insolvency of the maker, of which he had knowledge, it was held that an action for deceit would lie.[21] So where the defendants induced the plaintiff to join them, in the purchase of certain land and did not disclose the fact that they already owned a part interest therein.[22] And a familiar case of fraud, often redressed by means of the application of the doctrine of estoppel, is where one keeps silence when he sees his own property sold as the property of another, or property sold upon which he has a lien, and fails in either case to disclose the facts.[23]

§ 246. Matters of opinion—Representations as to value, cost, condition, quality, etc. Mere expressions of matters of

[17] Jeffery v. Bigelow, 13 Wend. 518. *Caveat emptor* does not apply to sale of cattle with Texas fever. Grigsby v. Stapleton, 94 Mo. 423, 7 S. W. 421. A different view was taken in Hill v. Balls, 2 H. & N. 299.

[18] Graves v. Lebanon Nat. Bank, 10 Bush, 23, 19 Am. Rep. 50; Lee v. Jones, 17 C. B. (N. S.) 380; Aetna Fire Ins. Co. v. Mabbett, 18 Wis. 667; State v. Bates, 36 Vt. 387; Lancaster Co. Bank v. Albright, 21 Pa. St. 228; Smith v. Osborn, 33 Mich. 410; Booth v. Storrs, 75 Ill. 438; Franklin Bank v. Cooper, 36 Me. 179.

[19] Bennett v. McMillan, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. Rep. 591.

[20] Chicora Fertilizer Co. v. Dunan, 91 Md. 144, 45 Atl. 347, 50 L. R. A. 401; Burt v. Mason, 97 Mich. 127, 56 N. W. 365.

[21] Gordon v. Irvine, 105 Ga. 144, 31 S. E. 151.

[22] Constant v. Lehman, 52 Kan. 227, 34 Pac. 745.

[23] Tomlin v. Den. 19 N. J. 76; Aortson v. Ridgeway, 18 Ill. 23; Gray v. Bartlett, 20 Pick. 186, 32 Am. Dec. 208; Dann v. Cudney, 13 Mich. 239, 87 Am. Dec. 755.

opinion, however strongly or positively made, though they are false, are no fraud, because, as is said in one case, these are matters in respect to which many men will be of many minds, and judgments are often governed by whim and caprice.[24] Therefore, for a vendor to assert that the lands he is negotiating to sell are of a particular value, greatly above their real worth, or to exaggerate their good qualities and productiveness, is no fraud.[25] This is especially true where the vendee has examined the property or made inquiries concerning it.[26] But if the land is at a distance so that examination is impossible or impracticable, or if any deception or artifice is used to prevent examination or throw the purchaser off his guard, then false representations as to value may be actionable.[27] It is not a fraud to assert that shares in an incorporated company which the party is selling are worth

[24] Pasley v. Freeman, 3 T. R. 51; Ross v. Estates Investment Co., L. R. 3 Eq. 122; Payne v. Smith, 20 Ga. 654; Fish v. Cleland, 33 Ill. 238; Lehman v. Shackleford, 50 Ala. 437; Reed v. Sidener, 32 Ind. 373; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Bristol v. Braidwood, 28 Mich. 191; Fulton v. Hood, 34 Pa. St. 365, 75 Am. Dec. 664; Tuck v. Downing, 76 Ill. 71; Anderson v. McPike, 86 Mo. 293; East v. Worthington Co., 88 Ala. 537, 7 So. 189; American Nat. Bank v. Hammond, 25 Colo. 367, 55 Pac. 1090; Wren v. Truitt, 116 Ga. 708, 43 S. E. 52; Swan v. Mathre, 103 Ia. 261, 72 N. W. 522; Allison v. Ward, 63 Mich. 128, 29 N. W. 528; Nostrum v. Halliday, 39 Neb. 828, 58 N. W. 429; Albion Milling Co. v. First Nat. Bank, 64 Neb. 116, 89 N. W. 638; Max Meadows L. & I. Co. v. Bradley, 92 Va. 71, 22 S. E. 845; Baker v. Bicknell, 14 Wash. 29, 44 Pac. 107; Warner v. Benjamin, 89 Wis. 290, 62 N. W. 179; J. H. Clark Co. v. Rice, 127 Wis. 451.

[25] Mooney v. Miller, 102 Mass. 217; Manning v. Albee, 11 Allen, 520; Sherwood v. Salmon, 2 Day, 128; Credle v. Swindell, 63 N. C 305; Lee v. McClelland, 120 Cal. 147, 52 Pac. 300; Moore v. Recek, 163 Ill. 17, 44 N. E. 868; Allison v. Ward, 63 Mich. 128, 29 N. W. 528; Cash Register Co. v. Townsend, 137 N. C. 652; Tretheway v. Hulett, 52 Minn. 448, 54 N. W. 486; Farr v. Peterson, 91 Wis. 182, 64 N. W. 863.

[26] Allison v. Ward, 63 Mich. 128, 29 N. W. 528; Farr v. Peterson, 91 Wis. 182, 64 N. W. 863.

[27] Mountain v. Day, 91 Minn. 249, 97 N. W. 883; Morgan v. Dinges, 23 Neb. 271, 36 N. W. 544, 8 Am. St. Rep. 121; McKnight v. Thompson, 39 Neb. 752, 58 N. W. 453; Stack v. Nolte, 29 Wash. 188, 69 Pac. 753; Horton v. Lee, 106 Wis. 439, 82 N. W. 360; Culley v. Jones, 164 Ind. 168.

a certain sum, when, in fact, they are worth very much less,[28] or to make exaggerated statements of the future profits and prospects of the company.[29] It is otherwise, if the representations relate to past profits, or to the existing condition and business of the company,[30] or if the vendee is ignorant of the value and the vendor knows this and that the vendee is relying upon his statements.[31] The rule is general that, in case of sales, fraud cannot be predicated on a mere representation, as to the value of the thing sold, though known to be false,[32] but false representations as to any matter of fact affecting the value of the property are an actionable fraud. Such are false statements as to the actual earnings, profits or rents of the property or business,[33] or that the vendor has been offered a certain sum for the property,[34] or as to the amount of work a machine has done,[35] and the like. False representation as to the cost of the property would seem to be of the same sort,[36] since the price actually paid for property, if re-

[28] State Bank v. Gates, 114 Ia. 323, 86 N. W. 311; Swan v. Mathre, 103 Ia. 261, 72 N. W. 522; Mumford v. Tolman, 157 Ill. 258, 41 N. E 617; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379. But if false quotations of value in a newspaper are exhibited at the same time, this is a plain fraud. Manning v. Albee, 11 Allen, 520.

[29] New Brunswick R. Co. v. Conybeare, 9 H. L. Cas. 711; Kisch v. R. Co., 3 DeG., J. & S. 122. So, an exaggerated estimate of the value of a patented invention is no fraud. Hunter v. McLaughlin, 43 Ind. 38. Or of the value of lands, or probable profits of a proposed railroad. Walker v. Mobile, etc., R. R. Co., 34 Miss. 245.

[30] French v. Ryan, 104 Mich. 625, 62 N W. 1016; Redding v. Wright, 49 Minn. 322, 51 N. W. 1056; Carruth v. Harris, 41 Neb. 789, 60 N. W. 106.

[31] Murray v. Tolman, 162 Ill. 417, 44 N. E. 748; Cook v. Gill, 83 Md. 177, 34 Atl. 248.

[32] Bain v. Withey, 107 Ala. 223, 18 So. 217; Blumenthal v. Greenberg, 130 Cal. 384, 62 Pac. 599; Gustafson v. Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644; Nostrum v. Halliday, 39 Neb. 828, 58 N. W. 429; Doran v. Eaton, 40 Minn. 35, 41 N. W. 244; Mosher v. Post, 89 Wis. 602, 62 N. W. 516.

[33] O'Donnell, etc., Brewing Co., v. Farrar, 163 Ill. 471, 45 N. E. 283; Ettinger v. Weil, 94 App. Div. 291, 87 N. Y. S. 1049; Fargo Gas & C. Co. v. Fargo Gas & Elec. Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593; Dimmock v. Hallett, L. R. 2 Ch. App. 21.

[34] Seaman v. Becar, 15 Misc. 616, 38 N. Y. S. 69; Strickland v. Graybill, 97 Va. 602, 34 S. E. 475.

[35] Merrillat v. Plummer, 111 Ia. 643, 82 N. W. 1020.

[36] So held in the following

cently purchased, would be important evidence of value,[37] but the authorities are conflicting on this point.[38] The defendant, owning a worthless leasehold conveyed it to A, who conveyed it to B for an expressed consideration of $100,000, and B gave a trust deed on the property to secure $75,000 of the purchase money represented by notes. The transactions were all fictitious and were made at the instance of the defendant. The plaintiff, through a broker, bought $4,000 of the notes, relying upon the abstract and upon the transactions being genuine. It was held, on demurrer to a declaration setting forth the facts, that the defendant, in effect, represented that the property had been sold *bona fide* for the price named in the deed and he was held liable in an action of deceit.[39] So where a contractor for work represented that the price charged was the usual one and the same as specified parties had paid for the same work, when, in fact, these parties had paid much less.[40] So where the defendant, who had sold his stock for $100 a share, represented to the plaintiff that he had sold it for $80, in order to induce the latter to sell to the same purchaser.[41]

There are some cases, however, in which even a false assertion of opinion will amount to a fraud, the reason being that, under the circumstances, the other party has a right to rely

cases: Ives v. Carter, 24 Conn. 392; Somers v. Richards, 46 Vt. 170; Green v. Bryant, 2 Kelly, 66; Van Epps v. Harrison, 5 Hill, 63, 40 Am. Dec. 314; McFadden v. Robison, 35 Ind. 24; McAleer v. Horsey, 35 Md. 439; Teachout v. Van Horsen, 76 Ia. 113, 40 N. W. 96, 14 Am. St. Rep. 206, 1 L. R. A. 664; Welch v. Burdick, 101 Ia. 70, 70 N. W. 94; Johnson v. Gavitt, 114 Ia. 183, 86 N. W. 256; Elerick v. Reid, 54 Kan. 579, 38 Pac. 814; Hoxie v. Small, 86 Me. 23, 29 Atl. 920; Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701.

[37] See St. Louis, etc., Ry. Co. v. Smith, 42 Ark. 265; Ham v. Salem, 100 Mass. 350, 352; Hoffman v. Connor, 76 N. Y. 121; New Orleans, etc., R. R. Co. v. Barton, 43 La. Ann. 171, 9 So. 19.

[38] False representations as to cost held not a fraud Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Cooper v. Lovering, 106 Mass. 77; Hemmer v. Cooper, 8 Allen 334; Medbury v. Watson, 6 Met 246, 260, 39 Am. Dec. 726; Mooney v. Miller, 102 Mass. 217; Bishop v. Small, 63 Me. 12.

[39] Leonard v. Springer, 197 Ill. 532, 64 N. E. 299.

[40] Conlan v. Roemer, 52 N. J. L. 53, 18 Atl. 858.

[41] Weaver v. Cone, 174 Pa. St. 104 34 Atl. 551.

upon it without bringing his own judgment to bear.[42] Such is the case where one is purchasing goods, the value of which can only be known to experts, and is relying upon the vendor, who is a dealer in such goods, to give him accurate information concerning them.[43] The same rule has been applied where a dealer in patent rights sold certain territory to one who was ignorant of its value, representing it to be very valuable, when he knew it was not;[44] and, also, to a vendor of a salt petre cave making false assertions as to the quantity of saltpetre which a certain quantity of nitrous earth would produce.[45]

An honest expression of opinion as to the financial standing of another imposes no liability, though the defendant was mistaken in his opinion,[46] but if solvency is positively affirmed as a fact within the personal knowledge of the defendant, and the fact is otherwise and the affirmation is relied on by the plaintiff to his injury, the defendant is liable.[47] Where the defendant, who was the president and head physician of a

[42] Ruberg v. Brown, 50 S. C. 397, 27 S. E. 873; Gustafson v. Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644; Wilson v. Nichols, 72 Conn. 173, 43 Atl. 1052; Moon v. McKinstry, 107 Mich. 668, 65 N. W. 546; Coulter v. Minion, 139 Mich. 200; Herschberg Optical Co. v. Richards, 62 Mo. App. 408; Jackson v. Foley, 53 App. Div. 97, 65 N. Y. S. 920; Charbonnel v. Seabury, 23 R. I. 543, 51 Atl. 208; Whitney v. Richards, 17 Utah, 226, 53 Pac. 1122.

[43] Picard v. McCormick, 11 Mich. 68; Kost v. Bender, 25 Mich. 515; Pike v. Fay, 101 Mass. 134. If the buyer has not equal means of knowledge, or having such is induced to forego inquiry and relies on seller's statement of value, it is binding. Stewart v. Stearns, 63 N. H. 99, 56 Am. Rep. 496; Bradbury v. Haines, 60 N. H. 123; Hanger v. Evins, 38 Ark. 334; Weidner v. Phillips, 39 Hun, 1; Grim v. Byrd, 32 Gratt. 293.

[44] Allen v. Hart, 72 Ill. 104. See Peffley v. Noland, 80 Ind. 164; McKee v. Eaton, 26 Kan. 226. The purchaser of a mill who is ignorant of the business has a right to rely upon the positive assertions of the seller as to the business the mill is capable of performing. Faribault v. Sater, 13 Minn. 223.

[45] Perkins v. Rice, Lit. Sel. Cas. 218, 12 Am. Dec. 298. See, as to representations of the value of oil lands, Kost v. Bender, 25 Mich. 515; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212.

[46] Wren v. Truitt, 116 Ga. 709, 43 S. E. 52; Albion Milling Co. v First Nat. Bank, 64 Neb. 116, 89 N. W. 638.

[47] American Nat. Bank v. Hammond, 25 Colo. 367, 55 Pac. 1090; Browning v National Capital

medical institute, falsely and fraudulently represented to the plaintiff that certain injuries he had sustained were curable and that they could and would cure him, and thereby induced him to pay $500 for treatment, from which he received no benefit, the defendant was held liable for deceit.[48] So, it is held the vendee of lands has a right to rely upon the representations of his vendor respecting the quantity of land contained in a parcel he is buying,[49] or respecting the size of a lot,[50] or the boundaries of the parcel.[51] So it is a fraud if the defendant fraudulently points out a different and more valuable property, as the one involved in the deal.[52] So are false representations as to the situation, character or quality of the land when it is at a distance,[53] or when the condition of the land

Bank, 13 App. D. C. 1; Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188.

[48] Hedin v. Minneapolis Medical, etc., Institute, 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417. See Spead v. Tomlinson, 73 N. H. 46.

[49] Pringle v. Samuel, 1 Litt. 44, 13 Am. Dec. 214; Cullum v. Branch Bank, 4 Ala. 21, 37 Am. Dec. 725; Whitney v. Allaire, 1 N. Y. 305; Beardsley v. Duntley, 69 N. Y. 577; Starkweather v. Benjamin, 32 Mich. 305; Hill v. Brower, 76 N. C. 124; Coon v. Atwell, 46 N. H. 510; Sangster v. Prather, 34 Ind. 504; Ledbetter v. Davis, 121 Ind. 119, 22 N. E. 744; Cawston v. Sturges, 29 Ore. 331, 43 Pac. 656; Griswold v. Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878. In Gordon v. Parmelee, 2 Allen, 212, 214, it is held that an action will not lie on such representations.

[50] Douglass v. Plotkin, 13 Ohio C. C. 461.

[51] Clark v. Baird, 9 N. Y. 183; Weatherford v. Fishback, 4 Ill. 170; Sanford v. Handy, 23 Wend. 260; Ramsey v. Wallace, 100 N. C. 75, 6 S. E. 638.

[52] Lee v. Tarplin, 183 Mass. 52, 66 N. E. 431; Nelson v. Carlson, 54 Minn. 90, 55 N. W. 821.

[53] Willey v. Clements, 146 Cal. 91, 79 Pac. 850; Antle v. Sexton, 137 Ill. 410, 27 N. E. 691; Borders v. Kattleman, 142 Ill. 96, 31 N. E. 19; Phelps v. James, 79 Ia. 262, 44 N. W. 543; Boddy v. Conover, 126 Ia. 31, 101 N. W. 447; Stevens v. Allen, 51 Kan. 144, 32 Pac. 922; Augus v. Smith, 90 Tenn. 728, 18 S. W. 398; Hecht v. Metzler, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906; Shanks v. Whitney, 66 Vt. 405, 29 Atl. 367; Horton v. Lee, 106 Wis. 439, 82 N. W. 360. Where the vendor misrepresented the quantity of bottom land and of corn land in the farm sold, he was held liable for deceit; though the vendee was on the farm, the latter making no measurements but relying on the representations. Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496. Misrepresentations as to the manner in which a house was constructed in respect to matters not open to in-

does not admit of examination by the vendee,[54] or if any artifice is used to prevent examination.[55]

§ 247. Matters of law. Misrepresentation as to the legal effect or consequence of a proposed transaction or contract cannot, in general, be looked upon as a cheat.[56] Thus, where the agent procuring subscriptions to the stock of a corporation represented that the subscribers would only be liable to a certain percentage, when the law made them responsible for the whole amount, a subscriber was held not entitled to defend a suit upon his subscription on the ground of fraud. Says Mr. Justice Hunt: "There was here no error, mistake or misrepresentation of any fact. The defendant made the subscription he intended to make, and received the certificate he had stipulated for; * * * but in law the defendant incurred a larger liability than he anticipated."[57] So where there were misrepresentations as to the powers of the corporation.[58]

§ 248. Fraudulent promises. If deceit, in order to be actionable, must relate to existing or past facts, it is evident that the fact that a promise, made in the course of negotiations, is never performed, is not of itself either a fraud, or the evidence of a fraud.[59] Nevertheless, a promise is some-

spection, were held actionable. Velsor v. Seeberger, 35 Ill. App. 598.

[54] Ladner v. Balsley, 103 Ia. 674, 72 N. W. 787.

[55] Brady v. Finn, 162 Mass. 260, 38 N. E. 506.

[56] Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; Johnston v. Covenant Mut. Life Ins. Co., 93 Mo. App. 580.

[57] Upton v. Tribilcock, 91 U. S. 45, 49. See, to the same effect, Rashdall v. Ford, L. R. 2 Eq. 750; Starr v. Bennett, 5 Hill, 303; Lewis v. Jones, 4 B. & C. 506; Steamboat Belfast v. Boon Co., 41 Ala. 50; Cowles v. Townsend, 37 Ala. 77; Clem v. Newcastle, etc., R. R. Co., 9 Ind. 488; Russell v. Branham, 8 Blackf. 277; People v. Supervisors of San Francisco, 27 Cal. 655; Rogers v. Place, 29 Ind. 577; Gormeley v. Gym. Ass'n, 55 Wis. 350; Burt v. Bowles, 69 Ind. 1; Ins. Co. v. Reed, 33 Ohio St. 283; Jaggar v. Winslow, 30 Minn. 263.

[58] Oil City Land & Imp. Co. v. Porter, 99 Ky. 254, 35 S. W. 643.

[59] Fenwick v. Grimes, 5 Cranch, C. C. 439; Farrar v. Bridges, 3 Humph. 566; Murray v. Beckwith, 48 Ill. 391; Sieveking v. Litzler, 31 Ind. 13; Long v. Woodman, 58 Me. 49; Jordan v. Money, 5 H. L. Cas. 185; Burt v. Bowles, 69 Ind. 1; Cunyus v. Guenther, 96 Ala. 564, 11 So. 649; History Co. v. Dougherty, 3 Ariz. 387, 29 Pac.

times the very device resorted to for the purpose of accomplishing the fraud, and the most apt and effectual means to that end.[60]

§ 249. Representations as to title. In *Monell v. Colden* it was decided that one who had been induced to make a purchase of land on a false representation by the vendor, that if he bought it he would be entitled to obtain from the state certain adjoining lands under water, the vendor knowing that the state had previously conveyed them, might maintain an action for the fraud. "If," said the court, "no representation had been made on the subject by the defendant, both parties would have been equally chargeable with a knowledge of the law and the public records of the state. But according to the declaration the defendant knowingly and falsely misrepresented the fact with respect to the situation of the land under the water, and if so, he is chargeable with all the damages resulting from such false representation."[61] The obvious answer to any such action is suggested by this decision,

649; Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; Farris v. Strong, 24 Colo. 107, 48 Pac. 963; Robinson v. Larson, 112 Ia. 173, 83 N. W. 900; First Nat. Bank v. Mattingly, 92 Ky. 650, 18 S. W. 940; McComb v. C. R. Brewer Lumber Co., 184 Mass. 276, 68 N. E. 222; Esterly Harvesting Machine Co. v. Berg, 52 Neb. 147, 71 N. W. 952; A. Landreth Co. v. Schevenel, 102 Tenn. 486, 52 S. W. 148; Watkins v. W. W. Land & Imp. Co. 92 Va. 1, 22 S. E. 554; Dudley v. Minor, 100 Va. 728, 14 S. E. 870; Buena Vista Co. v. Billmyer, 48 W. Va. 382, 37 S. E. 583; Warner v. Benjamin, 89 Wis. 290, 62 N. W. 179; J. H. Clark Co. v. Rice, 127 Wis. 451. It is held that false representations of an existing intent to do certain things which will benefit the property sold may be actionable. Albitz v. Minneapolis, etc., Ry. Co., 40 Minn. 476, 42 N. W. 542. *Contra*, History Co. v. Dougherty, 3 Ariz. 387, 29 Pac. 649.

[60] See Jones v. Jones, 40 Misc. 360, 82 N. Y. S. 325; Sweet v. Kimball, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406; Wilbur v. Prior, 67 Vt. 508, 32 Atl. 474; National Bank v. Mackey, 5 Kan. App. 437, 49 Pac. 324.

[61] Monell v. Colden, 13 Johns. 395, 402, 7 Am. Dec. 390, per Thompson, J. And see Wardell v. Fosdick, 13 Johns. 325, 7 Am. Dec. 381; Watson v. Atwood, 25 Conn. 313; Claggett v. Crall, 13 Kan. 319; Eames v. Morgan, 37 Ill. 260; Bailey v. Smock, 61 Mo. 213; Keifer v. Rogers, 19 Minn. 32; Parham v. Randolph, 5 Miss. 435, 35 Am. Dec. 403; Rhode v. Alby, 27 Tex. 443.

namely, that the records are open to public inspection and are notice of what the real title is; and it is the party's own folly if instead of inspecting them he chooses to accept and rely upon the word of the vendor. But the later cases almost uniformly hold that a false representation as to title is actionable, though an examination of the records would disclose the falsity.[62] Thus actions were sustained where the lot sold was falsely represented to be free and clear,[63] and where a second mortgage was represented to be a first mortgage.[64] So where the defendant procured a conveyance of the plaintiff's land for a nominal sum by representing that he had a tax title thereon, when he had none and no claim whatever.[65] So where the defendant represented that he owned a certain house and thereby induced the plaintiff to furnish the heating apparatus therefor, the title being in the defendant's wife. The court held that the plaintiff was not bound, at his peril, to examine the records and says: "Where the representation is a statement amounting to the positive assertion of an existing fact, the person to whom it is made has a right to rely upon its truth, and, having the right to rely upon it, is not put to his inquiry; and, therefore, if the representation be untrue and he is deceived thereby to his injury, negligence which will preclude his recovery cannot be predicated on his failure to make inquiry."[66]

§ 250. **Materiality of representations.** There is no positive standard by which to determine whether a representation is material or not. Every case is to be determined on its own facts.

[62] Kimball v. Saguin, 86 Ia. 186, 53 N. W. 116; Campbell v. Spears, 120 Ia. 670, 94 N. W. 1126; Nairn v. Ewalt, 51 Kan. 355, 32 Pac. 1110; Burns v. Dockray, 156 Mass. 135, 30 N. E. 551; Woolenslagle v. Runals, 76 Mich. 545, 43 N. W. 454; Davis v. Davis, 100 Mich. 162, 58 N. W. 651; Porter v. Fletcher, 25 Minn. 493; Olson v. Orton, 28 Minn. 36; Tretheway v. Hulett, 52 Minn. 448, 54 N. W. 486. *Contra*, Bianconi v. Smith, 3 Ariz. 320, 28 Pac. 880.

[63] Carpenter v. Wright, 52 Kan. 221, 34 Pac. 798.

[64] Faust v. Hosford, 119 Ia. 97, 93 N. W. 58; Nash v. Minn. Title Ins. & T. Co., 159 Mass. 437, 34 N. E. 625.

[65] Mattock v. Shaffer, 51 Kan. 208, 32 Pac. 890, 37 Am. St. Rep. 270.

[66] Hunt v. Barker, 22 R. I. 18, 46 Atl. 46, 84 Am. St. Rep. 812.

If the representation be such that, had it not been made, the contract would not have been entered into or the transaction completed, then it is material to it, but if it be shown or made probable that the same thing would have been done in the same way if the fraud had not been practiced, it cannot be deemed material.[67] It need not be the sole inducement.[68] The rule as to materiality, "simply means," says Bigelow, "that the particular representation in question must have been necessary, even with other inducements, to cause the party to act as he did."[69] The weight of authority is that the question of materiality is one for the jury under proper instructions,[70] but if the facts are undisputed and the inference plain it may be a question for the court.[71]

§ 251. Duty of self-protection. Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them. Therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has been placed by his own imprudent confidence.[72] It is for this reason that redress is often refused where fraud is alleged in the sale of

[67] McAleer v. Horsey, 35 Md. 439, 452; Hale v. Philbrick, 47 Ia. 217, 221; Gilmer v. Hanks, 84 N. C. 317; Shaw v. Gilbert, 111 Wis. 165, 185, 86 N. W. 188; Bigelow, Fraud, p. 7.

[68] Ibid.; Winter v. Bandel, 30 Ark. 362.

[69] Bigelow, Fraud, p. 7.

[70] Kehl v. Abram, 210 Ill. 218, 222, 223, 71 N. E. 347, 102 Am. St. Rep. 158; McAleer v. Horsey, 35 Md. 439, 452; Moore v. Cains, 116 Mass. 396; Fottler v. Moseley, 179 Mass. 295, 298, 60 N. E. 788; Davis v. Davis, 97 Mich. 419, 56 N. W. 774. *Contra*, Caswell v. Hunton, 87 Me. 277, 32 Atl. 899; Greenleaf v. Gerald, 94 Me. 91, 46 Atl. 799, 80 Am. St. Rep. 377, 50 L. R. A. 542.

[71] Dawe v. Morris, 149 Mass 188, 21 N. E. 315, 14 Am. Rep 404, 4 L. R. A. 158; McGowan v. Independent Order of Foresters, 104 Wis. 173, 183, 80 N. W. 603; Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188.

[72] Slaughter v. Gerson, 13 Wall 379; Rockafellow v. Baker, 41 Pa. St. 319; Hobbs v. Parker, 31 Me. 143; Brown v. Leach, 107 Mass. 364; Schwabacker v. Riddle, 99 Ill. 343; Collins v. Jackson, 54 Mich. 186; Terry v. Mut. Life Ins Co. 116 Ala. 242, 22 So. 532; Hooper v. Whitaker, 130 Ala. 324, 30 So. 355; Boddy v. Henry, 113

property which was at hand, and might have been inspected, and where the alleged defect was one which ordinary prudence would have disclosed.[73] The case of the purchase of property at a distance involves very different considerations, for there a degree of trust is not only usual, but often unavoidable. In such case the vendee may properly rely upon the vendor's representations as to the character of the land.[74] Upon similar reasons to those which support this case, it has been held that when one buys land which at the time is covered with snow, rendering an examination of the soil impracticable, he is entitled to rely upon the representations of the vendor respecting its productiveness.[75] So, if the vendor uses any artifice to prevent examination by the vendee.[76] Some cases hold that a party may always rely upon a positive representation of fact, though the means of verification are at hand. Thus it is said in one case that "a person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth."[77] And again: "As

Ia. 462, 85 N. W. 771, 53 L. R. A. 769; Kaiser v. Nummerdor, 120 Wis. 234, 97 N. W. 932; Southern Development Co. v. Silva, 125 U. S. 247, 8 S. C. Rep. 881, 31 L. Ed. 678.

[73] Lee v. McClelland, 120 Cal. 147, 52 Pac. 300; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Moore v. Recek, 103 Ill. 17, 44 N. E. 868; Moore v. Howe, 115 Ia. 62, 87 N. W. 750; Weaver v. Shriver, 79 Md. 530, 30 Atl. 189; Cagney v. Cuson, 77 Ind. 494.

[74] Smith v. Richards, 13 Pet. 26, 42; Maggart v. Freeman, 27 Ind. 531; Lester v. Mahan, 25 Ala. 445, 60 Am. Dec. 530; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Borders v. Kattleman, 142 Ill. 96, 31 N. E. 19; Phelps v. James, 79 Ia. 262, 44 N. W. 543; Stevens v. Allen, 51 Kan. 144, 32 Pac. 922; Bean v. Herrick, 12 Me. 262; Nowlin v. Snow, 40 Mich. 699; Griffin v. Farrier, 32 Minn. 474; Augur v. Smith, 90 Tenn. 728, 18 S. W. 398; Hecht v. Metzler, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906; Shanks v. Whitney, 66 Vt. 405, 29 Atl. 367; Horton v. Lee, 106 Wis. 439, 82 N. W. 360. The above rule has been applied where the land is but a few miles away. Nolte v. Reichelm, 96 Ill. 425; Caldwell v. Henry, 76 Mo. 254.

[75] Martin v. Jordan, 60 Me. 531. And see Ladner v. Balsley, 103 Ia. 671, 72 N. W. 787; Rhoda v. Annis, 75 Me. 17, 46 Am. Rep. 354; Jackson v. Armstrong, 50 Mich. 65.

[76] Hanscom v. Druillard, 79 Cal. 234, 21 Pac. 736; Brady v. Finn, 162 Mass. 260, 38 N. E. 506; Engeman v. Taylor, 46 W. Va. 669, 33 S. E. 922.

[77] Perry v. Rogers, 62 Neb. 898, 87 N. W. 1063; Foley v. Holtry, 43

between the original parties, one who has intentionally deceived the other to his prejudice ought not to be heard to say, in defense, that the other party ought not to have trusted him." [78]

§ 252. Who may rely upon the representations—Representations to the public. No one has a right to accept and rely upon the representations of others but those to influence whose action they were made.[79] If everyone might take up and act upon any assertion he heard made or saw in print as one made for him to act upon, and the truth of which was warranted by the assertor, the ordinary conversation of business and of society would become unsafe, and the customary publication of current news, or supposed news, would only be made under the most serious pecuniary responsibility. One may even be the person to whom the false representations are made, and yet be entitled to no remedy, if they were made to him as agent for another and to affect the action of the other, and were not intended to influence his own action.[80] But some representations are made for the express purpose of influencing the mind of the public, and of inducing individuals of the public to act upon them; and whoever, in fact, does receive, rely and act upon these in the manner intended, has a right to regard them as made to him, and to treat them as frauds upon him if in fact he was deceived to his damage.[81] Cases

Neb. 133. And see Sears v. Hicklin, 13 Colo. 143, 21 Pac. 1022; Hunt v. Barker, 22 R. I. 18, 46 Atl. 46, 84 Am. St. Rep. 812.

[78] Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638. To same effect, Mead v. Bunn, 32 N. Y. 275; Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; Stewart v. Stearns, 63 N. H. 99, 56 Am. Rep. 496; Walsh v. Hall, 66 N. C. 233; Oswald v. McGehee, 28 Miss. 340; McClellan v. Scott, 24 Wis. 81; Starkweather v. Benjamin, 32 Mich. 305; Caldwell v. Henry, 76 Mo. 254; Alexander v. Church, 53 Conn. 561; Porter v. Fletcher, 25 Minn. 493; Olson v. Orton, 28 Minn. 36.

[79] Henry v. Dennis, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365; Ashuelot Savings Bank v. Albee, 63 N. H. 152, 56 Am. St. Rep. 501; Darling v. Klock, 33 App. Div. 270, 53 N. Y. S. 593; Hindman v. First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623.

[80] Wells v. Cook, 16 Ohio St. 67, 88 Am. Dec. 436; McCracken v. West, 17 Ohio, 16.

[81] Carvill v. Jacks, 43 Ark. 454. If the representations are made to one with the intent that he repeat them to another, the latter acting upon them may hold the person making them. Watson v. Crandall, 78 Mo. 583. Otherwise

of the sort are those in which the projectors of corporate undertakings publish prospectuses containing misrepresentations calculated to influence others to invest moneys in their project. The cases are numerous in which the courts—sometimes of equity and sometimes of law—have given relief to parties defrauded by such misrepresentations.[82] So, if after a corporation is formed the managers make false reports, declare fictitious dividends, or resort to any fraudulent devices whatever, whereby they induce individuals to take stock in the corporation, they are liable to the parties thus defrauded in an action for the deceit.[83] So the officer of an insurance company who issued a false prospectus whereby one was induced to take out insurance in the company has been held liable for this fraud to the person so insuring.[84]

Representations made to a commercial agency as to one's pecuniary responsibility fall under the head of representations made to the public, and, if false, anyone to whom they are communicated and who relies thereon to his injury, may have an action for the fraud.[85] But if the defendant's representations are true and he is misquoted by the commercial agency

if the repetition is unauthorized. Rawlings v. Bean, 80 Mo. 614.

[82] Paddock v. Fletcher, 42 Vt. 389; Terwilliger v. Gt. West. Tel. Co., 59 Ill. 249; Booth ads. Wonderly, 36 N. J. L. 250; Johnson v. Goslett, 3 C. B. (N. S.) 569; Clarke v. Dickson, 6 C. B. (N. S.) 453; Gerhard v. Bates, 2 El. & Bl. 476; Taylor v. Ashton, 11 M. & W. 401; Henderson's Case, L. R. 5 Eq. 249; Reese River, etc., Co. v. Smith, L. R. 4 E. & I. App. 64; Central R. Co. v. Kisch, L. R. 2 E & I. App. 99; Oakes v. Turquand, L. R. 2 E. & I. App. 325.

[83] Huntingford v. Massey, 1 Fost. & Fin. 600; Morgan v. Skiddy, 62 N. Y. 319; Clarke v. Dickson, 6 C. B. (N. S.) 453; Un. Nat. Bank v. Hunt, 76 Mo. 439; Prewitt v. Trimble, 92 Ky. 176, 17 S. W. 356, 36 Am. St. Rep. 586; Ward v. Trimble, 103 Ky. 153, 44 S. W. 450.

[84] Pontifex v. Bignold, 3 M. & G. 63.

[85] Triplett v. Rugby Distilling Co., 66 Ark. 219, 45 S. W. 975; Cox Shoe Co. v. Adams, 105 Ia. 402, 75 N. W. 316; Salisbury v. Barton, 63 Kan. 552, 66 Pac. 618; Courtney v. Knable & Co. Mfg. Co., 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456; Genesee, etc., Bank v. Mich. Barge Co., 52 Mich. 164; Eaton, etc., Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Tindle v. Birkett, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822; Gainesville Nat. Bank v. Bamberger, 77 Tex. 48, 13 S. W 959, 19 Am. St. Rep. 738.

he is not responsible.[86] So if the representations are true when made, but the report of the agency is made and relied on at a date long afterwards, when they have become untrue by reason of changes in the defendant's financial condition.[87] Where a man refers to an agency, knowing what its ratings of him are and that they are not true, he is guilty of a fraud, though he did not give the information upon which the ratings were founded.[88]

Where the president of a company signed corporate bonds containing a false representation, he was held liable to one who took them as collateral security, relying upon the representation.[89] And where the defendant delivered to his agent a deed of land with the grantee in blank and a forged abstract showing title in himself, he was held liable to a purchaser from the agent for the fraud.[90] The false representations contained in the deed and abstract were held to be made to anyone who should become the purchaser. So where the representations were contained in fictitious deeds put upon record.[91] One W. S. Henry, Jr., had a business of his own under the name of W. S. Henry, Jr., & Co. He was also a member of a firm engaged in the same line of business under the name of Henry & Parsons. Under the name of W. S. Henry, Jr., & Co. he wrote to the defendants as to the credit of a certain company. The defendants replied to W. S. Henry, Jr., & Co., giving false representations whereby both W. S. Henry, Jr., & Co. and Henry & Parsons were induced to extend credit to the company and in consequence sustained a loss. The defendants were held liable to both concerns, the liability to Henry & Parsons being put on the ground that the defendants contemplated that the representations would be communicated to a firm of which W. S. Henry, Jr., was a member, and that it

[86] Wachsmuth v. Martini, 154 Ill. 515, 39 N. E. 129.

[87] Reid, Murdock & Co. v. Kempe, 74 Minn. 474, 77 N. W. 413. Compare Cox Shoe Co. v. Adams, 105 Ia. 402, 75 N. W. 316; Macullar v. McKinley, 99 N. Y. 353.

[88] Cox Shoe Co. v. Adams, 105 Ia. 402, 75 N. W. 316.

[89] Stickel v. Atwood, 25 R. I. 456, 56 Atl. 687.

[90] Baker v. Hallam, 103 Ia. 43, 72 N. W. 419.

[91] Leonard v. Springer, 197 Ill. 532, 64 N. E. 299.

was immaterial that defendants did not know the name of the firm or of the partner.[92]

A certificate filed with a state commissioner of corporations or other officer by the officers of a foreign corporation, for the purpose of obtaining a license to do business in the state, is not such a statement or representation as those doing business with the corporation or dealing in its stock or securities may rely upon.[93] So of a statement or report made by the directors of a bank to the secretary of state, as to the financial condition of the bank.[94] But where the law required insurance companies to file a report with the auditor of state, showing their financial condition, and provided for giving publicity to such report, it was held that one buying stock of a company relying upon such report could recover in an action of deceit against the officer making the same, if the report was intentionally false.[94a]

§ 253. Knowledge by the wrong-doer of the falsity. There is no doubt that an action on the case will lie, founded on representations made by the defendant, whenever it can be made to appear that he believed or had reason to believe the representations were false, and that the plaintiff relied upon them, to his injury.[95] But the question is, whether this remedy is

[92] Henry v. Dennis, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365.

[93] Hindman v. First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623; Hunnewell v. Duxbury, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733.

[94] Utley v. Hill, 155 Mo. 232, 55 S. W. 1091, 78 Am St. Rep. 569, 49 L. R. A. 323. Also Ashuelot Savings Bank v. Albee, 63 N. H. 152, 56 Am. St. Rep. 501. But held otherwise of a report made by the officers of a national bank to the comptroller of the currency. Gerner v. Mosher, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

[94a] Warfield v. Clark, 118 Ia. 69, 91 N. W. 833.

[95] Pasley v. Freeman, 3 T. R. 51; Tryon v. Whitmarsh, 1 Met. 1, 35 Am. Dec. 339; Medbury v. Watson, 6 Met. 246, 39 Am. Dec. 726; Hartford Ins. Co. v. Matthews, 102 Mass. 221; Cross v. Peters, 1 Me. 378, 10 Am. Dec. 78; Oberlander v. Spiess, 45 N. Y. 175; Griswold v. Sabine, 51 N. H. 167, 12 Am. Rep. 76; Nauman v. Oberle, 90 Mo. 666; Hutchinson v. Gorman, 71 Ark. 305, 73 S. W. 793; Phelps v. James, 79 Ia. 262, 44 N. W. 543; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Griswold v. Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878; Morrison v. Adoue, 76 Tex. 255, 13 S. W. 166. In such case the intent to deceive is conclusively pre-

confined to cases in which the defendant knew or had reason to believe he was deceiving by untruths; and it is certain, we think, that it is not. There are numerous cases in which it has been held that if a person makes a material representation in relation to a matter susceptible of knowledge, in such a manner as to import positive knowledge, but conscious that he has no knowledge of its truth or falsity, with intent that another should rely upon such representation, this is sufficient to establish against him a legal fraud, if the other does rely upon it and it proves untrue.[96] The fraud here consists in the

sumed. Hudnut v. Gardner, 59 Mich. 341; Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

[96] Monroe v. Pritchett, 16 Ala. 785; Hazard v. Irwin, 18 Pick. 95; Page v. Bent, 2 Met. 371; Fisher v. Mellen, 103 Mass. 503; Litchfield v. Hutchinson, 117 Mass. 195; Bennett v. Judson, 21 N. Y. 238; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598; Frenzel v. Miller, 37 Ind. 1, 10 Am. Rep. 62; West v. Wright, 98 Ind. 335; Cole v. Cassidy, 138 Mass. 437; 52 Am. Rep. 284; Hanger v. Evins, 38 Ark. 334; Brown v. Freeman, 79 Ala. 406; Caldwell v. Henry, 76 Mo. 254; Nauman v. Oberle, 90 Mo. 666; Hutchinson v. Gorman, 71 Ark. 305, 73 S. W. 793; Scholfield, G. & P. Co. v. Scholfield, 71 Conn. 1, 40 Atl. 1046; Borders v. Kattleman, 142 Ill. 96, 31 N. E. 19; Kirkpatrick v. Reeves, 121 Ind. 280, 22 N. E. 139; Hubbard v. Weare, 79 Ia. 678; Riley v. Bell, 120 Ia. 618, 95 N. W. 170; Prewitt v. Trimbell, 92 Ky. 176, 17 S. W. 356, 36 Am. St. Rep. 586; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Cahill v. Applegate, 98 Md. 493, 56 Atl. 794; Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Hamlin v. Abell, 120 Mo. 188, 25 S. W. 516; Peoples' Nat. Bank v. Central Trust Co., 179 Mo. 648, 78 S. W. 618; Hadcock v. Osmar, 153 N. Y. 604, 47 N. E. 923; Kountz v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360; Cawston v. Sturges, 29 Ore. 331, 43 Pac. 656; Martin v. Eagle Development Co., 41 Ore. 448, 69 Pac. 216; Hexter v. Bast, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874; Griswold v. Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878; Lamberton v. Dunham, 165 Pa. St. 129, 30 Atl. 716; Morrison v. Adoue, 76 Tex. 255, 13 S. W. 166; Johnson v. Cate, 75 Vt. 100, 53 Atl. 329; Northwestern S. S. Co. v. Horton, 29 Wash. 565, 70 Pac. 59; Montreal Riv. L. Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Krause v. Busacker, 105 Wis. 350, 81 N. W. 406; Lehigh Z. & I. Co. v. Bamford, 150 U. S. 665, 14 S. C. Rep. 219, 37 L. Ed. 1215. An unqualified affirmation of a fact amounts to an affirmation as of one's own knowledge. Bullitt v. Farrar, 42 Minn. 8, 11,

reckless assertion that that is true of which the party knows nothing, and in deceiving the other party thereby;[97] and even the actual belief of the party in the truth of what he asserts is held to be immaterial,[98] unless he had some apparently good reason for his belief, such, for example, as the positive statements of others in whom he confided, and was innocent of any attempt to mislead,[99] or unless his representations related to matters of opinion.[1] It would seem, therefore, that it must be sufficient in an action for the fraud to allege that the representations were not true and that the defendant made them with intent to deceive, having no knowledge respecting the facts, and no reason to believe them to be true,[2] and that

43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Hubbard v. Weare, 79 Ia. 678, 44 N. W. 915.

[97] Taylor v. Ashton, 11 M. & W. 401; Beebe v. Knapp, 28 Mich. 53, 76; Indianapolis, etc., R. R. Co. v. Tyng, 63 N. Y. 653; Einstein v. Marshall, 58 Ala. 153, 25 Am. Rep. 729, and cases in last two notes.

[98] Allen v. Hart, 72 Ill. 104; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Fisher v. Mellen, 103 Mass. 503; Litchfield v. Hutchinson, 117 Mass. 195; Cole v. Cassidy, 138 Mass. 437; Cotzhausen v. Simon, 47 Wis. 103; Sims v. Eiland, 57 Miss. 607.

[99] Haycraft v. Creasy, 2 East, 92; Omrod v. Hurth, 14 M. & W. 652; Taylor v. Ashton, 11 M. & W. 401; Lord v. Goddard, 13 How. 198; Sone v. Denny, 4 Met. 151; Marsh v. Falker, 40 N. Y. 562; Hubbard v. Briggs, 31 N. Y. 518; Chester v. Comstock, 40 N. Y. 575; Mayer v. Salazar, 84 Cal. 646, 24 Pac. 597; Scholfield G. & P. Co. v. Scholfield, 71 Conn. 1, 40 Atl. 1046; Kirkpatrick v. Reeves, 121 Ind. 280, 22 N. E. 139; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Cahill v. Applegate, 98 Md. 493, 56 Atl. 794; Busch v. Wilcox, 82 Mich. 315, 46 N. W. 940; Morrison v. Adoue, 76 Tex. 255, 13 S. W. 166.

[1] Page v. Bent, 2 Met. 371; Marsh v. Falker, 40 N. Y. 562. In the following it is held that if the defendant really believed his statements to be true, he cannot be held liable in an action of deceit. Boddy v. Henry, 113 Ia. 462, 85 N. W. 771, 53 L. R. A. 769; Mentser v. Sargeant, 115 Ia. 527, 88 N. W. 1068; Humphrey v. Merriam, 32 Minn. 197; Lamberton v. Dunham, 165 Pa. St. 129, 30 Atl. 716. And see Kountz v. Kennedy, 147 N. Y. 124, 129, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360; Holst v. Stewart, 154 Mass. 445, 28 N. E. 574; Derry v. Peek, L. R. 14 H. L. 337.

[2] Omrod v. Hurth, 14 M. & W. 652; Hammet v. Emerson, 27 Me. 308, 46 Am. Dec. 598; Weed v Case, 55 Barb. 534.

the same facts would be sufficient to make out a defense when the defendant was the party defrauded.[3]

It seems from the foregoing, that one who has been induced, by misrepresentations of material facts, to enter into a contract, may have redress as for a fraud—1. When the representations were made by the other party, with knowledge of their falsity, and with intent to deceive. 2. When the party making them had no knowledge and no belief on the subject, and recklessly made them with the like intent. 3. When the party supposed his representations to be true, but had no reason for any such belief, and nevertheless made them positively as of known facts, and induced the other to act upon them.[4]

The ground of recovery is substantially the same in each of these cases, and consists in the impression produced on the mind of one party that certain non-existent facts do exist to the knowledge of the other. The *scienter* on the part of the defendant may be established by showing first, actual knowledge of the falsity of the representation by defendant; second, that the defendant made the statement as of his own knowledge, or in such absolute, unqualified and positive terms as to imply his personal knowledge of the fact, when in truth defendant had no knowledge whether the statement was true or false; or third, that the party's special situation or means of knowledge were such as to make it his duty to know of the truth or falsity of the representations.[5]

§ 254. **Representations must have been acted on.** Unless the representations are acted on, the deception has not accom-

[3] See Graves v. Lebanon Nat. Bank, 10 Bush, 23, 19 Am. Rep. 50.

[4] The matter is thus summed up by the supreme court of Maryland: "If the party does not *bona fide* believe in the truth of the statement made by him, or if he pretends to have knowledge of what he speaks, which he must have known that he did not have, or was utterly indifferent and reckless as to whether it was true, or had no reasonable ground to believe it was, or falsely asserts a material fact to be true of his own knowledge, and such representations be made for a fraudulent purpose, and he thereby induces another to act to his prejudice, he commits a fraud which will sustain an action for deceit." Cahill v. Applegate, 98 Md. 493, 502, 503, 56 Atl. 794.

[5] Watson v. Jones, 41 Fla. 241, 25 So. 678.

plished its purpose, and an action will not lie.[6] It is not essential, however, that they should have formed the sole inducement to a contract; it is enough that they formed a material inducement.[7] If, on the other hand, it appears that the defendant did not at all rely upon the representations, either because he did not believe them, or because he chose to investigate and act upon his own judgment, it is plain that no action can be maintained.[8] Even in such a case, however, he might possibly he entitled to relief, if the subject-matter of the representation respected some quality of the thing sold which was not susceptible of being accurately determined except by experts, and the investigation made was not by persons competent to develop the facts.[9] So, though the representations

[6] Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; Holdom v. Ayer, 110 Ill. 448; Phipps v. Buckman, 30 Pa. St. 401; J. H. Clark Co. v. Rice, 127 Wis. 451. "When a party ignorant of the real facts, and having no ready means of information, makes a purchase or enters into a transaction, as to the subject matter of which representations have been made which are material, the law will presume, as a matter of fact, that he relied on them." Hicks v. Stevens, 121 Ill. 186, 194, 11 N. E. 241.

[7] Mathews v. Bliss, 22 Pick, 48; Safford v. Grout, 120 Mass. 20; Addington v. Allen, 11 Wend. 374; Winter v. Bandel, 30 Ark. 362; Clarke v. Dickson, 6 C. B. (N. S.) 453; Hale v. Philbrick, 47 Ia. 217; Lebby v. Ahrens, 26 S. C. 275, 2 S. E. 387; Fishback v. Miller, 15 Nev. 428; Union Mfg. & C. Co. v. East Ala. Nat. Bank, 129 Ala. 292, 29 So. 781; Spinks v. Clark, 147 Cal. 439; Marshall v. Gilman, 52 Minn. 88, 53 N. W. 811; Kirkendal v. Hartsock, 58 Mo. App. 234; Lebby v. Ahrens, 26 S. C. 275, 2 S. E. 387; Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188.

[8] Hagee v. Grossman, 31 Ind. 223; Nye v. Merriam, 35 Vt. 438; Humphrey v. Merriam, 32 Minn. 197; Proctor v. McCoid, 60 Ia. 153; Union Mfg. & C. Co. v. East Ala. Nat. Bank, 129 Ala. 292, 29 So. 781; Allison v. Ward, 63 Mich. 128, 29 N. W. 528; Walker v. Casgrain, 101 Mich. 604, 60 N. W. 291; Buxton v. Jones, 120 Mich. 522, 79 N. W. 980; Warren v. Ritchie, 128 Mo. 311, 30 S. W. 1023; Runge v. Brown, 23 Neb. 817, 37 N. W. 660; Stetson v. Riggs, 37 Neb. 797, 56 N. W. 608; Wimer v. Smith, 22 Ore. 469, 30 Pac. 416; Sioux Banking Co. v. Kendall, 6 S. D. 543, 62 N. W. 377; Farr v. Peterson, 91 Wis. 182, 64 N. W. 863. If the buyer acts on his own examination and the advice of a third person, no recovery. Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215.

[9] Perkins v. Rice, Lit. Sel. Cas. 218, 12 Am. Dec. 298. See Daiker v. Strelinger, 28 App. Div. 220, 50 N. Y. S. 1074.

may have been trusted at first, yet if before the negotiations were completed the party ascertained their falsity, or if after they were completed he affirmed the bargain unconditionally with full knowledge of the facts, the bargain must be treated in the same manner as though it was originally made under the same state of knowledge.[10] If the representations have brought about a contract, and a new one is substituted for this before their falsity is discovered, the second contract, as well as the first, is supposed to have been induced by them.[11]

Where the plaintiff was induced to purchase stock in a company as an investment by means of the false and fraudulent representations of the defendant, it was held that he might continue to hold the stock in reliance upon such representations and that the defendant was liable for any loss sustained by the plaintiff in so holding the stock.[12] So one may act upon representations in the legal sense by refraining from action as well as by taking positive action. Thus the plaintiff gave an order to the defendant to sell certain stock which the latter had in his possession as broker. The defendant, in order to induce the plaintiff not to sell, represented that he knew that certain sales of the stock which had been reported were real and genuine and the plaintiff relying upon these representations withdrew his order. Afterwards the corporation sustained a large loss by embezzlement which rendered the stock

[10] Pratt v. Philbrook, 41 Me. 132. See Tuck v. Downing, 76 Ill. 71; Whiting v. Hill, 23 Mich. 399; Raffel v. Epworth, 107 Mich. 143, 64 N. W. 1052.

[11] Davis v. Henry, 4 W. Va. 571.

[12] Smith v. Duffy, 57 N. J. L. 679, 32 Atl. 371. In this case the plaintiff held the stock for two years when the company failed and the defendant was held liable for the difference between what was paid for the stock and its value after the failure. National Bank v. Taylor, 5 S. D. 99, 58 N. W. 297, is a similar case in which the court says: "It would seem strange law that a party may safely accept and rely upon the statements of him with whom he is dealing without investigation, and make and complete the contract solely upon the strength of his reliance upon their truth, but that, when he has so concluded the contract, he can no longer rely upon the truth of such representations, but that he must then investigate, and see if they are true. He has the same right to rely upon the statements after, as before, the consummation of the contract."

practically worthless. The defendant was held liable in an action of deceit for the plaintiff's loss.[13]

§ 255. **Burden of proof.** Fraud is never presumed, and the party alleging and relying upon it must prove it.[14] This, however, is one of those rules of law which is to be applied with caution and circumspection. "So far as it goes, it is based on a principle which has no more application to frauds than any other subject of judicial inquiry. It amounts but to this, that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial."[15] Fraud is therefore as properly made out by marshaling the circumstances surrounding the transaction, and deducting therefrom the fraudulent purpose, when it manifestly appears, as by presenting the more positive and direct testimony of actual purpose to deceive;[16] and, indeed, circumstantial proof in most cases can alone bring the fraud to light, for fraud is peculiarly a wrong of secrecy and circumvention, and is to be traced not in the open proclamation of the wrong-doer's purpose, but by the indications of covered tracks and studious concealments.[17] And

[13] Fottler v. Moseley, 179 Mass. 295, 60 N. E. 788; S. C. Fottler v. Moseley, 185 Mass. 563, 70 N. E. 1040

[14] Hill v. Reifsnider, 46 Md. 555; Tompkins v. Nichols, 53 Ala. 197; Baldwin v. Buckland, 11 Mich. 389; Bowden v. Bowden, 75 Ill. 143; Farmer v. Calvert, 44 Ind. 209; London, etc., Bank v. Lempriere, L. R. 4 P. C. 572; Hoeller v. Haffner, 155 Mo. 589, 56 S. W. 312; Davidson v. Crosby, 49 Neb. 60, 68 N. W. 338; Alter v. Stockham, 53 Neb. 223, 73 N. W. 667; Keel v. Levy, 19 Ore. 450, 24 Pac. 253. If the representations are proved false the burden is cast upon the defendant to show they were not relied on. Fishback v. Miller, 15 Nev. 428.

[15] Black, Ch. J., in Kaine v. Weigley, 22 Pa. St. 179, 182. See O'Donnell v. Segar, 25 Mich. 367. It is not enough that the facts are ambiguous, and as consistent with innocence as guilt. Shultz v. Hoagland, 85 N. Y. 464. The plaintiff must show that he understood ambiguous words to mean what was false and had thereby incurred loss. Smith v. Chadwick, L. R. 9 App. Cas. 187.

[16] Kaine v. Weigley, 22 Pa. St. 179; Watkins v. Wallace, 19 Mich. 57; McDaniel v. Baca, 2 Cal. 326, 56 Am. Dec. 339; Waddingham v. Loker, 44 Mo. 132, 100 Am. Dec. 160; Bank of Orange County v. Fink, 7 Paige 87.

[17] Hopkins v. Sievert, 58 Mo. 201; Vance v. Phillips, 6 Hill 433; Hennequin v. Naylor, 24 N. Y. 139; Hoeller v. Haffner, 155 Mo.

while it is often said that to justify the imputation of fraud, the facts must be such as are not explicable on any other hypothesis,[18] yet this can mean no more than this, that the court or jury should be cautious in deducing the fraudulent purpose; for whatever satisfies the mind and conscience that fraud has been practiced is sufficient.[19]

§ 256. **Rescinding contract for fraud.** It is a general rule that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract and demand back what has been received under it, or he may affirm the bargain and sue and recover damages for the fraud.[20] If he elects the former course, he must not sleep on his rights, but must move promptly.[21] No rule is better settled than this, that equity will refuse relief

589, 56 S. W. 312; Alter v. Stockham, 53 Neb. 223, 73 N. W. 667.

[18] The Alabama, etc., Co. v. Pettway, 24 Ala. 544; Buck v. Sherman, 2 Doug. (Mich.) 176; McConnell v. Wilcox, 2 Ill. 343. In Alabama it is now denied that this is a correct statement of the law. Adams v. Thornton, 78 Ala. 489, 56 Am. Rep. 49.

[19] Kaine v. Weigley, 22 Pa. St. 179; Hildreth v. Sands, 2 Johns. Ch. 35; S. C. in error, 14 Johns. 493; Devoe v. Brandt, 53 N. Y. 462, 465. It need not be shown "conclusively." Sparks v. Dawson, 47 Tex. 138.

[20] Tillis v. Austin, 117 Ala. 262, 22 So. 975; Dow v. Swain, 125 Cal. 674, 58 Pac. 271; Goodrich v. Smith, 87 Mich. 1, 49 N. W. 469; Pronger v. Old Nat. Bank, 20 Wash. 618, 56 Pac. 391; Sell v. Miss. Riv. Logging Co., 88 Wis. 581, 60 N. W. 1065; Richman v. Miss. Mills, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413; Baltimore Sugar Ref. Co. v. Campbell & Zell Co., 83 Md. 36, 34 Atl. 369; Joyner v. Early, 139 N. C. 49. Bringing an action for the price is not a binding election unless it was with knowledge of the fraud. Eq., etc. Foundry Co. v. Hersee, 103 N. Y. 25; Hays v. Midas, 104 N. Y. 602. But suing for the price with knowledge of the fraud, waives the fraud. Evans v. Rothschild, 54 Kan. 747, 39 Pac. 701; Bryan-Brown Shoe Co. v. Block, 52 Ark. 458, 12 S. W. 1073.

[21] Masson v. Bovel, 1 Denio. 69, 43 Am. Dec. 651; Pearsoll v. Chapin, 44 Pa. St. 9; Herrin v. Libbey, 36 Me. 350; Cook v. Gilman, 34 N. H. 556; Wright v. Peet, 36 Mich. 213; Hammond v. Stanton, 4 R. I. 65; Hanger v. Evins, 38 Ark. 334; Moore v. Howe, 115 Ia. 62, 87 N. W. 750; Bell v. Keepers, 39 Kan. 105, 17 Pac. 785; Parsons v. McKinley, 56 Minn. 464, 57 N. W. 1134; Taylor v. Short, 107 Mo. 384, 17 S. W. 970; A. Landreth Co. v. Schevenel, 102 Tenn. 486, 52 S. W. 148. But the wrong-doer cannot insist on extreme promptitude. He cannot complain of a delay, unaccompanied by acts of ownership, by which he has not been affected. Pence v. Langdon, 99 U. S. 578.

where the delay in seeking redress has been so considerable that laches is fairly imputable,[22] and both at law and in equity long acquiescence with full knowledge of the fraud will be deemed a waiver of the right to rescind.[23] So is dealing with the property, after knowledge of the fraud, in a manner inconsistent with a right to rescind.[23a]

The party electing to rescind must also place the other party as nearly as possible *in statu quo*.[24] To do this, if he has received anything under the contract, whether it be property or securities, he must restore it.[25] To this general rule there may be an exception of the case where that which was received was absolutely worthless; but the burden to show this would be on the party who had failed to restore it.[26] More conclusive

[22] Hercy v. Dinwoody, 2 Ves. 87; Lupton v. Janney, 13 Pet. 381; Badger v. Badger, 2 Wall. 87; Banks v. Judah, 8 Conn. 145; Purlard v. Martin, 1 Smedes & M. 126; Hawley v. Cramer, 4 Cow. 717; Coleman v. Lyne, 4 Rand. 454.

[23] Michoud v. Girod, 4 How. 503; Randall v. Errington, 10 Ves. 423; Campbell v. Fleming, 1 Ad. & El. 40; R. R. Co. v. Row, 24 Wend. 74; McCulloch v. Scott, 13 B. Mon. 172; Collier v. Thompson, 4 T. B. Mon. 81; Finley v. Lynch, 2 Bibb, 566, 5 Am. Dec. 635; Dill v. Camp, 22 Ala. 249; Wright v. Peet, 36 Mich. 213; Strong v. Lord, 107 Ill. 25; Sharp v. Ponce, 76 Me. 350; Moore v. Howe, 115 Ia. 62, 87 N. W. 750; Parsons v. McKinley, 56 Minn. 464, 57 N. W. 1134.

[23a] Ex parte Briggs, L. R. 1 Eq. Cas. 483. And see Moore v. Howe, 115 Ia. 62, 87 N. W. 750; Parsons v. McKinley, 56 Minn. 464, 57 N. W. 1134.

[24] Bell v. Keepers, 39 Kan. 105, 17 Pac. 785; A. Landreth Co. v. Schevenel, 102 Tenn. 486, 52 S. W. 148.

[25] Byard v. Hofes, 33 N. J. L. 120; Babcock v. Case, 61 Pa. St. 427, 100 Am. Dec. 654; Thayer v. Turner, 8 Met. 550; Cushing v. Wyman, 38 Me. 589; Voorhees v. Earl, 2 Hill, 288, 38 Am. Dec. 583; Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203; Coghill v. Boring, 15 Cal. 213; Downer v. Smith, 32 Vt. 1, 76 Am. Dec. 148. In equity it would not be necesary to make restoration before bringing suit. Martin v. Martin, 35 Ala. 560; Abbott v. Allen, 2 Johns, Ch. 519, 7 Am. Dec. 554. And at law, if what he received was only the other party's obligations, or worthless notes, which he has not disposed of, it will be sufficient to tender them back at the trial. Coghill v. Boring, 15 Cal. 213; Thurston v. Blanchard, 22 Pick. 18, 33 Am. Dec. 700; Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259; Dayton v. Monroe, 47 Mich. 193; Wood v. Garland, 58 N. H. 154.

[26] Gillett v. Knowles, 108 Mich.

than mere delay against the right to rescind is the fact that the defrauded party has so dealt with the subject-matter of the contract that it has become impossible to put the other *in statu quo*. Except in very peculiar cases, a suit at law for damages will then be found to be the sole remedy.[27]

§ 257. Affirming the contract. The fraud may also be waived by an express affirmance of the contract. Where an affirmance is relied upon it should appear that the party having a right to complain of the fraud had freely, and with full knowledge of his rights, in some form, clearly manifested his intention to abide by the contract, and waive any remedy he might have had for the deception.[28] If the contract is rescinded and the party guilty of the fraud refuses to restore on demand what he has fraudulently obtained, the other, at his option, may treat the detention as a conversion.

§ 258. Remedy. The remedy for a fraud will depend upon the nature of the transaction into which it enters and the situation of the parties when relief is sought.[29] As already shown, when the fraud results in a contract, the injured party may rescind the contract and recover back what he has parted with, or he may affirm the contract and sue for damages.[30] But he cannot do both.[31] In the former case, the remedy will

602, 66 N. W. 497; Babcock v. Case, 61 Pa. St. 427, 100 Am. Dec. 654; Smith v. Smith, 30 Vt. 139.

[27] Downer v. Smith, 32 Vt. 1, 76 Am. Dec. 148; Poor v. Woodburn, 25 Vt. 234; McCormick v. Malin, 5 Blackf. 509; Buchenau v. Horney, 12 Ill. 336; Blen v. Bear River Co., 20 Cal. 602, 81 Am. Dec. 132; Jemison v. Woodruff, 34 Ala. 143; Pierce v. Wilson, 34 Ala. 596; Shaw v. Barnhart, 17 Ind. 183; Clarke v. Dickson, El. Bl. & El. 148. See Miller v. Barber, 66 N. Y. 558; Freeman v. Reagan, 26 Ark. 373.

[28] Bradley v. Chase, 22 Me. 511; Roberts v. Barrow, 53 Ga. 315; Negley v. Lindsay, 67 Pa. St. 217, 5 Am. Rep. 427; Cumberland Coal Co. v. Sherman, 20 Md. 117; Butler v. Haskell, 4 Dessaus, 651; Lyon v. Waldo, 36 Mich. 345; Edwards v. Roberts, 7 Sm. & Mar. 544; Cherry v. Newson, 3 Yerg. 369; Broddus v. Call, 3 McCall, 472; Boyd v. Hawkins, 2 Dev. Eq. 195; Cann v. Cann, 1 P. Wms. 723; Cole v. Gibbons, 3 P. Wms. 290; *Ex parte* Briggs, L. R. 1 Eq. Cas. 483.

[29] Bigelow, Fraud, p. 384.

[30] *Ante*, §§ 256, 257.

[31] Westerfeld v. N. Y. Life Ins. Co., 129 Cal. 68, 73, 58 Pac. 92, 61 Pac. 667; Wilson v. New U. S. Cattle Ranch Co., 73 Fed. 994, 20 C. C. A. 241.

be at law or equity, according to circumstances.[32] In the latter case, the appropriate remedy is an action on the case for deceit.[33] In case the injured party is sued on the contract he may set up the fraud and defeat a recovery.[34]

[32] Bigelow, Fraud, chapters 7 and 11; ibid, pp. 384 *et seq.*

[33] Bartholomew v. Bentley, 15 Ohio, 659; Upton v. Vail, 6 Johns. 182; Barney v. Dewey, 13 Johns. 236; Cole v. High, 173 Pa. St. 590, 599, 34 Atl. 292; Paisley v. Freeman, 3 T. R. 51.

[34] 9 Cyc. 742-744.

CHAPTER XVI.

MASTER AND SERVANT.

§ 259. Who is a servant. A preliminary remark is essential regarding the employment, in the law, of the words master and servant. The common understanding of the words and the legal understanding is not the same; the latter is broader, and comprehends some cases in which the parties are master and servant only in a peculiar sense, and for certain purposes; perhaps only for a single purpose. In strictness, a servant is one who, for a valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful business.[1] The relation is purely one of contract, and the contract may contemplate or stipulate for any services and any conditions of service not absolutely unlawful. The case of an apprentice may be embraced under this head; for although he does not always bargain in respect to the services on his own behalf, some one whom the law authorizes to speak for him does so, and the relation established is strictly one resting on an agreement for services in return for a consideration of some sort which the master is to render.

One who voluntarily assists a servant at the latter's request does not, as a general rule, become a servant of the master, so as to impose upon the latter the duties and liabilities of a master towards such volunteer, or so as to render the master liable to third persons injured by such volunteer's acts or negligence, while rendering such assistance.[2] Such a volunteer assumes all the risks of the service upon which he enters and is only

[1] "A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling." Murray v. Dwight, 161 N. Y. 301, 305, 55 N. 901, 48 L. R. A. 673.

[2] Georgia Pac. R. R. Co. v. Propst, 85 Ga. 203, 4 So. 711; Atlanta, etc. R. R. Co. v. West, 121 Ga. 641, 49 S. E. 711, 104 Am. St. Rep. 179, 67 L. R. A. 701; Church v. Chicago, etc. Ry. Co., 50 Minn. 218, 52 N. W. 647; Evarts v. St.

entitled to the protection due a trespasser.[3] But if the servant has authority, express or implied, to employ assistance, the rule is otherwise.[4] Such implied authority might arise in case of some unforeseen emergency, which created a necessity for such assistance.[5] And when a passenger is injured by the negligence of a volunteer the master is liable, though the volunteer was called in by a servant without the knowledge or authority of the master, and the reason is that "when the master obligates himself to transport a person from one place to another safely and properly, and to protect him from injury from any source that human judgment and foresight are capable of providing against, and the master entrusts the performance of the duty he has so undertaken to discharge to his employes, he becomes responsible for their acts, whether negligent or malicious, and they continue in the line of their employment until their relation with the master is dissolved. The specific duty of the employe in such case may be very limited, but the scope of the employment is as broad as the obligations the master has assumed."[6] And when one accepts the services of another in his business, he will be liable to third parties for the negligence of such other person, though no contract of service exists.[7] Thus the plaintiff was injured

Paul, etc., Ry. Co., 56 Minn. 141, 57 N. W. 459, 45 Am. St. Rep. 460, 22 L. R. A. 663; Longa v. Stanley Hod Elevator Co., 69 N. J. L. 31, 54 Atl. 251; Wischam v. Rickard, 136 Pa. St. 109; 20 Atl. 532, 20 Am. St. Rep. 900, 10 L. R. A. 97; Langan v. Tyler, 114 Fed. 716, 51 C. C. A. 503; Cincinnati, etc., Ry. Co. v. Finnell, 108 Ky. 135, 55 S. W. 902, 57 L. R. A. 266.

[3] Ibid.

[4] Haluptzok v. Great Northern Ry. Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739. See Johnson v. Ashland Water Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243.

[5] See Gwilliam v. Twist, (1895) 1 Q. B. 557; Gwilliam v. Twist, (1895) 2 Q. B. 84.

[6] Lakin v. Oregon Pac. R. R. Co., 15 Ore. 220, 231, 15 Pac. 641. In Althorf v. Wolfe, 22 N. Y. 355, where one had directed his servant to remove snow and ice from the roof of his house, and another person went up with the servant as a volunteer to assist him, and, by the carelessness of the latter in throwing the snow and ice into the street, a passerby was injured, the master was held responsible, for the master was bound to see that his premises were so used as not to injure others.

[7] Hill v. Morey, 26 Vt. 178; Potter v. Faulkner, 1 B. & S. 800; Hannibal, etc., R. R. Co. v. Martin, 11 Ill. App. 386. If a peniten-

at a railroad crossing by reason of the negligence of the flagman stationed there. There were two sets of tracks at the crossing, one belonging to the defendant and one to another company. The latter company employed and paid the flagman. But the flagman had been employed at this crossing for ten years, and during all that time had regularly flagged the defendant's trains. The court held the facts justified a finding that the flagman was a servant of the defendant company and stated the rule of law to be that "when one knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his service, he is liable, as a master, for the negligence of such servant when the act or failure constituting the negligence comes within the apparent scope of the servant's employment, even though the person for whom the service is rendered has not employed or paid the servant." [8]

As the child is by the law placed under the dominion of the parent, he is, while employed by the latter about his affairs, to be regarded as a servant.[9] And it follows, from what has been said above, that the agent in one's business, whether general or special, is in law a servant, and so is the officer of a

tiary keeper puts a convict in charge of his premises, he makes him his servant. Ward v. Young, 42 Ark. 542.

[8] Denver, etc., R. R. Co. v. Gustafson, 21 Colo. 393, 41 Pac. 505. And see Brow v. Boston, etc., R. R. Co., 157 Mass. 399, 32 N. E. 362.

[9] Schouler, Dom. Rel. 544, 545; Shearm. and Redf. on Neg., § 106; Johnson v. Ashland Water Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243; Everhart v. Terre Haute, etc., R. R. Co., 78 Ind. 290, 41 Am. Rep. 567; Barstow v. Old Colony R. R. Co., 143 Mass. 535; Mayton v. Texas, etc., R. R. Co. 63 Tex. 77, 51 Am. Rep. 637; Blair v. Grand Rapids, etc., Co., 80 Mich. 124. Compare Eason v. S. & E. T. Ry. Co., 65 Tex. 577, 57 Am. Rep. 606. See Sherman v. Hannibal, etc., R. R. Co., 72 Mo. 62, 37 Am. Rep. 423; Pittsburg etc., Co. v. Adams, 105 Ind. 151; Osborn v. Knox, etc., Co., 68 Me. 49. But a father is not liable for the acts or neglects of his son merely because of the relation. Palm v. Ivorson, 117 Ill. App. 535; Reynolds v. Buck, 127 Ia. 601; *ante*, § 22. A wife is not liable for an assault upon the plaintiff by her husband, committed in her hotel, on the ground that he was her servant, since she cannot control or discharge him or remove him from her premises. Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148.

private corporation.[10] The officer of a public corporation in the discharge of the proper duties of his office, is not, in general, to be deemed the servant of the corporation;[11] neither is any person who is employed in any capacity in the execution of its police regulations,[12] or in its fire department.[13] But

[10] Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Dwinelle v. New York Central, etc., R. R. Co., 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224; Schwarting v. Van Wie, etc., Co., 69 App. Div. 282, 74 N. Y. S. 747; Lovick v. Atlantic Coast Line R. R. Co., 129 N. C. 427, 40 S. E. 191; Gulf, etc., R. R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743. As to liability of charitable corporations for the acts and omissions of their officers, agents and servants, see *ante*, § 27.

[11] Arnold v. San Jose, 81 Cal. 618, 22 Pac. 877; Pitkin Co. v. Ball. 22 Colo. 125, 43 Pac. 1000, 55 Am. St. Rep. 117; Colwell v. Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; Bailey v. Fulton Co., 111 Ga. 313, 36 S. E. 596; Kinnare v. Chicago, 171 Ill. 332, 49 N. E. 536; Rock Island L. & M. Co. v. Elliott, 59 Kan. 42, 51 Pac. 894; Downing v. Mason Co., 87 Ky. 208, 8 S. W. 246, 12 Am. St. Rep. 473; Sherman v. Vermillion, 51 La. Ann. 880, 25 So. 538; Curran v. Boston, 151 Mass. 505, 24 N. E. 781, 21 Am. St. Rep. 465, 8 L. R. A. 243; Howard v. Worcester, 153 Mass. 426, 27 N. E. 11, 25 Am. St. Rep. 651, 12 L. R. A. 160; Taylor v. Avon, 73 Mich. 604, 41 N. W. 703; Murray v. Omaha, 66 Neb. 279, 92 N. W. 299, 103 Am. St. Rep. 702; Lefrois v. Monroe County, 162 N. Y. 563, 57 N. E. 185; Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; Caspany v. Portland, 19 Ore. 496, 24 Pac. 1036, 20 Am. St. Rep. 842; Ford v. School District, 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607; Horton v. Newell, 17 R. I. 571, 23 Atl. 910; Parks v. Greenville, 44 S. C. 168, 21 S. E. 540; O'Rourke v. Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789; McAndrews v. Hamilton Co., 105 Tenn, 399, 58 S. W. 483; Bates v. Rutland, 62 Vt. 178, 20 Atl. 278, 22 Am. St. Rep. 95, 9 L. R. A. 363; Fry v. Albemarle Co., 86 Va. 195, 9 S. E. 1004, 19 Am. St. Rep. 879; Commercial Elec. L. & P. Co. v. Tacoma, 20 Wash. 288, 55 Pac. 219, 72 Am. St. Rep. 103; Thomas v. Grafton, 34 W. Va. 282, 12 S. E. 478, 26 Am. St. Rep. 924. Such a corporation may be liable for acts of its officers, which it has specially authorized or afterwards ratified. Horton v. Newell, 17 R. I. 571, 23 Atl. 910; Commercial Elec. L. & P. Co. v. Tacoma, 20 Wash. 288, 55 Pac. 219, 72 Am. St. Rep. 103.

[12] Orlando v. Pragg, 31 Fla. 111, 12 So. 368, 34 Am. St. Rep. 17, 19 L. R. A. 196; Culver v. Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; Craig v. Charleston, 180

[13] Davis v. Lebanon, 108 Ky. 688, 57 S. W. 471; Alexander v. Vicksburg, 68 Miss. 564, 10 So. 62.

in the management of its own property a public corporation comes under the same rules with all others, and its agents are its servants.[14]

If the servants of a master are sent to do work upon the property or premises of another, they will become the servants of the latter, if they work under his direction and control,[15] otherwise not.[16] And where the servants of one person are hired or loaned to another, they become the servants of the latter for the time being.[17] In all such cases the test is whether in the particular service which the servant is engaged to perform, he continues liable to the direction and control of his general master or becomes subject to that of the party

Ill. 154, 54 N. E. 184; McFadden v. Jewell, 119 Ia. 321, 93 N. W. 302, 97 Am. St. Rep. 321; Peters v. Lindborg, 40 Kan. 654, 20 Pac. 490; Jolly's Admx. v. Hawesville, 89 Ky. 279, 12 S. W. 313; Conway v. Russell, 151 Mass. 581, 24 N. E. 1026. The doctrine of *respondeat superior* does not apply to public agents charged with a duty which can be exercised only through the services of others. They are liable only for their own misconduct. Walsh v. Trustees, etc., 96 N. Y. 427; Donovan v. McAlpin, 85 N. Y. 185, 39 Am. Rep. 649; Bowden v. Derby, 97 Me. 536, 55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223. See O'Hare v. Jones, 161 Mass. 391, 37 N. E. 371.

[14] See *ante*, § 28.

[15] Green v. Sansom, 41 Fla. 94, 25 So. 332; Wood v. Cobb, 13 Allen, 58; Ward v. New Eng. Fiber Co., 154 Mass. 419, 28 N. E. 219; Hastey v. Sears, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267; Delory v. Blodgett, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114; Roe v. Winston, 86 Minn. 77, 90 N. W. 122; McInerney v. Delaware & H. C. Co., 151 N. Y. 411, 45 N. E. 848; Wiest v. Coal Creek R. R. Co., 43 Wash. 176; Atlantic Transport Co. v. Coneys, 82 Fed. 177, 28 C. C. A. 388; Brady v. Chicago, etc., Ry. Co., 114 Fed. 100, 52 C. C. A. 48.

[16] Wylie v. Palmer, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285; Connelly v. Faith, 199 Pa. St. 553, 42 Atl. 1024; Burton v. Galveston, etc., Ry. Co., 61 Tex. 526.

[17] Cotten v. Lindgren, 106 Cal 602, 39 Pac. 939, 46 Am. St. Rep 255; Brown v. Smith, 86 Ga. 274 12 S. E. 411, 22 Am. St. Rep. 456; Kimball v. Cushman, 103 Mass 194, 4 Am. Rep. 528; Hasty v Sears, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267; Driscoll v. Towle, 181 Mass. 416, 63 N. E 922; Delaware, etc. Co. v. Hardy, 59 N. J. L. 35, 34 Atl. 986; Higgins v. Western Union Tel. Co. 156 N. Y. 75, 50 N. E. 500, 66 Am St. Rep. 537; Powell v. Construction Co., 88 Tenn. 692, 13 S. W 691, 17 Am. St. Rep. 925. See New Orleans, etc., R. R. Co v. Norwood, 62 Miss. 565.

to whom he is lent or hired.[18] Where the defendant sent his son with a team to render gratuitous assistance to his neighbor in harvesting wheat and the son negligently drove over the plaintiff's child, it was held to be a question for the jury whether the son, at the time, remained the servant of his father, or became the servant of the neighbor, whom he was assisting.[19]

The question whether one person is the servant of another arises out of a great variety of circumstances, and many cases are difficult of classification. A few additional illustrations are given: A person employed to sell sewing machines on commission, who was to give his entire time to the business under the direction of the company, who was furnished with a wagon by the company, but furnished his own horse and harness, was held to be a servant of the company.[20] But, generally, persons employed to sell on commission, who conduct their business as they please, are not servants of the consignors or owners of the goods.[21] One who hires convict labor is liable as master to a convict, "in respect to those incidents of the employment over which he has the same measure of control that a master ordinarily has, but not as to those features of the employment over which he is essentially deprived of such control."[22] A father was employed by the defendant company to mine coal at a specified price per ton, and had his boy to assist in the work, with the knowledge and consent of the company. The boy was held to be a servant of the company as respects the duty owed him by the company.[23] The lessor of a railroad is not liable as master, for injuries to the employes of the lessee.[24] Persons employed in the construc-

[18] Coughlin v. Cambridge, 166 Mass. 268, 277, 44 N. E. 218; Delory v. Blodgett, 185 Mass. 126, 128, 69 N. E. 1078, 64 L. R. A. 114; Consolidated Fire Works Co. v. Koehl, 190 Ill. 145, 150, 60 N. E. 87; Grace & Hyde Co. v. Probst, 208 Ill. 147, 151, 70 N. E. 12.

[19] Sacker v. Waddell, 98 Md. 43, 56 Atl. 399, 103 Am. St. Rep. 374.

[20] Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 S. C. Rep. 175, 33 L. Ed. 440.

[21] Abrahams v. California Powder Works, 5 N. M. 479, 23 Pac. 785, 8 L. R. A. 378.

[22] Baltimore Boot & Shoe Mfg. Co. v. Jamar, 93 Md. 404, 49 Atl. 847, 86 Am. St. Rep. 428.

[23] Ringue v. Oregon Coal Co., 44 Ore. 407, 75 Pac. 703.

[24] East Line, etc., Ry. Co. v. Culberson, 72 Tex. 375, 10 S. W.

tion of a church are not servants of a building committee who look after the work.[25] A Pullman car porter is a servant of the railroad company hauling the car, as respects passengers on the train,[26] but he is held not a servant of the railroad company in the sense that makes him a co-servant of the regular train employes.[27] Where one furnishes a carriage and driver for the use of another, the presumption is that the driver is the servant of the owner.[28] A pilot, whom the master of a vessel is compelled by law to accept, is not his servant.[29] Whether the relation of master and servant exists in a given case is usually a question of fact.[30]

§ 260. **Independent contractors.** An independent contractor has been defined to be "one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work."[31] In general, it is entirely competent for one having any particular work to be performed, to enter into an agreement with an independent contractor to take charge of and do the whole work, employing his own assistants, and being responsible only for the completion of the work as agreed. In such case, as a general rule, the contractor, for the time being, becomes an independent principal, whose servants are exclusively his, and not those of the employer he contracts with; and the contractor is in no such sense the servant of his employer as to give to others rights against the employer growing out of the

706, 13 Am. St. Rep. 805, 3 L. R. A. 567.

[25] Wilson v. Clark, 110 N. C. 364, 14 S. E. 962.

[26] Railroad Co. v. Ray, 101 Tenn. 1, 46 S. W. 554.

[27] Hughson v. Richmond, etc., R. R. Co., 2 App. D. C. 98.

[28] Sacker v. Waddell, 98 Md. 43, 56 Atl. 399, 103 Am. St. Rep. 374; Fenner v. Crips Bros., 109 Ia. 455, 80 N. W. 526; Huff v. Ford, 126 Mass. 24, 30 Am. Rep. 645; Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 45 Am. Rep. 54; McColligan v. Pennsylvania R. R. Co., 214 Pa. St. 229.

[29] Steam Nav. Co. v. British, etc., Nav. Co., L. R. 3 Exch. 330.

[30] Bernstein v. Roth, 145 Ill. 189, 34 N. E. 37; Sacker v. Waddell, 98 Md. 43, 56 Atl. 399, 103 Am. St. Rep. 374.

[31] Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925. This definition is quoted in Humpton v. Unterkircher, 97 Ia. 509, 66 N. W. 776, and declared to be the best found by the court.

negligence of the contractor or of his servants.[32] The general rule is subject to certain exceptions which have been thus stated: "1. If a contractor faithfully performs his contract, and the third person is injured by the contractor in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for the negligence of the contractor not done

[32] Myer v. Hobbs, 57 Ala. 175; Chattahoochee, etc. R. R. Co. v. Behrman, 136 Ala. 508, 35 So. 132; Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; Bennett v. True, 66 Cal. 509, 56 Am. Rep. 117; Louthan v. Hewes, 138 Cal. 116, 71 Pac. 180; Brunswick Grocery Co. v. Brunswick, etc., R. R. Co., 106 Ga. 270, 32 S. E. 92, 71 Am. St. Rep. 249; Butler v. Lewman, 115 Ga. 752, 42 S. E. 98; Schwartz v. Gilmore, 45 Ill. 455, 92 Am. Dec. 227; Hale v. Johnson, 80 Ill. 185; Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136; Foster v. Chicago, 197 Ill. 264, 64 N. E. 322; Ryan v. Curran, 64 Ind. 345; Strauss v. Louisville, 108 Ky. 155, 55 S. W. 1075; Davie v. Levy, 39 La. Ann. 551, 2 So. 395, 4 Am. St. Rep. 225; Eaton v. European, etc. R. R. Co., 59 Me. 520, 8 Am. Rep. 430; McCarthy v. Parish, 71 Me. 318, 36 Am. Rep. 320; Leavitt v. Bangor, etc., R. R. Co., 89 Me. 509, 36 Atl. 998, 36 L. R. A. 382; City & Suburban Ry. Co. v. Morris, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345; Harding v. Boston, 163 Mass. 14, 39 N. E. 411; Boomer v. Wilbur, 176 Mass. 482, 67 N. E. 1004, 53 L. R. A. 172; Shute v. Princeton, 58 Minn. 337, 59 N. W. 1050; Long v. Moon, 107, Mo. 334, 17 S. W. 810; Hitte v. Republican Val., etc., R. R. Co., 19 Neb. 620; Carter v. Berlin Mills Co., 58 N. H. 52; McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49; Jansen v. Jersey City, 61 N. J. L. 243, 39 Atl. 1025; McCafferty v. Spuyten Duyvil, etc., R. R. Co., 61 N. Y. 178, 19 Am. Rep. 267; King v. New York, etc., R. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; Hexamer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703; Herrington v. Lansingburgh, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348; Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692; Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391; Burke v. Ireland, 166 N. Y. 305, 59 N. E. 914; Cincinnati v. Stone, 5 Ohio St. 38, 41; Edmundson v. Pittsburg, etc. R. R. Co., 111 Pa. St. 316; Williams v. Tripp, 11 R. I. 454; Sandford v. Pawtucket St. Ry. Co., 19 R. I. 537, 35 Atl. 67; Bailey v. Troy, etc., Co., 57 Vt. 252, 52 Am. Rep. 129; Benton v. Beattie, 63 Vt. 186, 22 Atl. 422; Bibb's Admr. v. Norfolk, etc., R. R. Co., 87 Va. 711, 14 S. E. 163; Norfolk, etc., Ry. Co. v. Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367; Hackett v. Western Union Tel. Co., 80 Wis. 187, 49 N. W. 822; Smith v. Milwaukee, etc., Exchange, 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

under the contract, but in violation of it, the employer is in general not liable. * * * 2. If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think to be responsible on the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. * * * 3. If I employ as contractor a person incompetent or untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. * * * 4. The employer may be guilty of personal neglect connecting itself with the negligence of the contractor in such manner as to render both liable."[33] One cannot escape

[33] Seymour, J., in Lawrence v. Shipman, 39 Com. 586, 589. In Atlanta, etc., R. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277, the exceptions to the rule that an employer is not liable for the negligence of an independent contractor or of his servants, are stated as follows: "(1) When the work is wrongful in itself, or if done in the ordinary manner would result in a nuisance, the employer will be liable for injury resulting to third persons, although the work is done by an independent contractor."

"(2) If, according to previous knowledge and experience the work to be done is in its nature dangerous to others, however carefully performed, the employer will be liable and not the contractors, because, it is said, it is incumbent on him to foresee such danger and take precautions against it. * * * And in this exception is included the principle that where the injury is caused by defective construction which was inherent in the original plan of the employer, the latter is liable."

"(3) The next exception is where the wrongful act is the violation of a duty imposed by express contract upon the employer; for where a person contracts to do a certain thing, he cannot evade liability by employing another to do that which he has agreed to perform."

"(4) The next exception is where a duty is imposed by statute. The person upon whom a statutory obligation is imposed is liable for any injury that arises to others from its non-performance or in consequence of its having been negligently performed, either by himself or by a contractor employed by him."

"(5) The employer may also make himself liable by retaining the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming control of the work, or of some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference. But merely taking steps to see that the contractor carries out his agreement, as

liability by contracting for that the necessary or probable effect of which would be to injure others,[34] and he cannot, by any contract, relieve himself of duties resting upon him as owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance, and therefore an invasion of the rights of others.[35] Thus where the walls of a building were left in a dangerous condition by fire and the owner employed a contractor to take them down and, in consequence of his negligence in doing the work, the walls fell on the adjoining property, the owner was held liable on the ground that "when a party is under a duty to the public, or a third person, to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot by letting it to a contractor, avoid his liability, in case

having the work supervised by an architect or superintendent, does not make the employer liable; nor does reserving the right to dismiss incompetent workmen."

"(6) The employer may also be held liable upon the ground that he has ratified or adopted the unauthorized wrong of the independent contractor." pp. 165-168. For other statements of the exceptions see Birmingham v. McCary, 84 Ala. 469, 4 So. 630; Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391; Water Co. v. Ware, 16 Wall. 566, 576; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Chicago v. Robbins, 2 Black, 418; Railroad Co. v. Hanning, 15 Wall. 649; Cuff v. Newark, etc., R. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

[34] Evans v. Murphy, 87 Md. 498, 40 Atl. 109; Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482; Pye v. Faxon, 156 Mass. 471, 31 N. E. 640; Wetherbee v. Partridge, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486; Carrico v. W. Va. Cent., etc., Ry. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50

[35] Chicago v Robbins, 2 Black, 418; Clark v. Fry, 8 Ohio St. 358; Hughes v. Railroad Co., 39 Ohio St. 461; Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421; Thomas v. Harrington, 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742; Southern Ohio R. R. Co. v. Morey, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; Howver v. Whalen, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828; McCarrier v. Hollister, 15 S. D. 366, 89 N. W. 862, 91 Am. St. Rep. 695; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; Holliday v. National Telephone Co., (1899) 2 Q. B. 392. So if owners are charged with duty of keeping a mine safe, they are liable though independent contractors are to take out the ore. Lake Sup., etc., Co. v. Erickson, 39 Mich. 492, 33 Am Rep. 423; Kelly v. Howell, 41 Ohio St. 438.

it is negligently done to the injury of another."[36] Where a contract for the erection of a building contemplates blasting in close proximity to adjoining buildings, the work is intrinsically dangerous, and the rule of independent contractor does not apply.[37] But the contrary is held in New York.[38] Where an owner contracts for the erection or repair of a building upon his lot he is not liable for the acts or negligence of the contractor or his servants in obstructing the street or in permitting objects to fall into the street, whereby those lawfully using the street are injured.[39] But if the contract provides for doing work in the street itself, such as making water and sewer connections and the like, then as to such work the rule is different.[40] Where a building is erected in a manner forbidden by ordinance or statute and in consequence it falls or collapses, the owner is liable for any damage or injury occasioned thereby.[41] So if the plans are defective or the materials

[36] Covington, etc., Bridge Co. v. Steinbrock, 61 Ohio St. 215, 223, 55 N. E. 618, 76 Am. St. Rep. 375. See Duer v. Consolidated Gas Co., 86 App. Div. 14, 83 N. Y. S. 714.

[37] Wetherbee v. Partridge, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451.

[38] Roehm v. Striker, 142 N. Y. 134, 36 N. E. 808; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391.

[39] Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139; Hoff v. Shockley, 122 Ia. 720, 98 N. W. 573, 101 Am. St. Rep. 289, 64 L. R. A. 538; Strauss v. Louisville, 108 Ky. 155, 55 S. W. 1075, where plaintiff was injured by the contractor's servant throwing a piece of lime into a mortar bed placed in the street; Boomer v. Wilbur, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172; Emmerson v. Fay, 94 Va. 60, 26 S. E. 386; Richmond v. Sitterding, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879, 65 L. R. A. 445 (which last reference has a note on the subject of independent contractors); Smith v. Milwaukee, etc., Exchange, 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

[40] Spence v. Schultz, 103 Cal. 208; 37 Pac. 220; Wiggin v. St. Louis, 135 Mo. 558, 37 S. W. 528; Thomas v. Harrington, 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742; Southern Ohio R. R. Co. v. Morey 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; Hawver v. Whalen, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828; McCarrier v. Hollister, 15 S. D. 366, 89 N. W. 862, 91 Am. St. Rep. 695.

[41] Walker v. McMillan, 6 Can. S. C. R. 241; Pitcher v. Lennon, 16 Misc. 609, 38 N. Y. S. 1007.

directed to be used are unsuitable.[42] But where a person employs a competent architect and contractor and the plans are sufficient and approved by the building department of the municipality, he is not liable for an accident which happens by reason of the foreman of the contractor putting the foundation of a column on disturbed earth.[43] It is held in Illinois that, "Even though the person who causes the injury is a contractor, he will be regarded as the servant or agent of the corporation for whom he is doing the work, if he is exercising some chartered privilege or power of such corporation with its assent, which he could not have exercised independently of the charter of such corporation."[44] And in Pennsylvania it is held that if the employer, at the time he resumes possession of the work, from an independent contractor, knew or ought to have known, or from a careful examination could have known, that there was any defect in the work, he is responsible for any injury caused to a third person by defective construction.[45]

[42] Meier v. Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39.

[43] Burke v. Ireland, 166 N. Y. 305, 59 N. E. 914.

[44] Chicago Economic Fuel Gas. Co. v. Myers, 168 Ill. 139, 48 N. E. 66; Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221.

[45] First Presb. Congregation v. Smith, 163 Pa. St. 561, 30 Atl. 279, 43 Am. St. Rep. 808, 26 L. R. A. 504. And see Berberich v. Beach, 131 Pa. St. 165, 18 Atl. 1008. For further illustrations as to liability of owner or employer for negligence of contractor and his servants, see Colgrove v. Smith, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590; Donovan v. Oakland, etc., Rapid Transit Co., 102 Cal. 245, 36 Pac. 516; Fulton County St. R. R. Co. v. McConnell, 87 Ga. 756, 13 S. E. 828; Jacksonville v. Drew, 19 Fla. 106, 49 Am. Rep. 5; Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136; Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166; Davie v. Levy, 39 La. Ann. 551, 2 So. 395, 4 Am. St. Rep. 225; Leavitt v. Bangor, etc., R. R. Co., 89 Me. 509, 36 Atl. 998, 36 L. R. A. 382; Wilbur v. White, 98 Me. 191, 56 Atl. 657; Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482; Moore v. Townsend, 76 Minn. 64, 78 N. W. 880; Larson v. Met. St. Ry. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330; Turner v. Newburgh, 109 N. Y. 301, 16 N. E. 344; Herrington v. Lansingburgh, 110 N. Y. 145, 17 N. E. 728; Wylie v. Palmer, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285; Heidenway v. Philadelphia, 168 Pa. St. 72, 31 Atl. 1063; Sandford v. Pawtucket St. Ry. Co., 19 R. I. 537, 35 Atl. 67; Cameron M. & E.

In determining whether the relation is one of master and servant or of independent contractor, the decisive question is, had the defendant the right to control in the given particular the conduct of the person doing the wrong.[46] Where a city contracted for the erection of a building and the contract provided that the work was to be done "under the direction of the committees of the fire department and public buildings, representing the city council of said city, who shall have entire control over the manner of doing or shaping all and every part of said work," this clause was held to reserve such control to the city as to make it liable for the negligence of the contractor and his servants.[47] So of this provision in a contract for wrecking a building: "The whole of the work of demolition to be carried out according to the directions of the supervising architect, whose directions upon all points in dispute I agree to accept as final."[48] But where the only control reserved is to require the work to conform to the contract, or to some prescribed standard, or to be done to the satisfaction of the employer's engineer or architect, the doctrine of independent contractor applies.[49] So where the work was to be done "to the satisfaction and acceptance of the superintendent of sewers, and subject to his inspection and direction at all

Co. v. Anderson, 98 Tex. 156, — S. W. —; Benton v. Beattie, 63 Vt. 186, 22 Atl. 422; Stevenson v. Wallace, 27 Gratt. 77; Norfolk, etc., Ry. Co. v. Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; Bower v. Peate, L. R. 1 Q. B. D. 321; Holliday v. National Tel. Co., (1899) 2 Q. B. 392.

[46] Rait v. New Eng. Furniture, etc., Co., 66 Minn. 76, 68 N. W. 729.

[47] Covington v. Geyler, 93 Ky. 275, 19 S. W. 741.

[48] Faren v. Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256. The same conclusion was reached in the following cases: Larson v. Met. St. Ry. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A 330; Dublin v. Taylor, 92 Tex. 535, 50 S. W. 120; Atlantic Transport Co. v. Coneys, 82 Fed. 177, 28 C. C. A. 388.

[49] Vincennes Water Supply Co. v. White, 124 Ind. 376, 24 N. E. 747; Hughbanks v. Boston Investment So., 90 Ia. 267, 60 N. W. 640; Humpton v. Unterkircher, 97 Ia. 509, 66 N. W. 776; Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925; Green v. Soule, 145 Cal. 96, 78 Pac. 337; Pioneer Fireproof Construction Co v. Hansen, 176 Ill. 100, 52 N. E. 17.

times.''[50] It is immaterial that the right is reserved to make alterations, deviations and omissions.[51] So it is immaterial how the contractor is to be compensated, whether by a lump sum or a commission on the cost,[52] or a per diem.[53] The question thus depends upon the terms of the contract, and where the contract is in writing it is one of law for the court.[54] But where the contract is oral and the evidence conflicting, or where the written contract has become modified by the practice under it, it is a question for the jury under proper instructions.[55]

[50] Harding v. Boston, 163 Mass. 14, 39 N. E. 411.

[51] Green v. Soule, 145 Cal. 96, 78 Pac. 337. As to the right of supervision which will render the employer liable as master of the contractor, compare Pack v. New York, 8 N. Y. 222; Kelly v. New York, 11 N. Y. 432; Eaton v. European, etc., R. R. Co., 59 Me. 520, 8 Am. Rep. 430; Allen v. Willard, 57 Pa. St. 374, with Sadler v. Henlock, 4 E. & B. 570; Lowell v. Boston etc., R. R. Co., 23 Pick. 24; Linnehan v. Rollins, 137 Mass. 123; 50 Am. Rep. 287; Schwartz v. Gilmore, 45 Ill. 455, 92 Am. Dec. 227; Morgan v. Bowman, 22 Mo. 538; St. Paul v. Seitz, 3 Minn. 297; Speed v. Atlantic, etc. R. R. Co., 71 Mo. 303; Fink v. Miss., etc., Co., 82 Mo. 276; Callahan v. Burlington, etc., R. R. Co., 23 Iowa, 562; Cincinnati v. Stone, 5 Ohio St. 38; Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; Brown v. Werner, 40 Md. 15; New Orleans, etc., Co. v. Norwood, 62 Miss. 565; Campbell v. Lunsford, 83 Ala. 512, 3 So. 522. The fact that the employer pays the contractor's servants does not conclusively determine that he is to be regarded as their master. Rourke v. White Moss Colliery Co., 1 C. P. Div. 556; 2 C. P. Div. 305.

[52] Whitney & Starrette Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; Grace & Hyde Co. v. Probst, 208 Ill. 147, 70 N. E. 12; Morgan v. Smith, 159 Mass. 570, 35 N. E. 101.

[53] Emmerson v. Fay, 94 Va. 60, 26 S. E. 386.

[54] Hughbanks v. Boston Investment Co., 92 Ia. 267, 60 N. W. 640; Vosbeck v. Kellogg, 78 Minn. 176, 181, 80 N. W. 957; Allen v. Willard, 57 Pa. St. 374, 382; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 S. C. Rep. 175.

[55] Overhouser v. Am. Cereal Co., 118 Ia. 417, 92 N. W. 74; Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Rait v. New Eng., etc., Co., 66 Minn. 76, 68 N. W. 729; Klages v. Gillette-H. Mfg. Co., 86 Minn. 458, 90 N. W. 1116; Goyle v. Missouri Car, etc., Co. 177 Mo. 427, 76 S. W. 987; Howard v. Ludwig, 171 N. Y. 507, 64 N. E. 172; Wallace v. Southern Cotton Oil Co., 91 Tex. 18, 40 S. W. 399; Emmerson v. Fay, 94 Va. 60, 64, 26 S. E. 386.

§ 261. The master's liability to third persons for the acts or omissions of his servant—General rule. When the relation is found to exist, the question of the master's liability next presents itself. And it will readily occur to every mind that the master cannot, in reason, be held responsible generally for whatever wrongful conduct the servant may be guilty of. A liability so extensive would make him guarantor of the servant's good conduct, and would put him under a responsibility which prudent men would hesitate to assume, except under the stress of necessity. Even the parent is not made chargeable generally for the torts of his child; and if he cannot justly be held responsible for the conduct of one whom the law submits to his general direction and discipline, much less could another be held liable, generally, for the acts of a servant over whom his control is comparatively slight, and who is not submitted to his disciplinary authority.

The maxim applied here is the familiar one: *Qui facit per alium facit per se.* That which the superior has put the inferior in motion to do, must be regarded as done by the superior himself, and his responsibility is the same as if he had done it in person.[56] The maxim covers acts of omission as well as of commission, and embraces all cases in which the failure of the servant to observe the rights of others in the conduct of the master's business has been injurious.[57] To ren-

[56] In Farwell v. Boston, etc., R. R. Co., 4 Met. 49, 55, 56, 38 Am. Dec. 389, Shaw, C. J., speaking of the rule making the master liable to third persons for the acts or omissions of the servant in the master's business, says. "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it."

[57] "The law which makes one responsible for an act not his own, because the actual wrongdoer is his servant is based on a rule of public policy." This rule of public policy is the rule of *respondeat superior* and the practical ground of the rule is that "On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit." Hearns v. Waterbury Hospital, 66 Conn.

der the master liable the servant must, at the time of the injury, be engaged in the master's service. Where the conductor and motorman of a car were changed at a certain point and the new men had taken their respective positions on the car and the old conductor gave the signal to start, whereby the plaintiff, who was in the act of boarding the car, was injured, it was held that the old conductor had ceased to be in the master's service and that the company was not liable for his act.[58]

§ 262. **Master's liability for the willful, malicious or intentional acts of his servant.** The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. When, therefore, a merchant places a clerk in his store to sell his goods, and the clerk disposes of them with false representations of their qualities, the purchaser who brings suit for the fraud need not concern himself with the question whether the fraud was directed or not. His injury does not depend upon that, and it neither affects his equity to compensation, or the moral obligation of the merchant to respond.[59] So when a railway company puts a conductor in charge of its train, and he purposely and wrongfully ejects a passenger from the cars, the railway company must bear the blame and pay the damages. In this case the company chooses its servant and puts him in charge of its business, and the injury is done while performing it, and in the exercise of the power conferred. As between the company and the passenger, the right of the latter to compensation is unquestionable.[60] So for an assault upon

98, 33 Atl. 595, 31 L. R. A. 224. See on the basis of liability Burdick, Torts, pp. 130-132; Pollock, Torts, pp. 75-77; Harvard Law Rev. pp. 315, 383, 441.

[58] Lima Ry. Co. v. Little, 67 Ohio St. 91, 65 N. E. 861.

[59] Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380.

[60] Eastern Counties R. Co. v. Broom, 6 Exch. 314, 327; Moore v. Met. R. Co., L. R. 8 Q. B. 36; Philadelphia & Reading R. R. Co. v. Derby, 14 How. 468; Baltimore, etc., R. R. Co. v. Blocher, 27 Md. 277; Goddard v. Grand Trunk R. R. Co., 57 Me. 202, 2 Am. Rep. 39; Moore v. Fitchburg R. R. Co., 4 Gray 465, 64 Am. Dec. 83; Ramsden v. Boston, etc., R.

a passenger by the conductor, brakeman or other employe.[61] A railroad company is liable for the use of excessive force by is employes, in ejecting a trespasser from its cars.[62] And generally the master is liable for the willful or intentional

R. Co., 104 Mass. 117, 6 Am. Rep. 200; Drew v. Sixth Ave. R. R. Co., 26 N. Y. 49; Passenger R. R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep 78; Pa. R. R. Co. v. Vandiver, 42 Pa. St. 365, 82 Am. Rep. 520; Healey v. City R. R. Co., 28 Ohio St. 23; Southern Kansas Pac. Ry. Co. v. Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

[61] Birmingham Ry. & Elec. Co. v. Mason, 137 Ala. 342, 34 So. 207; Central of Georgia Ry. Co. v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; Chicago, etc., R. R. Co. v. Flexman, 103 Ill. 546; Wabash Ry. Co. v. Savage, 110 Ind. 156; Winnegar v. Central Pass. Ry. Co., 85 Ky. 547, 4 S. W. 237; Johnson v. Detroit, etc., Ry. Co., 130 Mich. 453, 90 N. W. 274; O'Brien v. St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592; Dwinelle v. New York Central, etc., R. R. Co., 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224; Williams v. Gill, 122 N. C. 967, 29 S. E. 879; Mahoning Valley Ry. Co. v. De Pascale, 70 Ohio St. 179, 71 N. E. 633, 65 L R. A. 860; Railroad Co. v. Ray, 101 Tenn. 1, 46 S. W. 554; Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; Texas, etc., Ry. Co. v. Williams, 62 Fed. 440, 10 C. C. A. 463. Where a passenger went for his baggage and an altercation arose over a charge for excess of weight, during which the depot agent shot and killed him, the company was held liable. Daniel v. Petersburg R. R. Co., 117 N. C. 592, 23 S. E. 327. So for an assault upon a passenger while waiting in a station. Seawill v. Carolina Central R. R. Co., 132 N. C. 856, 44 S. E. 610.

[62] Smith v. Savannah, etc., Ry. Co., 100 Ga. 96, 27 S. E. 725; Citizens' St. Ry. Co. v. Willoeby, 134 Ind. 563, 33 N. E. 627; West Jersey, etc., R. R. Co. v. Welsh, 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. Rep. 659; Cook v. Southern Ry. Co., 128 N. C. 333, 38 S. E. 925; Enright v. Pittsburg Junction R. R. Co., 198 Pa. St. 166, 47 Atl. 938, 82 Am. St. Rep. 795, 53 L. R. A. 330; Galveston, etc., Ry. Co. v. Zantzinger, 93 Tex. 64, 53 S. W. 379, 77 Am. St. Rep. 829, 47 L. R. A. 282; Higgins v. Watervliet, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Sanford v. Eighth Ave. R. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Coleman v. New York, etc., R. R. Co., 106 Mass. 160; Seymour v. Greenwood, 7 H. & N. 354; New York, etc., Ry. Co. v. Haring, 47 N. J. L. 137, 54 Am. Rep. 123. So for a station agent's ejecting a man from a station. Johnson v. Chicago, etc., Ry. Co., 58 Ia. 348. As to liability for causing arrest of passenger, see Wilke v. Louisville, etc., R. R. Co., 116 Ga. 309, 42 S. E. 525: Mulligan v. New York, etc., R. R. Co., 129 N. Y. 506, 29 N. E. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791; Palmeri v. Manhattan Ry.

wrongs of his servant committed in the performance of his duty as servant, or within the scope of his employment.[63] "It is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged, when the wrong was committed, and that the act complained of was done in the course of his employment. The master, in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another."[64]

But the liability of the master for malicious and intentional

Co., 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136; Duggan v. Baltimore, etc., R. R. Co., 159 Pa. St. 248, 28 Atl. 182, 39 Am. St. Rep. 672; Eichengreen v. Railroad Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702; Cunningham v. Seattle Elec. Ry. & P. Co., 3 Wash. 471, 28 Pac. 745.

[63] Railway Co. v. Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. Rep. 440, 24 L. R. A. 483; McDonald v. Franchen, 102 Ia. 496, 71 N. W. 427; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Haehl v. Wabash R. R. Co., 119 Mo. 325, 24 S. W. 737; Fifth Ave. Bank v. Forty-Second St. etc., R. R. Co., 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331; Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. 169, 59 L. R. A. 478; Lovick v. Atlantic Coast Line R. R. Co., 129 N. C. 427, 40 S. E. 191; Gulf, etc., R. R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; Bryan v. Adler, 97 Wis. 124, 72 N. W. 368, 65 Am. St. Rep. 99, 41 L. R. A. 658; Bergman v. Hendrickson, 106 Wis 434, 82 N. W. 304, 80 Am. St. Rep. 47; Cobb v. Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909.

[64] Rounds v. Delaware, etc., R. R. Co., 64 N. Y. 129, 134, 21 Am. Rep. 597; Lewis v. Schulte, 98 Ia. 341, 67 N. W. 266; Mott v. Consumers' Ice Co., 73 N. Y. 543; Chi-

acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do.[65] Thus if the conductor of a car or train leaves his post to beat a personal enemy, or from mere wantonness to inflict any injury, the difference between his case and that in which the passenger is removed from the cars is obvious. The one trespass is the individual trespass of the conductor, which he has stepped aside from his employment to commit; the other is a trespass committed in the course of the employment in the execution of orders the master has given, and apparently has the sanction of the master, and contemplates the furtherance of his interests.[66]

cago, etc., Ry. Co. v. West, 125 Ill. 320, 17 N. E. 788; Ochsenbein v. Shapley, 85 N. Y. 214.

[65] Howe v. Newmarch, 12 Allen, 49, 57. See Little Miami R. R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Evansville, etc., R. R. Co. v. Baum, 26 Ind. 70; Fraser v. Freeman, 43 N. Y. 566, 3 Am. Rep. 740; Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448. It is, as is said in the leading case of McManus v. Crickett, 1 East, 106, "where a servant quits sight of the object for which he was employed, and without having in view his master's orders, pursues that which his own malice suggests," that the master will not be liable for his acts. See Southwick v. Estes, 7 Cush. 385; Higgins v. Watervliet, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Philadelphia, etc., R. R. Co. v. Derby, 14 How. 468; Wood v. Detroit, etc., Co., 52 Mich. 402, 52 Am. Rep. 59; Marion v. Chicago, etc., Ry. Co., 59 Ia. 428, 44 Am. Rep. 687; Central Ry. Co. v. Peacock, 69 Md. 257, 14 Atl. 709.

[66] Palmer v. Winston-Salem Ry. & Elec. Co., 131 N. C. 250, 42 S. E. 604; Rudgeair v. Reading Traction Co., 180 Pa. St. 333, 36 Atl. 859; Crocker v. New London, etc., R. R. Co., 24 Conn. 249; Evansville, etc., R. R. Co. v. Baum, 26 Ind. 70; Central Ry. Co. v. Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425; McGilvray v. West End St. Ry. Co., 164 Mass. 122, 41 N. E. 116. To same effect: Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507; Vernon v. Cornwell, 104 Mich. 62, 62 N. W. 175; Richmond Turnpike Co. v. Vanderbilt, 1 Hill, 480; S. C. 2 N. Y. 479; Illinois Central R. R. Co. v. Downey, 18 Ill. 259; Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, 27 Am. St. Rep. 223, 15 L. R. A. 475; Cantor Cotton Warehouse Co. v. Pool, 78 Miss. 147, 28 So. 823, 84 Am. St. Rep. 620; In-

In determining whether or not the master shall be held responsible, the motive of the servant in committing the act is important but not conclusive.[67] The test of the master's responsibility is not the motive of the servant, but whether that which he did was something his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name.[68]

§ 263. **Master's liability for the unintentional or negligent wrongs of his servant.** When the servant, in the course of his employment, so negligently or with such want of skill conducts himself in or manages the business that an injury to some third person results in consequence, the master is responsible for his negligence or want of skill Every man owes to every other the duty of due care to avoid injury; and whether he manages his business in person or entrusts it to others, he must, at his peril, see that this obligation is observed. If another has suffered an injury through the negligent or improper management of the business, the right of action arises irrespective of the agency by which the business was conducted.[69] The term *business*, as here employed, is not

ternational, etc., Ry. Co. v. Cooper, 88 Tex. 607, 32 S. W. 517. Master not liable for theft by servant. Searle v. Parke, 68 N. H. 311, 34 Atl. 744. But where a passenger left a street car because insulted by the driver who pursued and beat him in the street, it was held to be one continuous wrong for which the company was liable. Wise v. Covington, etc., St. Ry. Co., 91 Ky. 537, 16 S. W. 351.

[67] Birmingham W. W. Co. v. Hubbard, 85 Ala. 179, 4 So. 607.

[68] Johnson v. Barber, 10 Ill. 425; Marion v. Chicago, etc., Ry. Co., 59 Ia. 428; Pittsburg, etc., R. R. Co. v. Donahue, 70 Pa. St. 119.

[69] Clowdis v. Fresno Flume etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; Pierce v. Connors, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279; Pueblo Elec. St. Ry. Co. v. Sherman, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116; Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29, 38 Am. St. Rep. 361, 27 L. R. A. 161; Jones v. Belt, 8 Houst. 562, 32 Atl. 723; Toledo, etc., R. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Andrews v. Bodecker, 126 Ill. 605, 18 N. E. 651, 9 Am. St. Rep. 649; Pittsburg, etc., R. R. Co. v. Kirk, 102 Ind. 399, 52 Am. Rep. 676; Brasher v. Kennedy, 10 B. Mon. 28; Loyacano v. Jurgens, 50 La. Ann. 441, 23 So. 717; American District Tel. Co. v. Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479; Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694; McDonald v. Snelling, 14 Allen, 290, 92 Am. Dec. 768; Corrigan v. Union Sugar Refinery, 98

restricted in its meaning to business in the ordinary sense, but embraces everything the servant may do for the master, with his express or implied sanction. The negligence must arise in the course of the employment. If the servant depart from the employment for purposes of his own, the master is not responsible for his negligence, even though he may at the time be making use of the master's implements or vehicles which have been entrusted to him in the business.[70]

Mass. 577, 96 Am. Dec. 685; Smith v. Spitz, 156 Mass. 319, 31 N. E. 5; Smith v. Webster, 23 Mich. 298; Gunderson v. N. W. El. Co., 47 Minn. 161, 49 N. W. 649; Whitehead v. St. Louis, etc., Ry. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; Danbeck v. N. J. Traction Co., 57 N. J. L. 463, 31 Atl. 1038; McCann v. Consolidated Traction Co., 59 N. J. L. 481, 36 Atl. 888, 38 L. R. A. 236; Sanford v. Eighth Ave. R. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Quinn v. Power, 87 N. Y. 535, 41 Am. Rep. 392; Harriss v. Mabry, 1 Ired. 240; Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; Cincinnati, etc., R. R. Co. v. Smith, 22 Ohio St. 227, 10 Am. Rep. 729; Dunn v. Agricultural Society, 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754; Harriman v. Railway Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Pittsburg, etc., Ry. Co. v. Shields, 47 Ohio St. 382, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464; Hays v. Miller, 77 Pa. St. 238, 18 Am. Rep. 445; Chase v. Spartenburg Ry. Co., 64 S. C. 212, 41 S. E. 899; Puryear v. Thompson, 5 Humph. 397; Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855; Andrus v. Howard, 36 Vt. 248, 84 Am. Dec. 680; Tuel v. Weston, 47 Vt. 634; Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855; Euting v. Chicago, etc., Ry. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158; Euting v. Chicago, etc., Ry. Co., 120 Wis. 651, 98 N. W. 944; Engelhart v. Farrant, (1897) 1 Q. B. 240; O'Connell v. Strong, Dudley, 265; Shearman & Redf. Neg. § 59. A druggist's liability for his clerk's mistake in putting up a prescription depends on the want of ordinary care in the clerk. Beckwith v. Oatman, 43 Hun, 265; Burgess v. Sims Drug Co., 114 Ia. 275, 86 N. W. 307, 89 Am. St. Rep. 359, 54 L. R. A. 364; Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698.

[70] Mitchell v. Crassweller, 13 C. B. 237; Aycrigg v. New York & Erie R. R. Co., 30 N. J. L. 460; Bard v. Yohn, 26 Pa. St. 482; Wiltse v. State, etc., Co., 63 Mich. 639, 30 N. W. 370; McCann v. Tillinghast, 140 Mass. 327; Bowler v. O'Connell, 162 Mass. 319, 38 N. E. 498, 44 Am. St. Rep. 359, 27 L. R. A. 173; Perlstein v. Am. Exp. Co., 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959; McCarthy v. Timins, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; Long v. Richmond, 68 App. Div.. 466, 73 N. Y. S. 912; Branch v. International, etc., Ry. Co., 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844; Robinson v. McNeill, 18 Wash. 163, 51 Pac.

§ 264. Disobedience of orders immaterial. It is immaterial to the master's responsibility that the servant at the time was neglecting some rule of caution which the master had prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and that the injury which actually resulted is attributable to the servant's failure to observe the directions given him. In other words, it is not sufficient for the master to give proper directions; he must also see that they are obeyed.[71] Taking the case of a conductor of a railway train: Let it be supposed that the company has given the most careful and exact directions for a cautious management, and that, amongst other things, it has directed that no train shall leave a station until orders to that effect are received by telegraph from the managing office; but that, notwithstanding these directions, the conductor, confident of his ability to reach the next station without injury, puts his train in motion, and a collision occurs. The case supposed is one in which no moral wrong is attributable to the managing officers; but the fact remains that in the management of

355; Chicago, etc., Ry. Co. v. Bryant, 65 Fed. 969, 13 C. C. A. 249; Sanderson v. Collins, (1904) 1 K. B. 628. So where a porter for his own convenience threw a bundle of soiled linen out of a moving car and hit a person. Walton v. New York, etc., Co., 139 Mass. 556. Section men kindled a fire on the right of way to warm their dinners and left it burning. It spread to adjoining property. The master not liable. Morier v. St. Paul, etc., Ry. Co., 31 Minn. 351, 47 Am. Rep. 793. So where a village officer for his own advantage piled tile upon a city lot and it fell and injured a woman on an adjacent lot. Palmer v. St. Albans, 60 Vt. 427, 13 Atl. 569.

[71] Philadelphia, etc., R. R. Co. v. Derby, 14 How. 468; Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560; Southwick v. Estes, 7 Cush. 385; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Higgins v. Watervliet, P. R. Co., 46 N. Y. 23, 7 Am. Rep. 293; Paulmier v. Erie R. Co., 34 N. J. L. 151; Johnson v. Centr. Vt. R. R. Co., 56 Vt. 707; Mound City, etc., Co. v. Conlon, 92 Mo. 221; Postal Tel. Co. v. Brantley, 107 Ala. 683, 18 So. 321; Driscoll v. Carlin, 50 N. J. L. 28, 11 Atl. 482; Trimble v. New York Central, etc., R. R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; McClung v. Dearborne, 134 Pa. St. 396, 19 Atl. 698, 19 Am. St. Rep. 708, 8 L. R. A. 204; Texas Trunk Ry. Co. v. Johnson, 75 Tex. 158, 12 S. W. 482; Cook v. Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52; Reinke v. Bentley, 90 Wis. 457, 63 N. W. 1055; Engelhart v. Farrant, (1897) 1 Q. B. 240.

their own business through agents an injury has been inflicted on others. That they trusted a servant who has ventured to disobey instructions is their misfortune, but it ought not also to be the misfortune of others who had no voice in his selection, and who had no concern in the question who should manage the company's business beyond the common concern of all the public that it should not be managed to their injury.[72] In all such cases the master's duty to so use his own and so conduct his business as not to injure his neighbor, has failed of performance, and the law leaves him to bear the consequences.[73]

§ 265. Scope of employment. From the foregoing discussion of the master's liability to third persons, it will be seen that the vital question in most cases is, whether the act or omission of the servant causing the injury was in the course of the master's business, or within the scope of the employment.[74] No general rule can be laid down for determining the question, for it depends upon the peculiar facts and cir-

[72] Philadelphia, etc., R. R. Co. v. Derby, 14 How. 468. See Powell v. Deveney, 3 Cush. 300, 50 Am. Dec. 738; Weed v. Panama R. R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Luttrell v. Hazen, 3 Sneed, 20. In Harriman v. Pittsburgh, etc., Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507, servants in disregard of instructions placed signal torpedoes on the track, where there was no need of so doing, and a lad was hurt by one exploding. The master was held liable on the ground that the servants were doing the master's work, though deviating from the line of duty in disobeying orders. See also, Pittsburg, etc., Ry. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464; Euting v. Chicago, etc., Ry. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158; Euting v. Chicago, etc., Ry. Co., 120 Wis. 651, 98 N. W. 944.

[73] The following, among a great number of cases, illustrate this general rule: Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312; Keedy v. Howe, 72 Ill. 133; Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Rounds v. Delaware, etc. R. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Kreiter v. Nichols, 28 Mich. 496; Barden v. Felch, 109 Mass. 154; Coleman v. New York, etc., R. R. Co., 106 Mass. 160; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Redding v. S. C. R. R. Co., 3 S. C. 1, 16 Am. Rep. 681.

[74] Theisen v. Porter, 56 Minn. 555, 563, 58 N. W. 265. And see Palmer v. St. Albans, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125; Euting v. Chicago, etc., Ry. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158.

cumstances of each particular case, and is therefore ordinarily a mixed question of law and fact for the court and jury.[75]

Where a servant, in driving home his master's team, took a roundabout way, in order to do an errand of his own, and left the team unhitched which started off and collided with the plaintiff, the master was held liable.[76] In driving the team by the roundabout way the servant was held to be in the execution of his master's business within the scope of his employment. But the contrary is held in Massachusetts.[77] And where the servant was employed to post bills in F. and drove fifteen miles away on his own business and there left the bills in the road, whereby the plaintiff's horse was frightened and killed, the master was held not liable.[78] So where the servant, without the knowledge of the master, takes the latter's horse and carriage or automobile for his own purposes and injures one by his negligence.[79] Where a section foreman

"The test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business." Davis v. Houghtellin, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737.

[75] Ibid.

[76] Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29, 38 Am. St. Rep. 361, 27 L. R. A. 161; Loomis v. Hollister, 75 Conn. 718, 55 Atl. 561; Lovejoy v. Campbell, 16 S. D. 231, 92 N. W. 24; Stone v. Hill, 45 Conn. 44.

[77] McCarthy v. Timins, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490. In this case the driver of a public hack had been told to take his team to the stable. In going there he turned off from the direct route a few hundred feet to go to a saloon. While he was in the saloon the horses ran and injured the plaintiff. And see Perlstein v. Am. Exp. Co., 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959.

[78] Smith v. Spitz, 156 Mass. 319, 31 N. E. 5.

[79] Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133; Clark v. Buckmobile Co., 107 App. Div. 120; Quigley v. Thompson, 211 Pa. St. 107; Sanderson v. Collins, (1904) 1 K. B. 628; S. P. Long v. Richmond, 68 App. Div. 466, 73 N. Y. S. 912; Chicago, etc., Ry. Co. v. Bryant, 65 Fed. 969, 13 C. C. A. 249; Robinson v. McNeill, 18 Wash. 163, 51 Pac. 355. In Brown v. Jarvis Engineering Co., 166 Mass. 75, 43 N. E. 1118, 55 Am. St. Rep. 382, 32 L. R. A. 605. the defendant contracted to put in a brick foundation for a printing press in a certain building, and sent a foreman and three men to do the work. The plaintiff came with rolls of paper to be delivered into the basement of the building and the defendant's work had to be suspended while the delivery

used a hand car in his own business and negligently injured one at a crossing, the company was held not liable in Texas,[80] but in a similar case in New Jersey the company was held liable, on the ground that it was the company's duty to maintain the crossing in a safe condition and to see that the hand car was not used in such a way as to endanger those rightfully using the crossing.[81]

A servant is not acting in the line of his employment when he invites a boy to ride with him in his master's vehicle,[82] or on his master's horse,[83] and the master is not liable for an injury to the boy as a result of the invitation. But when the master by his servant is operating a machine intrinsically dangerous, especially to small children, such as a hand car, street car, tug boat or horse power, it is generally held to be the master's duty to keep such children away from the danger, and it is a breach of this duty if the servant in charge invites or permits them to use it.[84]

Where the servant uses the master's machinery or property to perpetrate a practical joke, in consequence of which a person is injured, the master is not liable.[85] "When a servant

was being made. To hasten the delivery the defendant's foreman ordered his men to assist the plaintiff and the latter was injured by the negligence of one of them. It was held that the assistance was not within the scope of the employment of the men and that the defendant was not liable.

[80] Branch v. International, etc., Ry. Co., 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844. And see St. Louis S. W. Ry. Co. v. Harvey, 144 Fed. 806.

[81] Salisbury v. Erie R. R. Co., 66 N. J. L. 233 (Ct. of E. & A.), 50 Atl. 117, 88 Am. St. Rep. 480, 55 L. R. A. 578.

[82] Driscoll v. Scanlon, 165 Mass. 348, 43 N. E. 100, 52 Am. St. Rep. 523; Schulwitz v. Delta Lumber Co., 126 Mich. 559, 85 N. W. 1075.

[83] Bowler v. O'Connell, 162 Mass. 319, 38 N. E. 498, 44 Am. St. Rep. 359, 27 L. R. A. 173.

[84] Hand car. Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855; Missouri Pac. Ry. Co. v. Rodgers, 89 Tex. 675, 36 S. W. 243. Street car. Pueblo Elec. St. Ry. Co. v. Sherman, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116; Danbeck v. N. J. Traction Co., 57 N. J. L. 463, 31 Atl. 1038. Tug boat. Cook v. Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52. But see Railway Co. v. Bolling, 59 Ark. 395, 27 S. W. 492, 43 Am. St. Rep. 38, 27 L. R. A. 190; Robinson v. McNeill, 18 Wash. 163, 51 Pac. 355.

[85] Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, 27 Am. St. Rep. 223, 15 L. R. A. 475;

acts without any reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible in that case for either the act or omission of the servant."[86] Railroad employes, while scuffling on the station platform, accidentally hit the plaintiff and caused him to fall and break his leg. The company was held not liable, the acts of the employes not being done in pursuance of any authority, express or implied, nor incident to the service.[87] So where the foreman of a switching crew found a torpedo and exploded it on the track, just for a prank, whereby the plaintiff was injured.[88] But it is held that a person who employs such dangerous agencies in his business is bound to exercise great care in their custody and use and, if he entrusts them to servants who use them unnecessarily and carelessly, whereby injury results, he is liable for the damage.[89] Where the defendant directed his son to sprinkle the lawn with a hose and the latter, in a spirit of mischief, turned the hose on the plaintiff's horse hitched in the street opposite, whereby the horse was frightened and ran away, the defendant was held not liable.[90]

As a general rule it is not within the scope of employment

Canton Cotton Warehouse Co. v. Pool, 78 Miss. 147, 28 So. 823, 84 Am. St. Rep. 620; International, etc., Ry. Co. v. Cooper, 88 Tex. 607, 32 S. W. 517.

[86] Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, 27 Am. St. Rep. 223, 15 L. R. A. 475.

[87] Goodloe v. Memphis, etc., R. R. Co., 107 Ala. 233, 18 So. 166, 54 Am. St. Rep. 67, 29 L. R. A. 729.

[88] Sullivan v. Louisville, etc., R. R. Co., 115 Ky. 447, 74 S. W. 171. See Obertoni v. Boston, etc., R. R. Co., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422.

[89] Harriman v. Railway Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Pittsburgh, etc., Ry. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464; Euting v. Chicago, etc., Ry. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158; Euting v. Chicago, etc., Ry. Co., 120 Wis. 651, 98 N. W. 944. The rule applied to a railroad tricycle. Barmore v. Vicksburg, etc., R. R. Co., 85 Miss. 426, 38 So. 210.

[90] Evers v. Krouse, 70 N. J. L. 653, 655, 58 Atl. 181. And see City Delivery Co. v. Henry, 139 Ala. 161, 34 So. 389; Vernon v. Cornwell, 104 Mich. 62, 62 N. W. 175; Skipper v. Clifton Mfg. Co., 58 S. C. 143, 36 S. E. 509; Texas, etc., Ry. Co. v. Scoville, 62 Fed. 730, 10 C. C. A. 479.

for a servant to institute criminal proceedings for the larceny or embezzlement of the master's property, or for malicious injury thereto, or for frauds perpetrated upon the master.[91] But in many cases such authority is inferred from the duties assigned the agent or from the peculiar circumstances of the case.[92] Where the plaintiff had purchased a railroad ticket and received her change, and the agent then charged her with passing counterfeit money and demanded other money, which being refused, he put his hands on her and told her not to move until he got an officer, the company was held liable.[93] And where clerks in stores arrest or detain persons on the charge of theft committed on the spot, the proprietor is liable, it being part of their duty to protect the master's goods.[94]

[91] Wilke v. Louisville, etc., R. R. Co., 116 Ga. 309, 42 So. 525; Oberne v. O'Donnell, 35 Ill. App. 180; Singer Mfg. Co. v. Hancock, 74 Ill. App. 556; Flora v. Russell, 138 Ind. 153, 37 N. E. 593; Hern v. Iowa State Agricultural Soc., 91 Ia. 97, 58 N. W. 1092, 24 L. R. A. 655; Larson v. Fidelity Mut. Life Ass'n, 71 Minn. 101, 73 N. W. 711; Laird v. Farwell, 60 Kan. 512, 57 Pac. 98; Lafith v. New Orleans, etc., R. R. Co., 43 La. Ann. 34, 8 So. 701, 12 L. R. A. 337; Govaski v. Downey, 100 Mich. 429, 59 N. W. 167; Tucker v. Erie Ry. Co., 69 N. J. L. 19, 54 Atl. 557; Mulligan v. New York, etc., R. R. Co., 129 N. Y. 506, 29 N. E. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791; Penny v. New York Central, etc., R. R. Co., 34 App. Div. 10, 53 N. Y. S. 1043; Markley v. Snow, 207 Pa. St. 447, 56 Atl. 990, 64 L. R. A. 685; Cunningham v. Seattle Elec. Ry. & P. Co., 3 Wash. 471, 28 Pac. 745. So in case of malicious garnishment. Alabama State Land Co. v. Reed, 99 Ala. 19, 10 So. 238.

[92] Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Ruth v. St Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303; Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. 169, 59 L. R. A. 478; Dupre v. Childs, 52 App. Div. 306, 65 N. Y. S. 179; Schwarting v. Van Wie, etc., Co. 69 App. Div. 282, 74 N. Y. S. 747; Lovick v. Atlantic Coast Line R. R. Co., 129 N. C. 427, 40 S. E. 191; Eichengreen v. Railroad Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702; Gulf, etc., R. R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; Missouri, etc., Ry. Co. v. Warner, 19 Tex. Civ. App. 463, 49 S. W. 254. And see Duggan v. Baltimore, etc., R. R. Co., 159 Pa. St. 248, 28 Atl. 182, 39 Am. St. Rep. 672.

[93] Palmeri v. Manhattan Ry. Co., 133 N. Y. 261, 265, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136. And see Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. Rep. 440, 24 L. R. A. 483.

[94] Woodward v. Ragland, 5

And "when one places his property in the possession and under the control of another, the right to protect that possession as well as the right to prevent any interference with its immediate use, springs out of the possession and out of the duty to control and manage it," and the master is liable for the manner in which the servant exercises this authority and for errors of judgment in so doing.[95]

It is not, as a general rule, within the scope of the servant's employment to commit an assault upon a third person and the master is not liable for such an assault, though committed while the servant was about the master's business.[96] A workman employed to move bales of cotton from the sidewalk to the defendant's warehouse waved his hook at some boys playing about the bales, when the hook slipped off the handle and hit the plaintiff, who stood by, watching but not interfering, and put out his eye. The act was held outside the servant's employment, and the master not liable.[97] So where some boys placed obstructions on a street car track and then hid them-

Mackey, 220; Field v. Kane, 99 Ill. App. 1; Efroymson v. Smith, 29 Ind. App. 451, 63 N. E. 328; McDonald v. Franchere Bros., 102 Ia. 496, 71 N. W. 427; Knowles v. Bullene, 71 Mo. App. 341; Cobb v. Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909. But see Bernheimer v. Becker, 102 Md. 250.

[95] Galveston, etc., Ry. Co. v. Zantzinger, 93 Tex. 64, 53 S. W. 379, 77 Am. St. Rep. 829, 47 L. R. A. 282; Smith v. Savannah, etc., Ry. Co., 100 Ga. 96, 27 S. E. 725; Citizens' St. R. R. Co. v. Willoeby, 134 Ind. 563, 33 N. E. 627; Golden v. Newbrand, 52 Ia. 59, 2 N. W. 537, 35 Am. Rep. 257; Haehl v. Wabash Ry. Co., 119 Mo. 325, 24 S. W. 737; Enright v. Pittsburg Junction R. R. Co., 198 Pa. St. 166, 47 Atl. 938, 82 Am. St. Rep. 795, 53 L. R. A. 330; West Jersey, etc., R. R. Co. v. Welsh, 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. Rep. 659; Cook v. Southern Ry. Co., 128 N. C. 333, 38 S. E. 925; Barrett v. Oechsner, 92 Tex. 588, 50 S. W. 562, 71 Am. St. Rep. 880; Brenan v. Merchant, 205 Pa. St. 258, 54 Atl. 891; Hyman v. Tilton, 208 Pa. St. 641, 57 Atl. 1124. Compare Holler v. Ross, 68 N. J. L. 324, 53 Atl. 472, 59 L. R. A. 943.

[96] Callahan v. Hyland, 59 Ill. App. 347; McDermott v. Am. Brewing Co., 105 La. 124, 29 So. 498, 83 Am. St. Rep. 225, 52 L. R. A. 684; Johanson v. Pioneer Fuel Co., 72 Minn. 405, 75 N. W. 719; Collins v. Butter, 179 N. Y. 156, 71 N. E. 746; Meehan v. Morewood, 52 Hun, 566, 5 N. Y. S. 710; Waaler v. Great Northern Ry. Co., 18 S. D. 420.

[97] Guille v Campbell, 200 Pa. St. 119, 49 Atl. 938, 86 Am. St. Rep. 705, 55 L. R. A. 111.

selves and the motorman threw a stone in the direction of the hiding place and hit the plaintiff.[98] So where the driver of an ice wagon hit a boy over the head because he had broken the ice axe.[99] "It is not within the scope of the authority of a servant," says the court, "to whose custody his master's property has been confided, to undertake to secure it from future injury by committing the illegal act of inflicting personal chastisement on persons who have done damage to it in the past." But where a barkeeper assaulted a customer in order to collect pay for drinks, the master was held liable.[1] So when the assault is made to protect the master's property from trespass or spoliation being at the time committed.[2] And so in case of an assault upon passengers to whom the master owes the duty of safe carriage.[3]

Where the master owes a special duty to the plaintiff and entrusts the performance of that duty in whole or in part to his servant, the master is liable for any violation of the duty by the servant whether the same is negligent or willful and malicious. Thus the defendant had a contract with the plaintiff to deliver to it pure milk for use in its business of manufacturing butter and cheese and knew that it was to be mixed with other milk. The defendant's servant, out of malice towards the defendant and without his knowledge, delivered adulterated milk whereby the products of the plaintiff's factory were of inferior quality and its business greatly damaged. The defendant was held liable for all the damages resulting from the wrong.[4]

§ 266. **Master's liability to the servant—General principles.** The master's liability in tort to the servant depends upon the

[98] Dolan v. Hubinger, 109 Ia. 408, 80 N. W. 514.

[99] Brown v. Boston Ice Co., 178 Mass. 108, 59 N. E. 644, 86 Am. St. Rep. 469. Where a waiter assaulted a guest in an inn the master was held not liable. Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 100 Am. St. Rep. 154.

[1] Bergman v. Hendrickson, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47. And see *ante*, p. 497, note 93; Richberger v. Am. Exp. Co., 73 Miss. 161, 18 So. 922, 55 Am. St. Rep. 522, 31 L. R. A. 390; Ziegenheim v. Smith, 116 Ill. App. 80.

[2] See note 95, p. 498.

[3] *Ante*, p. 493, note 72.

[4] Stranhan Bros. Catering Co. v. Colt, 55 Ohio St. 398, 45 N. E. 634.

neglect or violation of some duty owed by him to the servant. This follows from the nature of tort liability itself.[5] If there is no duty involved there can be no liability. The duties of the master to the servant, therefore, naturally form the first subject for consideration, in discussing the master's liability. These duties are implied by law from the relation and, though usually regarded as being implied undertakings of the contract,[6] they may equally well be considered as arising out of the general duty resting upon every person to exercise due care for the safety of others.[7] When this general duty is applied to the particular conditions created by the relation of master and servant, it gives rise to such special duties as are necessary to be observed by the master in order to secure the safety of the servant. These special duties, as recognized by courts and juristic writers, may be summarized as follows: (1) To provide a reasonably safe place for the servant to work. (2) To provide reasonably safe, suitable and sufficient tools, appliances and materials for the servant to work with. (3) To provide reasonably careful and competent fellow-servants and in sufficient number. (4) And generally so to conduct and manage his business as not to expose the servant to dangers which may be avoided by the exercise of reasonable care and diligence on the part of the master.[8] These

[5] *Ante*, § 2.

[6] Sullivan v. India Mfg. Co., 113 Mass. 396; Fifield v. Northern R. R. Co., 42 N. H. 225; Harrison v. Central R. R. Co., 31 N. J. L. 293, 297; Farwell v. Boston, etc., R. R. Co., 4 Met. 49, 38 Am. Dec. 339.

[7] Larmore v. Crown Point Iron Co., 101 N. Y. 391, 394, 4 N. E. 757, 54 Am. Rep. 718. For the general duty see Pollock, Torts, pp. 1, 22; 21 Am. & Eng. Enc., p. 470.

[8] Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 423, 49 Pac. 559; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Mullin v. California Horseshoe Co., 105 Cal. 77. 38 Pac. 535; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Camp v. Hall, 39 Fla. 535, 22 So. 792; Harvey v. Alturas Gold Min. Co., 3 Ida. 510, 31 Pac. 819; Whitney & Starrette Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; Schumaker v. St. Paul, etc., R. R. Co., 46 Minn. 39, 48 N. W. 559, 17 L. R. A. 257; Wendler v. People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737; Goransson v. Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338; Morrison v. Burgess Sulphite Fibre Co., 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634; Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604;

are the duties as implied by law from the relation, unaffected by express contract or special circumstances. If, by reason of the neglect of any of these duties, the servant is injured without his fault, the master is *prima facie* liable.

But the master's duty and, consequently, his liability is affected by the assumption of risk by the servant. It is manifest that if the servant agrees to assume a certain risk, the master is absolved from all duty respecting that risk,[9] and if the risk results in injury, the master is not liable. If this were not so, the assumption of risk would be a dead letter. Assumption of risk is a matter of contract between the parties and, for the most part, is a matter of implied contract. The servant necessarily assumes certain risks in every contract of service and he may assume other risks by express agreement or under special circumstances. Since the master cannot be made liable unless he has neglected some duty to the servant, it follows that, so far as the master is concerned, the servant assumes the risk of all dangers that are not due to the neglect of some duty by the master. By entering into the contract of service, the servant, by implication of law, is held to assume such risks.[10] Otherwise the master would be an insurer of the

Comben v. Belleville Stone Co., 59 N. J. L. 226, 36 Atl. 473; McDonald v. Standard Oil Co., 69 N. J. L. 445, 55 Atl. 289; McGovern v. Central Vt. R. R. Co., 123 N. Y. 280, 25 N. E. 373; Neily v. S. W. Cotton Seed Oil Co., 13 Okl. 356, 75 Pac. 537; Mast v. Kern, 34 Ore. 247, 54 Pac. 950, 75 Am. St. Rep. 580; Ross v. Walker, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160; Kehler v. Schwenk, 144 Pa. St. 348, 27 Am. St. Rep. 633, 13 L. R. A. 374; McDonald v. Postal Tel. Co., 22 R. I. 131, 46 Atl. 407; Sanders v. Aiken Mfg. Co., 71 S. C. 58, 50 S. E. 679; Morriss Bros. v. Bowers, 105 Tenn. 59, 58 S. W. 328; Pool v. Southern Pac. Co., 20 Utah, 210, 58 Pac. 326; Boyle v. Union Pac. R. R. Co., 25 Utah, 420, 71 Pac. 988; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342; Partlett v. Dunn, 102 Va. 459, 46 S. E. 467; McDonough v. Great Northern Ry. Co., 15 Wash. 244, 46 Pac. 334; Promer v. Milwaukee, etc., Ry. Co., 90 Wis. 215, 63 N. W. 90, 48 Am. St. Rep. 905; Williams v. North Wis. Lumber Co., 124 Wis. 328, 102 N. W. 589; Baltimore, etc., R. R. Co. v. Baugh, 149 U. S. 368, 13 S. C. Rep. 914, 37 L. Ed. 772; Mather v. Rillston, 156 U. S. 391, 15 S. C. Rep. 464, 39 L. Ed. 464; Smith v. Baker & Sons, (1891) A. C. 325.

[9] Sullivan v. India Mfg. Co., 113 Mass. 396, 398, 399.

[10] 1 Labatt, Master & Servant, § 3.

servant against accidents, which all the authorities agree that he is not.[11] The risks which the servant thus necessarily assumes in every contract of employment, are such as are incidental to the business or arise in course of its prosecution and are not due to the master's fault. But the servant is also held by implication of law to assume other risks, which exist at the time of his employment or which arise afterwards, and the rule which applies may be stated as follows: If the servant has knowledge of a particular danger and fully understands and appreciates it, and enters into the service with such knowledge and understanding, or continues in it after having acquired such knowledge and understanding, he thereby impliedly agrees to assume the risk of such danger.[11a] This is the general rule, but it is subject to some qualifications and exceptions, as we shall show hereafter. Doubtless the servant may by express contract assume the risk of any specified danger, unless it be a danger created by the neglect of a statutory duty, but such express contracts are seldom, if ever, made, and need no special consideration. The liability of the master to the servant thus involves a consideration of the master's duties to the servant and of the assumption of risk by the servant. There is no conflict or interference between the master's duty on the one hand and the assumption of risk by the servant on the other. Assumption of risk begins where the duty of the master ends. But the duty of the master may be narrowed and the assumption of risk extended by contract between the parties, either express or implied. It is in this field, where the master primarily owes a duty, but where the servant may absolve him from it by assuming the risk, that the greatest difficulty and uncertainty lies, in the law of master and servant. From this general survey of the subject we proceed to a more detailed consideration of its various parts.

§ 267. Master's duty and liability as to place. All the authorities are agreed upon the general rule that the master must provide a reasonably safe place for the servant to work in, or, to state it more accurately, that he must exercise ordinary care and diligence to provide a reasonably safe place.[12]

[11] *Post*, § 273, notes 74, 75.

[11a] *Post*, § 275, note 92.

[12] Perry v. Marsh, 25 Ala. 659; Jackson L. Co. v. Cunningham,

It is equally the master's duty to use ordinary care and dili gence to keep the place safe, except as the conditions may b changed by the very work which the servant is required t

141 Ala. 206, — So. —; Baxter v. Roberts, 44 Cal. 187, 13 Am. Rep. 160; Davis v. Diamond C. & L. Co., 146 Cal. 59, 79 Pac. 596; Grant v. Varney, 21 Colo. 329, 40 Pac. 771; Carleton M. & M. Co. v. Ryan, 29 Colo. 401, 68 Pac. 279; Diamond State Iron Co. v. Giles, 7 Houst. 556, 11 Atl. 189; Schooner Norway v. Jensen, 52 Ill. 373; Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. 714; Ross v. Shanley, 185 Ill. 390, 56 N. E. 1105; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; Cincinnati, etc., Ry. Co. v. Roesch, 126 Ind. 445, 26 N. E. 171; Republic I. & S. Co. v. Ohler, 161 Ind. 393, 67 N. E. 535; Foley v. Cudahy Packing Co., 119 Ia. 246, 93 N. W. 284; Buehner v. Creamery Package Co., 124 Ia. 445, 100 N. W. 345, 104 Am. St. Rep. 354; Henderson Tobacco Extracts Works v. Wheeler, 116 Ky. 322, 76 S. W. 34; Clairain v. Western Union Tel. Co., 40 La. Ann. 178, 3 So. 625; Bland v. Shreveport Belt Ry. Co., 48 La. Ann. 1057, 20 So. 284, 36 L. R. A. 114; McGinn v. McCormick, 109 La. 396, 33 So. 382; Haggerty v. Hallowell Granite Co., 89 Me. 118, 35 Atl. 1029; Frye v. Bath Gas & Elec. Co., 94 Me. 17, 46 Atl. 604; Baltimore Boot & Shoe Mfg. Co. v. Jamar, 93 Md. 404, 49 Atl. 847, 86 Am. St. Rep. 428; Hearn v. Quillan, 94 Md. 39, 50 Atl. 402; Walsh v. Peet Valve Co., 110 Mass. 23; Wheeler v. Wason Mfg. Co., 135 Mass. 294; Dayharsh v. Hannibal, etc., R. R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; Miller v. Missouri Pac. R. R. Co., 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673; Hurst v. Kansas City, etc., R. R. Co., 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539; McCabe v. Montana Cent. Ry. Co., 30 Mont. 323, — Pac. —; English v. Amidon, 71 N. H. 301, 56 Atl. 548; Burns v. Delaware, etc., Tel. Co., 70 N. J. L. 745, 59 Atl. 220, 67 L. R. A. 956, Ryan v. Fowler, 24 N. Y. 410, 82 Am. Dec. 315; Coughtry v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387; Eastland v. Clark, 166 N. Y. 420, 59 N. E. 202; McGuire v. Bell Tel. Co., 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437; Dorsett v. Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612; Davis v. Turner, 69 Ohio St. 101, 68 N. E. 819; Butterman v. McClintic-Marshall Con. Co., 206 Pa. St. 82, 55 Atl. 839; McDonald v. Postal Tel. Co., 22 R. I. 131, 46 Atl. 407; Proffitt v. Missouri, etc., Ry. Co., 95 Tex. 593, 68 S. W. 979; Trihay v. Brooklyn Lead Min. Co., 4 Utah, 468, 11 Pac. 612; Chapman v. Southern Pac. Co., 12 Utah, 30, 41 Pac. 551; Johnson v. Bellingham Bay Imp. Co., 13 Wash. 455, 43 Pac. 370; Bessex v. Chicago, etc., R. R. Co., 45 Wis. 477; Nadan v. White Riv. Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29; Western Coal & Min. Co. v. Ingraham, 70 Fed. 219, 17 C. C. A. 71; Louisville, etc., R. R. Co. v. Johnson, 81 Fed. 679, 27 C. C. A. 367. The master is not relieved by the fact that the place is made unsafe by the negligence of an independent

do, or by his manner of doing it.[13] To this end it is the duty of the master to make inspections and tests at proper intervals and to make repairs as required.[14] The master is presumed to have notice of any defect which he might have ascertained by ordinary care.[15] The rule as to safe place does not apply where the servant prepares the place in which he is to work [16] or when he is set to ascertain and repair the defects that create the danger.[17] Nor when the servant is sent to make repairs or do work upon the premises of a third party.[18] Nor when the servant goes upon a part of the premises where his

contractor. Toledo Brewing & Malt Co. v. Bosch, 101 Fed. 530, 41 C. C. A. 482. The duty as to safe place includes a safe mode of entrance and exit. Haber v. Jenkins Rubber Co., 72 N. J. L. 171.

[13] Russell v. Pacific Can Co., 116 Cal. 527, 48 Pac. 616; McDonnell v. Central of Ga. Ry. Co., 118 Ga. 86, 44 S. E. 840; National Syrup Co. v. Carlson, 155 Ill. 210, 40 N. E. 492; Ashland Coal & I. Ry. Co. v. Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; Essex County Elec. Co. v. Kelly, 57 N. J. L. 100, 29 Atl. 427; Chesson v. Roper Lumber Co., 118 N. C. 59, 23 S. E. 925; Lillie v. Am. Car, etc., Co., 209 Pa. St. 161, 58 Atl. 272; Knoxville Iron Co. v. Pace, 101 Tenn. 476, 48 S. W. 232; Morriss Bros. v. Bowers, 105 Tenn. 59, 58 S. W. 328; Freeman v. Railroad Co., 107 Tenn. 340, 64 S. W. 1; Faulkner v. Mammouth Min. Co., 23 Utah, 437; 66 Pac. 799; Garity v. Bullion, etc., Min. Co., 27 Utah, 534, 76 Pac. 556; Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 53; Santa Fe Pac. R. R. Co. v. Holmes, 202 U. S. 438.

[14] Smith v. Erie R. R. Co., 67 N. J. L. 636, 643, 52 Atl. 634, 59 L. R. A. 302. Compare Essex County Elec. Co. v. Kelly, 57 N. J. L. 100, 29 Atl. 427.

[15] Whitney & Starrette Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; Myhan v. La. Elec. L. & P. Co., 41 La. Ann. 964, 6 So. 799, 17 Am. St. Rep. 436, 7 L. R. A. 172.

[16] Thayer v. Smoky Hollow Coal Co., 121 Ia. 121, 96 N. W. 718.

[17] Greeley v. Foster, 32 Colo. 292, 75 Pac. 351; McGorty v. Southern New Eng. Tel. Co., 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; Bergin v. Southern New Eng. Tel. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; Kellyville Coal Co. v. Bruzas, 223 Ill. 595; State v. Lazaretto Guano Co., 90 Md. 177, 44 Atl. 1017; Saxton v. N. W. Tel. Exch. Co., 81 Minn. 314, 84 N. W. 109; Broderick v. St Paul City Ry. Co., 74 Minn. 163, 77 N. W. 28; Butte v. Pleasant Val. Coal Co., 14 Utah, 282, 47 Pac. 77; Finlayson v. Utica Min. & M. Co., 67 Fed. 507, 14 C. C. A. 443.

[18] Roche v. Llewellyn, 140 Cal. 563, 74 Pac. 147; Channon v. Sandford Co., 70 Conn. 573, 40 Atl. 462, 66 Am. St. Rep. 133, 41 L. R. A. 200.

duties do not call him and where he is not invited by the master expressly or by implication, but is seeking to gratify his curiosity or pursue some purpose of his own.[19] The duty of the master is not confined to the hours of actual work, but embraces a reasonable time before and after hours and intermissions for meals.[20]

The liability of the master may be grounded on the general rule that the owner of real estate is bound to take care that those who come upon his premises by his express or implied invitation be protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited party had no reason to look for.[21] The invitation to come upon dangerous premises without apprising him of the danger is just as culpable, and an injury resulting from it is just as deserving of compensation in the case of a servant as in any other case. Moreover, no reason of public policy, and none to be deduced from the contract of the parties, can be suggested, which would relieve the culpable master from responsibility. A man cannot be understood as contracting to take upon himself risks which he neither knows nor suspects, nor has reason to look for; and it would be more reasonable to imply a contract on the part of the master not to invite the servant into unknown dangers, than one on the part of the servant to run the risk of them. But the question of contract may be put entirely aside from the case, and the responsibility of the master may be planted on the same ground which would render him responsible if the relation had not existed. Whether invited upon his prem-

[19] Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153; Knox v. Pioneer Coal Co., 90 Tenn. 546, 18 S. W. 255; Ellsworth v. Metheney, 104 Fed. 119, 44 C. C. A. 484. Where a lineman climbed a tree to prosecute his work in stringing wires and was injured by the breaking of a limb, the company was held not liable. Yearsley v. Sunset T. & T. Co., 110 Cal. 236, 42 Pac. 638. See Maltbie v. Belden, 167 N. Y. 307, 60 N. E. 645, 54 L. R. A. 52; Frank v. Bullion, etc., Min. Co., 19 Utah, 35, 56 Pac. 419.

[20] Heldemaier v. Cobbs, 195 Ill 172, 62 N. E. 853; Virginia B. & I. Co. v. Jordan, 143 Ala. 603; Cleveland, etc., R. R. Co. v. Martin, 13 Ind. App. 485, 41 N. E. 1051; Walbert v. Trexler, 156 Pa. St. 112, 27 Atl. 65; Blovelt v. Sawyer, (1904) 1 K. B. 271.

[21] *Post*, § 359.

ises by the contract of service, or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes a duty to the party accepting it to see that at least ordinary care and prudence is exercised to protect him against dangers not wihin his knowledge, and not open to observation. It is a rule of justice and right which compels the master to respond for a failure to exercise this care and prudence.[22]

The master is not liable in cases where the risks were apparent, and were voluntarily assumed by a servant capable of understanding and appreciating them.[23]

Where the place was originally safe and only becomes unsafe as the work progresses and in consequence of the manner in which the work is done, the master as a rule is not responsible.[24] Thus where the plaintiff was injured by the fall of a rock from the face of a ledge in a quarry in which he was working the master was held not liable.[25] There are many similar cases where the work was in a gravel pit, sand bank or the like, and the danger arose from undermining the bank, which have been decided the same way.[26] But where the

[22] Marshall v. Stewart, 2 Macq. H. L. 20; S. C. 33 Eng. L. & Eq. 1; Indermaur v. Dames, L. R. 2 C. P. 311; North Chicago, etc., R. R. Co. v. Johnson, 114 Ill. 57; Akerson v. Dennison, 117 Mass. 407; Horner v. Nicholson, 56 Mo. 220; Strahlendorf v. Rosenthal, 30 Wis. 674.

[23] Hayden v. Smithville Mfg. Co., 29 Conn. 548; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Quinn v. New York, etc., R. R. Co., 175 Mass. 150, 55 N. E. 891; Ladd v. Brockton St. Ry. Co., 180 Mass. 454, 62 N. E. 730; Drake v. Auburn City Ry. Co., 173 N. Y. 66, 66 N. E. 121; Hafner v. Chesapeake, etc., Ry. Co., 96 Va. 528, 31 S. E. 899; Norfolk, etc., R. R. Co. v. Marpole, 97 Va. 594, 34 S. E. 462; Williamson v. Newport News, etc., R. R. Co., 34 W. Va. 657, 12 S. E. 824, 26 Am. St. Rep. 927, 12 L. R. A. 297; Kenney v. Meddaugh, 118 Fed. 209, 55 C. C. A. 115; *post*, § 275.

[24] Shaw v. New Year Gold Mines Co., 31 Mont. 138; Poorman Silver Mines v. Devling, 34 Colo. 37; Devlin v. Phoenix Iron Co., 182 Pa. St. 109, 37 Atl. 927. And see Richmond Locomotive Works v. Ford, 94 Va. 627, 27 S. E. 509; Robinson v. Dininny, 96 Va. 41, 30 S. E. 442; Russell Creek Coal Co. v. Wells, 96 Va. 416, 31 S. E. 614; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017.

[25] Mielke v. Chicago, etc., Ry. Co., 103 Wis. 1, 78 N. W. 402, 74 Am. St. Rep. 834.

[26] Swanson v. Lafayette, 134

plaintiff was put to work at excavating a bank which was in a dangerous condition by reason of work previously done and the danger was not obvious, and injury resulted, the master was held liable.[27] The case would seem clearer where the servant so put to work was newly employed. Thus in the New York case cited it is held that when the relation of master and servant first begins is the time when the law requires due diligence on the part of the master to furnish the servant a safe place to work, and that if the place has been made dangerous prior to the servant's employment by the negligence of those whom his employment makes fellow-servants, he does not assume the risk of such negligence, if the danger is not obvious.[28] A different conclusion is reached in Massachusetts and Vermont.[29] "We are of opinion," says the supreme court of the former state, "that an employer under such circumstances owes one who is about to enter his services no duty to inspect all the work which has been done by his servants previously, and which ordinarily may be intrusted to them without liability to their fellow-servants for their negligence. If he owes no such duty, the risk of accident from previous negligence of servants in their own field is one of the ordinary risks of

Ind. 625, 33 N. E. 1033; Mikoljczak v. North Am. Chemical Co., 129 Mich. 80, 88 N. W. 75; Perry v. Rogers, 157 N. Y. 251, 51 N. E. 1021; De Vito v. Crage, 165 N. Y. 378, 59 N. E. 141; Capasso v. Woolfolk, 163 N. Y. 472, 57 N. E. 760; Miller v. Thomas, 15 App. Div. 105, 44 N. Y. S. 277; Cisney v. Pennsylvania Sewer Pipe Co., 199 Pa. St. 519, 49 Atl. 309; Larich v. Moies, 18 R. I. 513, 28 Atl. 661; Allen v. Logan City, 10 Utah, 279, 37 Pac. 496; Christienson v. Rio Grande Western Ry. Co., 27 Utah, 132, 74 Pac. 876, 101 Am. St. Rep. 945; Culby v. Northern Pac. Ry. Co., 35 Wash. 241, 77 Pac. 202; Larsson v. McClure, 95 Wis. 533, 70 N. W. 662, 66 L. R. A. 804.

[27] Simone v. Kirk, 173 N. Y. 7, 65 N. E. 739; Thomas v. Ross, 75 Fed. 552, 21 C. C. A. 444; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876. And see Libby v. Scherman, 146 Ill. 540, 34 N. E. 801; Bradley v. Chicago, etc., Ry. Co., 138 Mo. 293, 39 S. W. 763.

[28] Simone v. Kirk, 173 N. Y. 7, 65 N. E. 739. So, also, Thomas v. Ross, 75 Fed. 552, 21 C. C. A. 444.

[29] O'Connor v. Rich, 164 Mass. 560, 42 N. 111, 49 Am. St. Rep. 483; Killea v. Faxon, 125 Mass. 485; McCampbell v. Cunard S. S. Co., 144 N. Y. 552, 39 N. E. 637; Lambert v. Missisquoi Pulp Co., 72 Vt. 278, 47 Atl. 1085; Garrow v. Miller, 72 Vt. 284, 47 Atl. 1087.

the business which the employee assumes by virtue of his contract on entering the service."[30]

§ 268. **Duty and liability of master as to tools, appliances, materials, etc.** The master may also be negligent in not exercising ordinary care to provide suitable and safe machinery or appliances, or in making use of those which he knows have become defective, but the defects in which he does not explain to the servant, or in continuing ignorantly to make use of those which are defective, where his ignorance is due to a neglect to use ordinary prudence and diligence to discover defects. The rule of law is that it is the duty of the master to exercise ordinary care and prudence to provide reasonably safe machinery, tools and appliances and to keep them so.[31]

[30] O'Connor v. Rich, 164 Mass. 560, 42 N. E. 111, 49 Am. St. Rep 483.

[31] Going v. Ala. S. & W. Co., 141 Ala. 537, — So. —; Arizona L. & T. Co. v. Mooney, 4 Ariz. 366, 42 Pac. 952; Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 48, 27 Pac. 590; Mullin v. Cal. Horseshoe Co., 105 Cal. 77, 38 Pac. 535; New York, etc., Co. v. Rogers, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198; Denver, etc., R. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093; Schmidt v. Leistekow, 6 Dak. 386, 43 N. W. 820; McDade v. Washington, etc., R. R. Co., 5 Mackey, 144; Austin v. Appling, 88 Ga. 54, 13 S. E. 955; Cooper v. Portner Brewing Co., 112 Ga. 894, 38 S. E. 91; Pennsylvania Coal Co. v. Kelly, 156 Ill. 9, 40 N. E. 938; Kansas, etc., R. R. Co. v. Ryan, 52 Kan. 637, 35 Pac. 292; Lawrence v. Hegemeyer, 93 Ky. 591, 20 S. W. 704; Williams v. Levert L. & S. Co., 114 La. 805, 38 So. 567; Twombley v. Consolidated Elec. Lt. Co., 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551; Caven v. Bolwell Granite Co., 99 Me. 278, 59 Atl. 285; Wagner v. Upshur, 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412; Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348; Morton v. Detroit, etc., R. R. Co., 81 Mich. 423, 46 N. W. 111; Noble v. Bessemer S. S. Co., 127 Mich. 103, 86 N. W. 520, 89 Am. St. Rep. 461, 54 L. R. A. 456; Eicheler v. Hanggi, 40 Minn. 263, 41 N. W. 975; Stiller v. Bohn Mfg. Co., 80 Minn. 1, 82 N. W. 981; Bohn v. Chicago, etc., Ry. Co., 106 Mo. 429, 17 S. W. 580; Goransson v. Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338; Union Pac. R. R. Co. v. Broderick, 30 Neb. 735, 46 N. W. 1121; Chicago, etc., R. R. Co. v. Kellogg, 54 Neb. 127, 74 N. W. 454; Olney v. Boston, etc., R. R. Co., 71 N. H. 427, 52 Atl. 1097; Fenderson v. Atlantic City R. R. Co., 56 N. J. L. 708, 31 Atl. 767; Flannigan v. Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762; Kern v. De Castro, etc., Co., 125 N. Y. 50, 25 N. E. 1071; Harley v. Buffalo Car Mfg. Co., 142 N. Y. 31, 36 N. E. 813; Byrne v. Eastmans Co., 163 N. Y. 461, 57 N. E. 738; Hicks v. Manufacturing Co., 138 N. C. 319,

The point here is, not that the master warrants the strength or safety of his machinery or appliances, but that he is personally negligent in not taking proper precautions to see that they are reasonably strong and safe. The law does not require him to guarantee the prudence, skill or fidelity of those from whom he obtains his tools or machinery, or the strength or fitness of the materials they make use of. If he employs reasonable care and prudence in selecting or ordering what he requires in his business, such as every prudent man is expected to employ in providing himself with the conveniences of his occupation, that is all that can be required of him.[32] In

— S. E. —; Cameron v. Great Northern Ry. Co., 8 N. D. 124, 77 N. W. 1016; Ross v. Walker, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160; Kehler v. Schwenk, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. Rep. 633, 13 L. R. A. 374; Finnerty v. Burnham, 205 Pa. St. 305, 54 Atl. 996; Moran v. Corliss Steam Engine Co., 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267; McGarrity v. New York, etc., R. R. Co., 25 R. I. 269, 55 Atl. 718; Carter v. Oliver Oil Co., 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; Koon v. Southern Ry. Co., 69 S. C. 101, 48 S E. 86; Record v. Cooperage Co., 108 Tenn. 657, 69 S. W. 334; Gulf, etc., R. R. Co. v. Silliphant, 70 Tex. 623, 8 S. W. 673; International, etc., Ry. Co. v. Kernan, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; Allen v. Union Pac. Ry. Co., 7 Utah, 239, 26 Pac. 297; Boyle v. Union Pac. R. R. Co., 25 Utah, 420, 71 Pac. 988; Houston v. Brush, 66 Vt. 331, 29 Atl. 380; Norfolk, etc., R. R. Co. v. Jackson, 85 Va. 489, 8 S. E. 370; Norfolk, etc., Ry. Co. v. Cromer, 99 Va. 763, 40 S. E. 54; Norfolk, etc., Ry. Co. v. Phillips, 100 Va. 362, 41 S. E. 726; Crooker v. Pacific, etc., R. R. Co., 29 Wash. 30, 69 Pac. 359; Ralph v. Am. Bridge Co., 30 Wash. 500, 70 Pac. 1098; Boelter v. Ross Lumber Co., 103 Wis. 324, 79 N. W. 243; Northern Pac. R. R. Co. v. Babcock, 154 U. S. 190, 14 S. C. Rep. 978, 38 L. Ed. 958. "In order to recover from his master for injuries caused by defective machinery, the servant must show, first, that the appliance with which he was working was defective; second, that the master had knowledge thereof, or ought to have had; and, third, that the servant did not know of the defect or did not have equal means of knowing with the master." Mellott v. Louisville, etc., R. R. Co., 101 Ky. 212, 215, 40 S. W. 696.

[32] Readhead v. Midland R. Co., 2 Q. B. 412; S. C. in Exch. Chamber, L. R. 4 Q. B. 379; Ladd v. New Bedford R. R. Co., 119 Mass. 412, 20 Am. Rep. 331; Ford v. Fitchburg R. R. Co., 110 Mass. 240, 14 Am. Rep. 598; Indianapolis, etc., R. R. Co. v. Love, 10 Ind. 554; Fort Wayne, etc., R. R. Co. v. Gildersleeve, 33 Mich. 134; Toledo, etc., R. R. Co. v. Fredericks, 71 Ill. 294; Columbus, etc., R. R. Co.

a case where a servant was killed by the breaking of a derrick chain owing to a latent defect, it appeared that the chain was purchased of a reputable manufacturer and was represented to be of the best workmanship and material, and that it had been frequently inspected for visible defects. The court held that the master was not liable and says: "The master is not a guarantor of the safety of machinery or implements furnished his employes, and is only bound to use ordinary care, diligence and skill for the purpose of protecting them, and it is not negligence to use and employ such machinery or implements as the experience of trade and manufacture sanction as reasonably safe. * * * In the selection of machinery, tools, or material the master is responsible to his servants for only ordinary care; that degree of care which a man of ordinary prudence in the same line of business would be expected to exercise to secure his own safety were he doing the work. * * * Ordinary care does not require such tests as are appropriate only to the process of manufacture. Nor does it require that the article shall be taken to pieces or subjected to any other test which is not shown to be practically efficient and in ordinary use by careful users. * * * A purchaser of such an article from a reputable manufacturer, with representations as to its tested strength and quality of material, is not responsible for hidden defects, which cannot be discovered by careful external examination."[83]

v. Troesch, 68 Ill. 545, 18 Am. Rep. 578; Mobile, etc., R. R. Co. v. Thomas, 42 Ala. 672; Patterson v. Pittsburgh, etc., R. R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Gibson v. Pacific R. R. Co., 46 Mo. 163, 2 Am. Rep. 497; Lewis v. St. Louis, etc., R. R. Co., 59 Mo. 495, 21 Am. Rep. 385; Flike v. Boston, etc., R. R. Co., 53 N. Y. 549; Kelley v. Norcross, 121 Mass. 508; Shanny v. Androscoggin Mills, 66 Me. 420; Umback v. Lake Shore, etc., Co., 83 Ind. 191; Painton v. Nor. Centr. etc., Co., 83 N. Y. 7; Hobbs v. Stauer, 62 Wis. 108.

[83] Westinghouse Elec. & Mfg. Co. v. Heimlich, 127 Fed. 92, 62 C. C. A. 92. To same effect: Kansas City, etc., R. R. Co. v. Ryan, 52 Kan. 637, 35 Pac. 292; Carlson v. Phoenix Bridge Co., 132 N. Y. 273, 30 N. E. 750; Service v. Shoneman, 196 Pa. St. 63, 46 Atl. 292, 79 Am. St. Rep. 689; Read v. New York, etc., R. R. Co., 20 R. I. 209, 37 Atl. 947. If the defect could have been discovered by proper and careful inspection, the master is liable. Chicago, etc., R. R. Co. v. Platt, 89 Ill. 141; Spicer v. South Boston, etc., Co.,

It is equally the duty of the master by inspection and repair to keep his machinery and appliances in a reasonably safe condition for use. This is the general rule.[34] "The duty of inspection is affirmative and must be continually fulfilled and positively performed." [35] The duty of the master does not extend so far as to require him to attend to the proper regulation of those parts which necessarily have to be adjusted in the course of the use of the machine, with regard to the particular work to be done, and the adjustment of which is properly incident to the particular service which the servant himself is called upon to perform.[36] And the master may require

138 Mass. 426; Covey v. Hannibal, etc., Co., 86 Mo. 635; Finnerty v. Burnham, 205 Pa. St. 305, 54 Atl. 996; Jones v. New York, etc., R. R. Co., 20 R. I. 210, 37 Atl. 1033.

[34] Rincicotti v. O'Brien Contracting Co., 77 Conn. 617; New York, etc., Co. v. Rogers, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198; Louisville, etc., R. R. Co. v. Utz, 133 Ind. 265, 32 N. E. 881; Solomon R. R. Co. v. Jones, 30 Kan. 601; Caven v. Bodwell Granite Co., 99 Me. 278, 59 Atl. 285; McDonald v. Mich. Cent. R. R. Co., 108 Mich. 7, 65 N. W. 597; Nichols v. Crystal Plate Glass Co., 126 Mo. 55, 28 S. W. 991; Cole v. Warren Mfg. Co., 63 N. J. L. 626, 44 Atl. 647; Randolph v. New York Cent., etc., R. R. Co., 69 N. J. L. 420, 55 Atl. 240; Bailey v. Rome, etc., R. R. Co., 139 N. Y. 302, 34 N. E. 918; Byrne v. Eastmans Co., 163 N. Y. 461, 57 N. E. 738; Cameron v. Great Northern Ry. Co., 8 N. D. 124, 77 N. W. 1016; Finnerty v. Burnham, 205 Pa. St. 305, 54 Atl. 996; Carter v. Oliver Oil Co., 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; Record v. Cooperage Co., 108 Tenn. 657, 69 S. W. 334; International, etc., Ry. Co. v. Kernan, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; Norfolk, etc., R. R. Co. v. Nunnally, 88 Va. 546, 14 S. E. 367; Norfolk, etc., Ry. Co. v. Ampley, 93 Va. 108, 25 S. E. 226; Texas, etc., Ry. Co. v. Barrett, 67 Fed. 214, 14 C. C. A. 373; Texas, etc., Ry. Co. v. Thompson, 70 Fed. 944, 17 C. C. A. 524. The master's duty is satisfied by such inspections and tests as are reasonably practicable under the circumstances. Randolph v. New York Central, etc., R. R. Co., 69 N. J. L. 420, 55 Atl. 240. And see Cowan v. Umbagog Pulp Co., 91 Me. 26, 39 Atl. 340. The duty to inspect is held not to apply to common tools which the servant understands as well as the master. Gulf, etc., Ry. Co. v. Larkin, 98 Tex. 225, 82 S. W. 1026.

[35] Houston v. Brush, 66 Vt. 331, 29 Atl. 380.

[36] Eicheler v. Hanggi, 40 Minn. 263, 41 N. W. 975; Webber v. Piper, 109 N. Y. 496, 17 N. E. 216. Nor to cleaning and oiling the machine. Quigley v. Levering, 167 N. Y. 58, 60 N. E. 276, 54 L. R. A. 62. But the master was held liable where he had made no pro-

the servant to make ordinary repairs on the machine or appliance, which are within the capacity of the servant, and the necessity for which arises from daily use, materials and tools for such repairs being supplied by the master, and this duty may be implied from the circumstances of the case.[37] But in cases where skill and practical knowledge are required in keeping machinery in a reasonable condition as to safety, beyond what is needed in operating it, it is the duty of the employer to supply the necessary intelligence, skill, and experience in the care and inspection of the machinery to protect the servant from injury; and for any failure to exercise proper care and skill the employer is accountable.[38]

The master is not bound to furnish the newest, safest or best machines and appliances, but only such as are reasonably safe and fit for the purpose.[39] As a general rule the master dis-

vision for cleaning and oiling. Prescott v. Ottman Lithograph Co., 20 App. Div. 397, 46 N. Y. S. 812.

[37] Cregan v. Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854; Jaques v. Great Falls Mfg. Co., 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824; Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604.

[38] Jaques v. Great Falls Mfg. Co., 66 N. H. 482, 484, 22 Atl. 552, 13 L. R. A. 824; Nord Deutscher Lloyd S. S. Co. v. Ingebregtsen, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604; Rogers v. Ludlow Mfg. Co., 144 Mass. 198, 59 Am. Rep. 68; Rice v. King Philip Mills, 144 Mass. 229, 59 Am. Rep. 80.

[39] Arizona L. & T. Co. v. Mooney, 4 Ariz. 366, 42 Pac. 952; Arkadelphia Lumber Co. v. Bethea, 57 Ark. 76, 20 S. W. 808; Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 48, 27 Pac. 590; Davis v. Augusta Factory, 92 Ga. 712, 18 S. E. 974; Simmons v. Chicago, etc., R. R. Co., 110 Ill. 340; Louisville, etc., R. R. Co. v. Orr, 84 Ind. 50; Burns v. Chicago, etc., R. R. Co., 69 Ia. 450, 58 Am. Rep. 227; Hull v. Hall, 78 Me. 114; Michigan Cent., etc., R. R. Co. v. Smithson, 45 Mich. 212; Lamotte v. Boyce, 105 Mich. 545, 63 N. W. 517; Stiller v. Bohn Mfg. Co., 80 Minn. 1, 82 N. W. 981; Smith v. St. Louis, etc., R. R. Co., 69 Mo. 32; Huhn v. Missouri, etc., R. R. Co., 92 Mo. 440; Missouri Pac. Ry. Co. v. Baxter, 42 Neb. 793, 60 N. W. 1044; Sweeney v. Berlin, etc., R. R. Co., 101 N. Y. 520, 54 Am. Rep. 722; Bajus v. Syracuse, etc., R. R. Co., 103 N. Y. 312, 57 Am. Rep. 723; Kern v. De Castro, etc., Co., 125 N. Y. 50, 25 N. E. 1071; Harley v. Buffalo Car Mfg. Co., 142 N. Y. 31, 36 N. E. 813; Augerstein v. Jones, 139 Pa. St. 183, 21 Atl. 24, 23 Am. St. Rep. 174; Carr v. Am. Locomotive Co., 26 R. I. 180; Guthrie v. Louisville, etc., R. R. Co., 11 Lea, 372, 47 Am. Rep. 286; Mis-

charges his duty, if he furnishes such tools and appliances as are in common and ordinary use for the same purpose.[40] It is said to be sufficient if he furnishes such as, by ordinary care, may be used without danger.[41] If the master uses an appliance of another in his business he is under the same duty to see that it is in proper condition as though it was his own.[42] It follows as a matter of course that, if in any case, the master neglects his duty and the servant is injured as a consequence of such neglect, the master is liable.[43]

souri, etc., R. R. Co. v. Lyde, 57 Tex. 505; Norfolk, etc., Ry. Co. v. Cromer, 99 Va. 763, 40 S. E. 54; Seldomridge v. Chesapeake, etc., Ry. Co., 46 W. Va. 569, 33 S. E. 293. "The test is not whether the master omitted to do something he could have done, but whether, in selecting tools and machinery for their use, he was reasonably prudent and careful; not whether better machinery might not have been obtained, but whether that provided was adequate and proper for the use to which it was to be applied." Stringham v. Hilton, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483. See Bradbury v. Goodwin, 108 Ind. 286.

[40] Tompkins v. Marine Engine, etc., Co., 70 N. J. L. 330, 58 Atl. 393; Kehler v. Schwenk, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. Rep. 633, 13 L. R. A. 374; Leonard v. Herrmann, 195 Pa. St. 222, 45 Atl. 723; Benson v. New York, etc., R. R. Co., 23 R. I. 147, 49 Atl. 689; Chattanooga Machinery Co. v. Hargraves, 111 Tenn. 476, 78 S. W. 105; Geno v. Fall Mt. Paper Co., 68 Vt. 568, 35 Atl. 475; Fritz v. Salt Lake, etc., Elec. Lt. Co., 18 Utah, 493, 56 Pac. 90; Boyle v. Union Pac. R. R. Co., 25 Utah, 420, 71 Pac. 988; Innes v. Milwaukee, 96 Wis. 170, 70 N. W. 1064; Mississippi Riv. Logging Co. v. Schneider, 74 Fed. 195, 20 C. C. A. 390; Nyback v. Champagne Lumber Co., 109 Fed. 732, 48 C. C. A. 632. If there are several appliances in common use for the same purpose, the employer is held to have an absolute discretion in selecting according to his own judgment. Kehler v. Schwenk, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. Rep. 633, 13 L. R. A. 374.

[41] Lehigh, etc., Coal Co. v. Hayes, 128 Pa. St. 294, 18 Atl. 387, 15 Am. St. Rep. 680, 5 L. R. A. 441.

[42] Frolich v. Cranker, 21 Ohio C. C. 615; Sharpley v. Wright, 205 Pa. St. 253, 54 Atl. 896; Baltimore, etc., R. R. Co. v. Mackey, 157 U. S. 72, 15 S. C. Rep. 491, 39 L. Ed. 624.

[43] Louisville, etc., R. R. Co. v. Coulton, 86 Ala. 129, 5 So. 459; Nixon v. Selby Smelting Co., 102 Cal. 458, 36 Pac. 803; Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788; Illinois Central R. R. Co. v. Welch, 52 Ill. 183, 4 Am. Rep. 593; Chicago, etc., R. R. Co. v. Taylor, 69 Ill. 461, 18 Am. Rep. 626; Monmouth M. & M. Co. v. Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187; Columbus, etc., R. R. v. Arnold, 31 Ind. 174, 69 Am. Dec. 117; Louisville, etc.,

If a servant is injured by reason of an improper use by himself or his fellow-servant of a machine or appliance,[44] or by reason of selecting and using a defective or improper tool or appliance where the master has provided sound and suitable ones,[45] he cannot recover against the master.

R. R. Co. v. Caven, 9 Bush, 559, 15 Am. Rep. 740; Shanny v. Androscoggin Mills, 66 Me. 420; Wonder v. Baltimore, etc., R. R. Co., 32 Md. 411, 3 Am. Rep. 143; Cayzer v. Taylor, 10 Gray, 274, 69 Am. Dec. 317; Hackett v. Middlesex Mfg. Co., 101 Mass. 101; Harper v. Indianapolis, etc., R. R. Co., 47 Mo. 567, 4 Am. Rep 353; Lewis v. St. Louis, etc., R. R. Co., 59 Mo. 495, 21 Am. Rep. 385; Keegan v. Western R. R. Co., 8 N. Y. 175, 59 Am. Dec. 476; Laning v. N. Y. Cent., etc., R. R. Co., 49 N. Y. 521; Orr v Southern Bell Tel. Co., 130 N. C. 627, 41 S. E. 880; McGattrick v. Wason, 4 Ohio St. 566; Geldard v. Marshall, 43 Ore. 438, 73 Pac. 330; Mullan v. Phila., etc., R. R. Co., 78 Pa. St. 25, 21 Am. Rep. 2; Bowers v. Union Pac. R. R. Co., 4 Utah, 215, 7 Pac. 251; Noyes v. Smith, 28 Vt. 59, 65 Am. Dec. 222; Richmond, etc., R. R. Co. v. George, 88 Va. 223, 13 S. E. 429; Virginia, etc., Wheel Co. v. Chalkley, 98 Va. 62, 34 S. E. 976; Crocker v. Pacific, etc., Co., 29 Wash. 30, 69 Pac. 359; Wedgewood v. Chicago, etc., R. R. Co., 41 Wis. 478.

[44] Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Gribben v. Yellow Aster M. & M. Co., 142 Cal. 248, 75 Pac. 839; Helling v. Schindler, 145 Cal. 303, 78 Pac. 710; Small v. Allington, etc., Mfg. Co., 94 Me. 551, 48 Atl. 177; South Baltimore Car Works v. Schaeffer, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560; Gittens v. Wm. Porten Co., 90 Minn. 512, 97 N. W. 378; McLaughlin v. Camden Iron Works, 60 N. J. L. 557, 38 Atl. 677; Prescott v. Ball Engine Co., 176 Pa. St. 459, 35 Atl. 224, 53 Am. St. Rep. 683. If a servant is injured in an attempt to repair a machine when it is his duty to report the trouble to a mechanic, he cannot recover. McCue v. National Starch Mfg. Co., 142 N. Y. 106, 36 N. E. 809. So where he violates positive directions as to the use of a machine. Card v. Wilkins, 61 N. J. L. 296, 39 Atl. 676. And where a servant patched up a ladder in a negligent way and a fellow servant was injured thereby, the master was held not liable. Higgins v. Higgins, 188 Mass. 113.

[45] Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Towne v. United Elec., etc., Co., 146 Cal. 766, 81 Pac. 124; Green v. Sansom, 41 Fla. 94, 25 So. 332; Bolton v. Georgia Pac. Ry. Co., 83 Ga. 659, 10 S. E. 197; East Tenn., etc., Ry. Co. v. Perkins, 88 Ga. 1, 13 S. E. 952; Snyder v. Viola M. & S. Co., 3 Idaho, 28, 26 Pac. 127; Rawley v. Collian, 90 Mich. 31, 51 N. W. 350; Thomas v. Ann Arbor R. R. Co., 114 Mich. 59, 72 N. W. 40; Hefferen v. Northern Pac. R. R. Co., 45 Minn. 471, 48 N. W. 1, 526; Moran v. Brown, 27 Mo. App. 487; Maher v. Thropp, 59 N. J. L. 186,

The rule in regard to tools and appliances embraces the materials with which the servant is to work. It is the duty of the master to exercise reasonable care to furnish reasonably safe and suitable materials.[46] Animals, such as horses, mules, etc., are appliances within the rule. If they are vicious and the servant is not warned of their propensities, the master will be liable for resulting injuries.[47] So it is held that "the duty to provide reasonably safe instrumentalities embraces the obligation to provide a sufficient number of servants to perform the work safely. Proper and sufficient help and assistance are as essential in the performance of the servant's duty, where not safely performed alone, as safe instrumentalities, and the law enjoins upon the master the duty of providing them."[48]

§ 269. **Duty of master in employing and retaining fellow-servants.** The obligation to employ suitable servants is precisely the same as that to provide suitable machinery and appliances for the business. If the master is negligent in employing those who are wanting in the requisite care, skill and prudence for

35 Atl. 1057; Guggenheim Smelting Co. v. Flanigan, 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145; Campbell v. Gillespie Co., 69 N. J. L. 279, 55 Atl. 276; Vogel v. Am. Bridge Co., 180 N. Y. 373, 73 N. E. 1; Prescott v. Ball Engine Co., 176 Pa. St. 459, 35 Atl. 224, 53 Am. St. Rep. 683; Higgins v. Southern Pac. Co., 26 Utah, 164, 72 Pac. 690.

[46] Currelli v. Jackson, 77 Conn. 115; Treka v. Burlington, etc., Ry. Co., 100 Ia. 205, 69 N. W. 422; Neven v. Sears, 155 Mass. 303, 29 N. E. 472; Van den Heurel v. National Furnace Co., 84 Wis. 636, 54 N. W. 1016.

[47] Farmer v. Cumberland Tel. & Tel. Co., 86 Miss. 55; Leigh v. Omaha St. Ry. Co., 36 Neb. 131, 54 N. W. 134; George H. Hammond Co. v. Johnson, 38 Neb. 244, 56 N. W. 967; Helmke v. Stetler, 69 Hun, 107, 23 N. Y. S. 392; Donahue v. Enterprise R. R. Co., 32 S C. 299, 11 S. E. 95, 17 Am. St. Rep. 854; Wilson v. Sioux Consolidated Min. Co., 16 Utah, 392, 52 Pac. 626; Wysocki v. Wisconsin, etc., Co., 121 Wis. 96, 98 N. W. 950.

[48] Peterson v. Am. Grass Twine Co., 90 Minn. 343, 96 N. W. 913. So, also, Illinois Cent. R. R. Co. v. Langan, 116 Ky. 318, 76 S. W. 32; Hill v. Big Creek Lumber Co., 108 La. 162, 32 So. 372, 58 L. R. A. 346; Haviland v. Kansas City, etc., R. R. Co., 172 Mo. 106, 72 S. W. 515; Wright v. Southern Pac. Co., 14 Utah, 383, 46 Pac. 374; Johnson v. Ashland Water Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243; Bodie v. Charleston, etc., Ry. Co., 66 S. C. 302, 44 S. E. 943.

the business entrusted to them, or in continuing such persons in his employ after their unfitness has become known to him, or when, by the exercise of ordinary care, it would have been known, then he will be liable for an injury to a fellow-servant due to such unfitness or incompetency.[49] "The servant when he engages to run the risks of the service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care."[50] But if an employe knows that his fellow-servant is incompetent and continues in the employment without objection, he takes the risk of such incom-

[49] Gier v. Los Angeles C. E. Ry. Co., 108 Cal. 129, 41 Pac. 22; Illinois Central R. R. Co. v. Jewell, 46 Ill. 99, 92 Am. Dec. 240; Western Stone Co. v. Whalen, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; Pittsburg, etc., R. R. Co. v. Ruby, 33 Ind. 294, 10 Am. Rep. 111; Nordyke, etc., Co. v. Van Sant, 99 Ind. 188; Scott v. Iowa Tel. Co., 126 Ia. 524, 102 N. W. 432; Blake v. Me. Cent. R. R. Co., 70 Me. 60, 35 Am Rep. 297; Norfolk, etc., R. R. Co. v. Hoover. 79 Md. 253, 29 Atl. 994, 47 Am. St. Rep. 392, 25 L. R. A. 710; Maryland Steel Co v. Marney, 88 Md. 482. 42 Atl. 60, 71 Am. St. Rep 441, 42 L. R. A. 842; Gilman v Eastern R. R. Co., 13 Allen. 433. Davis v. Detroit, etc., R. R. Co., 20 Mich. 105, 4 Am. Rep. 364; Hilts v. Chicago, etc., Ry. Co., 55 Mich 437; McMahon v. Davidson, 12 Minn. 357; Smith v. Backus L. Co. 64 Minn. 447, 67 N. W. 358; Harper v Indianapolis, etc., R. R. Co.. 47 Mo. 567, 4 Am. Rep 353; Maxwell v. Hannibal, etc., R. R. Co.. 85 Mo. 95; Williams v. Mo. Pac Ry Co., 109 Mo. 475, 18 S. W. 1098; Laning v. N. Y. Cent. R. R. Co., 49 N. Y. 521; Whittaker v. Delaware, etc., Canal Co., 126 N. Y. 544, 27 N. E. 1042; Weger v. Pennsylvania R. R. Co., 55 Pa. St. 460; Huntingdon, etc., R. R. Co. v. Decker, 82 Pa. St. 119; Mexican Nat. Ry. Co. v. Mussette, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642; Texas, etc., Ry. Co. v. Johnson, 89 Tex. 519, 35 S. W. 1042; Handley v. Daly Min. Co., 15 Utah, 176, 49 Pac. 295, 62 Am. St. Rep. 916; Kamp v. Coxe Bros. & Co., 122 Wis. 206, 99 N. W. 366; Baltimore, etc., R. R. Co. v. Henthorne, 73 Fed. 634, 19 C. C. A. 623; Tarrant v. Webb, 18 C. B. 797.

[50] Alderson, B., in Hutchinson v. Railway Co., 5 Exch. 343. See Alabama, etc., R. R. Co. v. Waller, 48 Ala. 459; New Orleans, etc., R. R. Co. v. Hughes, 49 Miss. 258; Moss v. Pacific R. R. Co., 49 Mo. 167, 8 Am. Rep. 126; Mich. Cent. R. R. Co. v. Dolan, 32 Mich. 510; Columbus, etc., R. R. Co. v. Troesch, 68 Ill. 545, 18 Am. Rep. 578; Hogan v. Cent. Pacific R. R. Co., 49 Cal. 128; Memphis, etc., R. R. Co. v. Thomas, 51 Miss. 637; United States, etc., Co. v. Wilder, 116 Ill. 100.

petency.[51] If the master promises to discharge the incompetent servant, he may continue in the employment a reasonable time at the master's risk.[52] The care to be exercised by the master in employing a servant is in proportion to the danger arising from incompetence and unskillfulness.[53] "Where the service in which the servant is employed is such as to endanger the life and persons of co-employes, upon the plainest principles of justice and good faith, the master, upon engaging such servant, should be required to make reasonable investigation into his character, skill and habits of life."[54]

The burden is on the plaintiff to show that the master has been negligent in employing or retaining the servant whose act or omission caused the injury.[55]

[51] Latremoille v. Bennington, etc., R. R. Co., 63 Vt. 336, 22 Atl. 656; McCharles v. Horn Silver Min., etc., Co., 10 Utah, 470, 37 Pac. 733. Otherwise if he does not know, Hicks v. Southern Ry. Co., 63 S. C. 559, 41 S. E. 753.

[52] Lyberg v. Northern Pac. R. R. Co., 39 Minn. 15, 38 N. W. 632; Gray v. Red Lake Falls Lumber Co., 85 Minn. 24, 88 N. W. 24; Wust v. Erie City Iron Works, 149 Pa. St. 263, 24 Atl. 291; Maitland v. Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137.

[53] As to the degree of care required in the selection of servants, see Mobile, etc., R. R. Co. v. Thomas, 42 Ala. 672, 715; Alabama, etc., R. R. Co. v. Waller, 48 Ala. 459; Wabash Ry. Co. v. McDaniels, 107 U. S. 454.

[54] Western Stone Co. v. Whalen, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244.

[55] Gier v. Los Angeles C. E. Ry. Co., 108 Cal. 129, 41 Pac. 22; Beasley v. San Jose Fruit Packing Co., 92 Cal. 388, 28 Pac. 485; National Fertilizer Co. v. Travis, 102 Tenn. 16, 49 S. W. 832; Weeks v. Scharer, 111 Fed. 330, 49 C. C. A. 372. It must appear that the master had notice or knowledge of the incompetency or that he might have had it by the exercise of ordinary care. Whittaker v. Delaware, etc., Canal Co., 126 N. Y. 544, 27 N. E. 1042; National Fertilizer Co. v. Travis, 102 Tenn. 16, 49 S. W. 832; Klieforth v. Northwestern Iron Co., 98 Wis. 495, 74 N. W. 356. Notice to one who has power to hire and discharge or suspend is notice to the master. Baltimore, etc., R. R. Co. v. Henthorne, 73 Fed. 634, 19 C. C. A. 623; Weeks v. Scharer, 111 Fed. 330, 49 C. C. A. 372. But notice to one who merely directs or supervises is held not sufficient. Ibid. The mere proof of specific careless acts is not enough to charge the master with knowledge of his incompetence. Huffman v. Chicago, etc., Ry. Co., 78 Mo. 50; Cameron v. New York, etc., R. R. Co., 145 N. Y. 400, 40 N. E. 1. Nor is a single negligent act of a servant enough to show him incompetent. Balt., etc., Co. v. Neal, 65

It is not only the duty of the master to see that the servants he employs are fit and competent, but it is also his duty to employ a sufficient number of servants to perform the work with reasonable safety to those engaged therein, and for a failure in this respect he may be liable.[56]

§ 270. General duty of master to protect servant from latent and unnecessary dangers. It is the duty of the master to warn the servant of latent defects and dangers, which are or ought to be known to him but are not known to the servant,[57]

Md. 438. Nor is his laziness. Corson v. Maine Centr., etc., Co., 76 Me. 244. As to proof of general reputation for incompetency, see Western Stone Co. v. Whalen, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; Park v. New York, etc., R. R. Co., 155 N. Y. 215, 49 N. E. 674, 63 Am. St. Rep. 663. The whole matter is ably summed up in Southern Pac. Co. v. Hetzer, 135 Fed. 272, — C. C. A. —.

[56] Alabama Gt. So. Ry. Co. v. Vail, 142 Ala. 134; Cheeney v. Ocean S. S. Co., 92 Ga. 726, 19 S E. 33, 44 Am. St. Rep. 113; Supper v. Agnew, 191 Ill. 439, 447, 61 N. E. 392; Thorpe v. Mo. Pac. Ry. Co., 89 Mo. 650, 58 Am. Rep. 120; Hilton v. Fitchburg R. R. Co., 73 N. H. 116; Flike v. Boston, etc., R. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Booth v. Boston, etc., R. R. Co., 73 N. Y. 38, 29 Am. Rep. 97; Mad River, etc., R. R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Jones v. Old Dominion Cotton Mills, 82 Va. 140, 156; Johnson v. Ashland Water Co., 71 Wis. 553, 557, 37 N. W. 823. In the following cases the failure to employ a sufficient number of men was held to be a patent risk which the servant assumed by continuing in the business. World v. Georgia R. R. Co., 99 Ga. 283, 25 S. E. 646; Mayott v. Norcross Bros., 24 R. I. 187, 52 Atl 889; Grout v. Tacoma Eastern R. R. Co., 33 Wash. 524, 74 Pac. 665; Texas, etc., Ry. Co. v. Rogers, 57 Fed. 378, 6 C. C. A. 403; Skiff v. Eastern Counties R. R. Co., 9 Exch. 223. Held otherwise if the plaintiff was justified in believing he could continue with safety. Thorpe v. Missouri, etc., R. R. Co., 89 Mo. 650, 58 Am. Rep. 120; Labatt, Master & Servant, § 277, p. 656, note.

[57] Gisson v. Schwabacher, 99 Cal. 419, 34 Pac. 104; Rhoades v. Varney, 91 Me. 222, 39 Atl. 552; Campbell & Zell Co. v. Roediger, 78 Md. 601, 28 Atl. 901; Ribich v. Lake Superior Smelting Co., 123 Mich. 401, 82 N. W. 279, 81 Am. St. Rep. 215, 48 L. R. A. 649; Evans Laundry Co. v. Cranford, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814; Western Union Tel. Co. v. McMullen, 58 N. J. L. 155, 33 Atl. 384, 32 L. R. A. 351; Melchert v. Smith Brewing Co., 140 Pa. St. 448, 21 Atl. 755; Johnson v. Tacoma Mill Co., 22 Wash. 88, 60 Pac. 53; Collingwood v. Ill. & Ia. Fuel Co., 125 Ia. 537, 101 N. W. 283; Carter v. Dubach Lumber Co., 113 La. 239, 36 So. 952; Ingham v.

and generally to observe such care as will not expose the servant to perils and dangers, which may be guarded against by the exercise of reasonable care and diligence on his part.[58] This is especially true of employments that are intrinsically dangerous. On this point the Supreme Court of the United States says: "We think it may be laid down as a legal principle that in all occupations that are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained."[59]

§ 271. Duty of master as to supervision and regulation. Where the business of the master is of such a nature as to re-

Honor Co., 113 La. 1040, 37 So. 963; Lebeau v. Dyerville Mfg. Co., 26 R. I. 34; Yess v. Chicago Brass Co., 124 Wis. 406, 102 N. W. 932.

[58] Schwarzschild & S. Co. v. Weeks, 72 Kan. 190, 83 Pac. 406; Jensen v. Kyer, 101 Me. 106; Schumaker v. St. Paul, etc., R. R. Co., 46 Minn. 39, 48 N. W. 559, 17 L. R. A. 257; Morrison v. Burgess Sulphite Fibre Co., 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634; Pool v. Southern Pac. Co., 20 Utah, 210, 58 Pac. 326; Parlett v. Dunn, 102 Va. 459, 46 S. E. 467; McDonough v. Great Northern Ry. Co., 15 Wash. 244, 46 Pac. 334; Promer v. Milwaukee, etc., Ry. Co., 90 Wis. 215, 63 N. W. 90, 48 Am. St. Rep. 905; Smith v. Baker & Sons, (1891) A. C. 325. "The servant has a right to assume superior knowledge in the master, to rely on his prudence and judgment, and to believe that he will not unnecessarily jeopardize his person and life by avoidable risk." Myhan v. Electric Lt. & P. Co., 41 La. Ann. 965, 6 So. 799, 17 Am. St. Rep. 436, 7 L. R. A. 172; Carter v. Dubach Lumber Co., 113 La. 239, 36 So. 952.

[59] Mather v. Rillston, 156 U. S. 391, 399, 15 S. C. Rep. 464, 39 L. Ed. 464.

quire supervision and direction it is his duty to provide therefor, and he may be liable for a neglect so to do.[60] So where the business is dangerous and complicated it is the duty of the master to make and enforce such reasonable rules and regulations for the government of the men in his employ and the conduct of the business, as may be necessary to insure the safety of his servants, in so far as that is reasonable and practicable.[61] Where a servant is set to work in a place where he

[60] McElligott v. Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; Schroeder v. Chicago, etc., R. R. Co., 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; Carlson v. N. W. Tel. Exch. Co., 63 Minn. 428, 65 N W. 914; Trainor v. Philadelphia, etc., R. R. Co., 137 Pa. St. 148, 20 Atl. 632; Ross v. Walker, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160.

[61] Dowd v. New York., etc., R. R. Co., 170 N. Y. 459, 63 N. E. 541; Moran v. Rockland, etc., St. Ry. Co., 99 Me. 127, 58 Atl. 676; Abel v. Delaware, etc., Canal Co., 128 N. Y. 662, 28 N. E. 663; Francis v. Kansas City, etc., R. R. Co., 110 Mo. 387, 19 S. W. 935; Boyle v. Union Pac. R. R. Co., 25 Utah, 420, 71 Pac. 988; Johnson v. Union Pac. Coal Co., 28 Utah, 46, 76 Pac. 1089; Merrill v. Oregon Short Line, 29 Utah, 264; Regan v. St. Louis, etc., Co., 93 Mo. 348, 6 S. W. 371; Sheehan v. New York, etc., Co., 91 N. Y. 332; Abel v. Pres., etc., Del., etc., Co., 103 N Y. 581. But he need not adopt the safest system. Hannibal, etc., Co. v. Kanaley, 39 Kan. 1, 17 Pac. 324. The servant takes the risk of his fellow servant's failure to obey the rules. Slater v. Jewett, 85 N. Y. 61. And see generally on the subject of rules and regulations, McQueen v. Mechanics Institute, 107 Cal. 163, 40 Pac. 114; Brush Elec. L. &. P. Co. v. Wells, 110 Ga. 192, 35 S. E. 365; Stucke v. Orleans R. R. Co., 50 La. Ann. 172, 23 So. 342; Hussey v. Coger, 112 N. Y. 614, 20 N. E. 556, 8 Am. St. Rep. 787, 3 L. R. A. 559; Byrnes v. New York, etc., R. R. Co., 113 N. Y. 251, 21 N. E. 50, 4 Am. St. Rep. 151; McGovern v. Central Vt R. F. Co., 123 N. Y. 280, 25 N. E. 373; Doing v. New York, etc., R. R. Co., 151 N. Y. 579, 45 N. E. 1028; Kelly Island L. & T. Co. v. Pachuter, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep. 706; Hartvig v. Northern Pac. Lumber Co., 19 Ore. 522, 25 Pac. 358; Wild v. Oregon Short Line, 21 Ore. 159, 27 Pac. 954; Hough v. Grant's Pass Power Co., 41 Ore. 531, 69 Pac. 655; Virginia Iron, etc., Co. v. Hamilton, 107 Tenn. 705, 65 S. W. 401; Missouri Pac. Ry. Co. v. Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867; Galveston, etc., Ry. Co. v. Smith, 76 Tex. 611, 13 S. W. 562, 18 Am. St. Rep. 78; International, etc., Ry. Co. v. Hinzie, 82 Tex. 623, 18 S. W. 681; Texas, etc., Ry. Co. v. Echols, 87 Tex. 339, 27 S. W. 60, 28 S. W. 517; Texas, etc., Ry. Co. v. Eberheart, 91 Tex. 321, 43 S. W. 510; Houston, etc., R. R. Co. v. Stewart, 92 Tex. 540, 50 S. W. 333; Richmond, etc., R. R. Co.

is exposed to danger from the doing of work by other servants not connected with his own, all the authorities agree that it is the duty of the master to provide for giving warning of the danger, if it is reasonably practicable to do so.[62] Some of the authorities and the majority hold that if the master provides a reasonably competent person to give such warning, he has discharged his whole duty in the premises and that the neglect of such person to give the warning is the neglect of a fellow-servant for which he is not responsible.[63] Other cases hold that the negligence of such person is the negligence of the master.[64]

§ 272. **Duty to warn and instruct the young and inexperienced.** The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in consequence of which they are injured. Such cases occur most frequently in the employment of infants. It has been repeatedly held that the case of an infant is no exception to the general rule which exempts the master from responsibility for injuries arising from the hazards of his service.[65] But while this

v. Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827; Smith v. Chicago, etc., Ry. Co., 91 Wis. 503, 65 N. W. 183.

[62] Railway Co. v. Murphy, 50 Ohio St. 135, 33 N. E. 403, and cases cited in next two notes.

[63] Donovan v. Ferris, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25; State v. South Baltimore Car Works, 99 Md. 461, 58 Atl. 447; Galvin v. Pierce, 72 N. H. 79, 54 Atl. 1014; McLaine v. Head., etc., Co., 71 N. H. 294, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462; Merchants, etc., Oil Co. v. Burns, 96 Tex. 573, 74 S. W. 758; Moore Lime Co. v. Richardson, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; Portance v. Lehigh Val. Coal Co., 101 Wis. 574, 77 N. W. 875, 70 Am. St. Rep. 932; Little Rock, etc., R. R. Co. v. Barry, 84 Fed. 944, 28 C. C. A. 644.

[64] Belleville Stone Co. v. Mooney, 60 N. J. L. 323, 38 Atl. 835; S. C. affirmed, 61 N. J. L. 253, 39 Atl. 764, 39 L. R. A. 834; Nelson v. Willey S. S. & Nav. Co., 26 Wash. 548, 67 Pac. 237; Sroufe v. Moran Bros. Co., 28 Wash. 381, 68 Pac. 896, 92 Am. St. Rep. 847, 58 L. R. A. 313; Western Elec. Co. v. Hanselman, 136 Fed. 564, — C. C. A. ——.

[65] King v. Boston, etc., R. R. Co., 9 Cush. 112; Gartland v. Toledo, etc., R. R. Co., 67 Ill. 498; Chicago Anderson P. B. Co. v. Reineiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249: Murphy v. Smith, 19 C. B. (N. S.) 361.

is unquestionably true as a rule, it would be gross injustice, not to say absurdity, to apply in the case of infants the same tests of the master's culpable negligence which are applied in the case of persons of maturity and experience.[66] It may be ordinary caution in one case to apprise the servant of the danger he must guard against, while in the case of another, not yet beyond the years of thoughtless childhood, it would be gross and most culpable, if not criminal, carelessness for the master to content himself with pointing out dangers which were not likely to be appreciated, or if appreciated, not likely to be kept with sufficient distinctness and caution in mind, and against which, therefore, effectual protections ought to be provided. The duty of the employer to take special precautions in such cases, has been very emphatically asserted by the courts.[67] It is also negligence for the master to put a child at

If he understands the risk he is held to accept it. Hickey v. Taaffe, 105 N. Y. 26; McGinnis v. Can. Sou. Bridge Co., 49 Mich. 466; Viets v. Toledo, etc., Ry. Co., 55 Mich. 120; Brazil, etc. Co. v. Cain, 98 Ind. 282; Atlas Eng. Works v. Randall, 100 Ind. 293; Youll v. Sioux City, etc., Co., 66 Ia. 346; Williams v. Churchill, 137 Mass. 243, 50 Am. St. Rep. 304; Rock v. Inr., etc., Mills, 142 Mass. 22; Northern Ala., etc., R. R. Co. v. Beacham, 140 Ala. 422, 37 So. 227; Michael v. Stanley, 75 Md. 464, 23 Atl. 1094; Williams v. Belmont Coal & C. Co., 55 W. Va. 84; Groth v. Thomann, 110 Wis. 488, 86 N. W. 178; Cudahy Packing Co. v. Marcan, 106 Fed. 645, 45 C. C. A. 515; Evans Laundry Co. v. Cranford, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814. So a patent danger as from uncovered machinery. Fones v. Phillips, 39 Ark. 17, 43 Am. Rep. 264; Ciriack v. Merchants' Woolen Co., 146 Mass. 182, 15 N. E. 579; Groth v. Thomann, 110 Wis. 488, 86 N. W. 178; or from falling lumber. East, etc., R. Co. v. Sims, 80 Ga. 807, 6 S. E. 595. *Contra*, Miss. Pac. etc., Co. v. Callbreath, 66 Tex. 526

[66] Chicago Anderson P. B. Co. v. Reineiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249.

[67] Marbury L. Co. v. Wesbrook, 121 Ala. 179, 25 So. 914; Arizona L. & T. Co. v. Money, 4 Ariz. 96, 33 Pac. 590; Emma Cotton Seed Oil Co. v. Hale, 56 Ark. 232, 19 S. W. 600; O'Connor v. Golden Gate, etc., Co. 135 Cal. 537, 67 Pac. 966, 87 Am. St. Rep. 127; Camp v. Hall, 39 Fla. 535, 22 So. 792; Hinckley v. Horazdowsky, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490; Standard Oil Co. v. Eiler, 110 Ky. 209, 61 S. W. 8; Lindsay v. Tioga Lumber Co., 108 La. 468, 32 So. 464, 92 Am. St. Rep. 384; American Tobacco Co. v. Strickling, 88 Md. 500, 41 Atl. 1083; Levy v. Clark, 90 Md. 146, 44 Atl. 990; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Ciriack v. Mer-

work with or about dangerous machinery, who is so young and immature that he is incapable of appreciating the risk or of safely performing the work, though he is fully warned and instructed.[68]

The rule requiring the master to warn and instruct the young and inexperienced is not one which in its application is confined exclusively to infants: the principle is a general one which requires good faith and reasonable prudence on the part of the employer, under the special circumstances of the particular case; of which infancy, if it exists, may be a very important one, but possibly not more so than some others.[69]

chants' Woolen Co., 151 Mass. 152, 23 N. E. 829, 21 Am. St. Rep. 438, 6 L. R. A. 733; Patnode v. Warren Cotton Mills, 157 Mass. 283, 32 N. E. 161, 34 Am. St. Rep. 275; Dowling v. Allen, 102 Mo. 213, 14 S. W. 751; Ittner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951; Smith v. Irwin, 51 N. J. L. 507, 18 Atl. 852, 14 Am. St. Rep. 699; Turner v. Goldsboro Lumber Co., 119 N. C. 387, 26 S. E. 23; Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 20 N. E. 466, 15 Am. St. Rep. 596, 3 L. R. A. 385; Rummel v. Dilworth, 131 Pa. St. 509, 19 Atl. 346, 17 Am. St. Rep. 827; Fisher v. Delaware, etc., Co., 153 Pa. St. 378, 26 Atl. 18; Neilson v. Hillside C. & I. Co., 168 Pa. St. 256, 31 Atl. 1091, 47 Am. St. Rep. 886; Gulf, etc., Ry. Co. v. Jones, 76 Tex. 350, 13 S. W. 374; Williamson v. Sheldon Marble Co., 66 Vt. 427, 29 Atl. 669; Hayes v. Colchester Mills, 69 Vt. 1, 37 Atl. 269, 60 Am. St. Rep. 915; Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 Am. St. Rep. 908; Turner v. Norfolk, etc., R. R. Co., 40 W. Va. 675, 22 S. E. 83; Jones v. Florence Min. Co., 66 Wis. 268, 57 Am. Rep. 269; Nadan v. White Riv. Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29; Horn v. La Crosse Box Co., 123 Wis. 399, 101 N. W. 935; Grizzle v. Frost, 3 F. & F. 622; Bartonshill Coal Co. v. McGuire, 3 Macq. H. L. 300.

[68] Brazil Block Coal Co. v. Gaffney, 119 Ind. 455, 21 N. E. 1102, 12 Am. St. Rep. 422, 4 L. R. A. 850; Williamson v. Sheldon Marble Co., 66 Vt. 427, 29 Atl. 669; Hayes v. Colchester Mills, 69 Vt. 1, 37 Atl. 269, 60 Am. St. Rep. 915. Whether a boy has capacity to appreciate the danger is a question of fact for the jury. McCarragher v. Rogers, 120 N. Y. 526, 24 N. E. 812; Chopin v. Badger Paper Co., 83 Wis. 192, 52 N. W. 452. It is negligence to put a boy at dangerous work for which he was not employed. Marbury Lumber Co. v. Wesbrook, 121 Ala. 179, 25 So. 914; Orman v. Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602; Camp v. Hall, 39 Fla. 535, 22 So. 792; Jones v. Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92; Northern Pac. Coal Co. v. Richmond, 58 Fed. 756, 7 C. C. A. 485.

[69] See Chicago, etc., R. R. Co. v. Hayfield, 37 Mich. 205; Patter-

Where a master desired to qualify an ordinary laborer to operate an elevator and directed a servant to instruct him to that end and the latter left him to run the elevator alone before he was qualified to do so and in consequence of his ignorance and inexperience he was injured, the master was held liable.[70]

The master may assume that an adult person has ordinary intelligence and capacity and, unless he has notice to the contrary, he is under no obligation to instruct or warn such a servant as to dangers which the ordinary servant would understand and appreciate.[71]

§ 273. Degree of care required of master in performance of duties. Although it is a common form of expression to say that it is the master's duty to provide a reasonably safe place, reasonably safe tools and appliances, and reasonably fit and competent fellow-servants, yet the true rule is that it is the master's duty *to exercise ordinary care and diligence* to make such provision for his servants,[72] and when the distinction is

son v. Pittsburgh, etc., R. R. Co., 76 Penn. St. 389, 18 Am. Rep. 412. Cases of liability for failure to instruct inexperienced adult servants. Parkhurst v. Johnson, 50 Mich. 70; Smith v. Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535; Hawkins v. Johnson, 105 Ind. 29, 55 Am. Rep. 169; Smith v. Pen. Car Works, 60 Mich. 501; Miss. Pac., etc., Co. v. Watts, 64 Tex. 568; Ryan v. Los Angeles I. & C. S. Co., 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524; Tedford v. Los Angeles Elec. Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; May v. Smith, 92 Ga. 95, 18 S. E. 630, 44 Am. St. Rep. 84; Carter v. Dubach Lumber Co., 113 La. 239, 36 So. 952; Campbell v. Eveleth, 83 Me. 50, 21 Atl. 784; Drapeau v. International P. Co., 96 Me. 299, 52 Atl. 647; Welch v. Bath Iron Works, 98 Me. 361, 57 Atl. 88; Brennan v. Gordon, 118 N. Y. 489, 23 N. E. 810, 16 Am. St. Rep. 775, 8 L. R. A. 818; Lebbering v. Struthers, 157 Pa. St. 312, 27 Atl. 720; Smith v. Hillside C. & I. Co., 186 Pa. St. 28, 40 Atl. 287; Hightower v. Bamberg Cotton Mills, 48 S. C. 190, 26 S. E. 222; Tennessee Coal, etc., Co. v. Jarrett, 111 Tenn. 565, 82 S. W. 224; Anderson v. Daly Min. Co., 15 Utah, 22, 49 Pac. 120; Reynolds v. Boston, etc., R. R. Co., 64 Vt. 66, 24 Atl. 134, 33 Am. St. Rep. 908; Janeko v. West Coast, etc., Co., 34 Wash. 556, 76 Pac. 78.

[70] Brennan v. Gordon, 118 N. Y. 489, 494, 23 N. E. 810, 16 Am. St. Rep. 775, 8 L. R. A. 818.

[71] Thompkins v. Marine Engine, etc., Co., 70 N. J. L. 330, 58 Atl. 393; King v. Morgan, 109 Fed. 446, 48 C. C. A. 507.

[72] Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 48, 27 Pac. 590; Denver, etc., R. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093; Greeley v. Foster, 32 Colo. 292, 75 Pac. 351; Currelli v. Jackson, 77 Conn. 115;

material the courts ordinarily make and enforce it. It has been held error to instruct the jury that the master was bound to furnish a reasonably safe place.[73] And in the same case it was held that the instruction should have been that he was bound to exercise ordinary and reasonable care to furnish a reasonably safe place. The master is not an insurer of the servant against accidents in the business,[74] and does not warrant or guarantee the safety of the place or appliances,[75] and

Butler v. Frazee, 25 App. D. C. 392; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Kansas City, etc., R. R. Co. v. Ryan, 52 Kan. 637, 35 Pac. 292; Lawrence v. Hagemeyer, 93 Ky. 591, 20 S. W. 704; Wilson v. Chesapeake & W. Co., 117 Ky. 567, 78 S. W. 453; Morton v. Detroit, etc., R. R. Co., 81 Mich. 423, 46 N. W. 111; Lamotte v. Boyce, 105 Mich. 545, 63 N. W. 517; Smith v. Fordyce, 190 Mo. 1; Essex County Elec. Co. v. Kelly, 57 N. J. L. 100, 29 Atl. 427; Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604; Baulec v. New York, etc., R. R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Fuller v. Jewett, 80 N. Y. 46, 36 Am. Rep. 575; Carlson v. Phoenix Bridge Co., 132 N. Y. 273, 30 N. E. 750; Harley v. Buffalo Car Mfg. Co., 142 N. Y. 31, 36 N. E. 813; Allen v. Union Pac. Ry. Co., 7 Utah, 239, 26 Pac. 297; Wood v. Rio Grande W. R. R. Co., 28 Utah, 351, 79 Pac. 182; Norfolk, etc., R. R. Co. v. Jackson, 85 Va. 489, 8 S. E. 370; Norfolk, etc., Ry. Co. v. Cromer, 99 Va. 763, 40 S. E. 54; Bertha Zinc Co. v. Martin, 93 Va. 791, 22 S. E. 869; Persinger v. Allegheny Ore. & Iron Co., 102 Va. 350, 46 S. E. 325; Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 53; Washington, etc., R. R. Co. v. McDade, 135 U. S. 554, 10 S. C. Rep. 1044, 34 L. Ed. 235; Northern Pac. Ry. Co. v. Dixon, 194 U. S. 338, 24 S. C. Rep. 683, 48 L. Ed. 1006; Westinghouse, etc., Mfg. Co. v. Heinlich, 127 Fed. 92, 62 C. C. A. 92; National Biscuit Co. v. Nolan, 138 Fed. 6 (C. C. A.); McDonald v. Oceanic Steam Nav. Co., 143 Fed. 480 (C. C. A.).

[73] Louisville, etc., R. R. Co. v. Johnson, 81 Fed. 679, 27 C. C. A. 367.

[74] Smoot v. Mobile, etc., Ry. Co., 67 Ala. 13; Louisville, etc., R. R. Co. v. Allen 78 Ala. 494; Edward Hines L. Co. v. Ligas, 172 Ill. 315, 317, 50 N. E. 225; Jenney Elec. L. & P. Co. v. Murphy, 115 Ind. 566, 568, 18 N. E. 30; Atchison, etc., R. R. Co. v. Winston, 56 Kan. 456, 461, 43 Pac. 777; Porter v. Hannibal, etc., R. R. Co., 71 Mo. 66; Harley v. Buffalo Car Mfg. Co., 142 N. Y. 31, 34, 36 N. E. 813; Pleasants v. Raleigh, etc., R. R. Co., 95 N. C. 194, 200; Shafer v. Harsh, 110 Pa. St. 575, 578, 1 Atl. 575; Philadelphia, etc., R. R. Co. v. Hughes, 119 Pa. St. 301, 314, 13 Atl. 286; Augerstein v. Jones, 139 Pa. St. 183, 189, 21 Atl. 24, 23 Am. St. Rep. 174; Oliver v. Ohio Riv. R. R. Co., 42 W. Va. 703, 26 S. E. 444.

[75] Little Rock, etc., R. R. Co. v. Duffey, 35 Ark. 602; Essex Co.

jury.[76]

The standard of ordinary or reasonable care in such matters is such care as a man of ordinary prudence would exercise if he was making the provision for his own personal use.[77] In one case it is said that the ordinary care intended or required is "that degree of care which a man of ordinary prudence in the same line of business would be expected to exercise to secure his own safety were he doing the work."[78] In Pennsylvania and some other states the rule is that "whatever is, according to the general, usual and ordinary course, adopted by those in the same business, is reasonably safe within the law."[79] But the natural tendency is for men to take less care for the safety of others than they take for the

Elec. Co. v. Kelly, 57 N. J. L. 100, 29 Atl. 427; Patton v. Texas, etc., Ry. Co., 179 U. S. 658; Westinghouse E. & M. Co. v. Heimlich, 127 Fed. 92, 62 C. C. A. 92.

[76] Northern Pac. Ry. Co. v. Dixon, 194 U. S. 338, 24 S. C. Rep. 683, 48 L. Ed. 1006.

[77] "He satisfies the requirements of the law if in the selection of the machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard for his own safety, if he were supplying them for his own personal use." Harley v. Buffalo Car. Mfg. Co., 142 N. Y. 31, 34, 36 N. E. 813; Smoot v. Mobile, etc., Ry. Co., 67 Ala. 13, 18; Louisville, etc., R. R. Co. v. Allen, 78 Ala. 494; Brymer v. Southern Pac. Co., 90 Cal. 496, 498, 27 Pac. 371; Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 48, 56, 27 Pac. 590; Burke v. Witherbee, 98 N. Y. 562, 565; Marsh v. Chickering, 101 N. Y. 396, 400, 5 N. E. 56; Hoffman v. Dickinson, 31 W. Va. 142, 152, 6 S. E. 53. See Last Chance M. & M. Co. v. Ames, 23 Colo. 167, 47 Pac. 382; International, etc., Ry. Co. v. Bell, 75 Tex. 50, 12 S. W. 321.

[78] Westinghouse Elec. & Mfg. Co. v. Heimlich, 127 Fed. 92, 94, 62 C. C. A. 92.

[79] Kehler v. Schwenk, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. Rep. 633, 13 L. R. A. 374; Higgins v. Fanning, 195 Pa. St. 599, 46 Atl. 102; Leonard v. Herrmann, 195 Pa. St. 222, 45 Atl. 723; Tompkins v. Marine Engine, etc., Co., 70 N. J. L. 330, 58 Atl. 393; Benson v. New York, etc., R. R. Co., 23 R. I. 147, 49 Atl. 689; Fritz v. Salt Lake, etc., Elec. Lt. Co., 18 Utah, 493, 56 Pac. 90; Boyle v. Union Pac. R. R. Co., 25 Utah, 420, 71 Pac. 988; Bertha Zinc Co. v. Martin, 93 Va. 791, 22 S. E. 869; Innes v. Milwaukee, 96 Wis. 170, 70 N. W. 1064; Miss. Riv. Logging Co. v. Schneider, 74 Fed. 195, 20 C. C. A. 390.

test the tendency would be constantly towards a lower and lower standard, or towards a less and less safe practice. The law regards the life and safety of the servant as of equal importance with the life and safety of the master. Hence the law should require the master to take the same care for the life and safety of the servant that he would take for his own. And hence the master in making provision for his servant should be required to exercise the same degree of care that an ordinarily prudent man would exercise, if he was making that provision for himself. Ordinary usage may be important as tending to show ordinary care, and, standing alone, may be sufficient to show such care, but it is not conclusive.[80]

§ 274. Master cannot delegate his duties. As respects the duties of the master which have been considered in the foregoing sections, all the authorities agree that he cannot delegate them so as to absolve himself for negligence in their performance.[81] As will be hereafter shown, whoever is set to per-

[80] Geno v. Fall Mt. Paper Co., 68 Vt. 568, 35 Atl. 475; Nyback v. Champagne Lumber Co., 109 Fed. 732, 48 C. C. A. 632.

[81] Emma Cotton Seed Oil Co. v. Hale, 56 Ark. 232, 19 S. W. 600; Sanborn v. Madura, etc., Co., 70 Cal. 261; Grant v. Varney, 21 Colo., 329, 40 Pac. 771; Denver, etc., R. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093; Wilson v. Willimantic, etc., Co., 50 Conn. 433; Hess v. Rosenthal, 160 Ill. 620, 43 N. E. 743; Chicago, etc., R. R. Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826; Shickle & Harrison & H. Iron Co. v. Beck, 212 Ill. 268, 72 N. E. 423; Chicago Union Traction Co. v. Sawasch, 218 Ill. 130; Nall v. Louisville, etc., Ry. Co., 129 Ind. 260, 28 N. E. 183; Dill v. Marmon, 164 Ind. 507; Blazenic v Iowa & Wis. Coal Co., 102 Ia. 706, 72 N. W. 292; Collingwood v. Ill. & Ia. Fuel Co., 125 Ia. 537, 101 N. W. 283; Fry v. Bath Gas & Elec. Co., 94 Me. 17, 46 Atl. 604; Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348; Hopkins v. O'Leary, 176 Mass. 258, 57 N. E. 342; Morton v. Detroit, etc., R. R. Co., 81 Mich. 423, 46 N. W. 111; Fox v. Spring Lake Iron Co., 89 Mich. 387, 50 N. W. 872; Ashman v. Flint, etc., R. R. Co., 90 Mich. 567, 51 N. W. 645; McDonald v. Mich. Cent. R. R. Co., 108 Mich. 7, 65 N. W. 597; Foy v. Minn., etc., Co., 30 Minn. 231; Moore v. Wabash Ry. Co., 85 Mo. 588; Maher v. Thropp, 59 N. J L 186, 35 Atl. 1057; Fuller v. Jewett, 80 N. Y. 46, 36 Am. Rep. 557; Brennan v. Gordon, 118 N. Y. 489, 23 N. E. 810, 16 Am. St. Rep. 775, 8 L. R. A. 818; Anderson v. Bennett, 16 Ore. 515, 19 Pac. 765, 8 Am. St. Rep. 311; Roth v. Northern Pac. Lumbering Co., 18 Ore. 205, 22 Pac. 842; Ross v. Walker,

§ 275. Assumption of risk by servant. The common statement of the general rule on this subject is that, by virtue of the contract of service, the servant assumes the usual and ordinary risks incident to the employment;[82] also such as are

139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160; Lebbering v. Struthers, 157 Pa. St. 312, 27 Atl. 720; Smith v. Hillside C. & I. Co., 186 Pa. St. 28, 40 Atl. 287; Carter v. Oliver Oil Co., 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; Missouri Pac. Ry. Co. v. McElyer, 71 Tex. 386, 9 S. W. 73, 10 Am. St. Rep. 749; International, etc., Ry. Co. v. Kernan, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; San Antonio Gas Co. v. Robertson, 93 Tex. 503, 56 S. W. 323; Chapman v. Southern Pac. Co., 12 Utah, 30, 41 Pac. 551; Hough v. Railway Co., 100 U. S. 213; Northern Pac. R. R. Co. v. Herbert, 116 U. S. 642; Western Coal & Min. Co. v. Ingraham, 70 Fed. 219, 17 C. C. A. 71; Northern Pac. R. R. Co. v. Herbert, 116 U. S. 642.

[82] *Post*, § 281; Mullin v. Cal. Horseshoe Co., 105 Cal. 77, 38 Pac. 535; Denver, etc., R. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093; Flanigan v. Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762; Bailey v. Rome, etc., R. R. Co., 139 N. Y. 302, 34 N. E. 918; Houston v. Brush, 66 Vt. 331, 29 Atl. 380; Norfolk, etc., R. R. Co. v. Ampley, 93 Va. 108, 25 S. E. 226; Norfolk, etc., Ry. Co. v. Phillips, 100 Va. 362, 41 S. E. 726; Wood v. Rio Grande W. R. R. Co., 28 Utah, 351, 79 Pac. 182.

[83] Lovell v. DeBardelaben C. & I. Co., 90 Ala. 13, 7 So. 756; Colorado Midland Ry. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701; Minty v. Union Pac. Ry. Co., 2 Idaho, 471, 21 Pac. 660; Herdman-Harrison Milling Co. v. Spehr, 145 Ill. 329, 33 N. E. 944; Consolidated Coal Co. v. Haenni, 146 Ill. 614, 35 N. E. 162; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Swanson v. Lafayette, 134 Ind. 625, 33 N. E. 1033; Smith v. Sellers, 40 La. Ann. 527, 4 So. 333; Boyer v. Eastern Ry. Co., 87 Minn. 367, 92 N. W. 326; Lucey v. Hannibal Oil Co., 129 Mo. 32, 31 S. W. 340; Evans Laundry Co. v. Crawford, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814; Henderson v. Williams, 66 N. H. 405, 23 Atl. 365; Neely v. S. W. Cotton Seed Oil Co., 13 Okl. 356, 75 Pac. 537; Stager v. Troy Laundry Co., 38 Ore 480, 63 Pac. 645, 53 L. R. A. 459; Benson v. New York etc., R. R. Co., 23 R. I. 147, 49 Atl. 689; Baumler v. Narragansett Brewing Co., 23 R. I. 430, 50 Atl. 841; McKeever v. Homestake Min. Co., 10 S. D. 599, 74 N. W. 1053; Trihay v. Brooklyn Lead Min. Co., 4 Utah, 468, 11 Pac. 612; Carbin's Admr. v. Bennington, etc., R. R. Co., 61 Vt. 348, 17 Atl. 491; Stewart v.

ant necessarily assumes by entering the service, are those risks which are not due to the master's negligence.[85] As to what constitutes an obvious or patent risk it has been said: "It is one so patent that it would be instantly recognized by a person familiar with the business. It is a risk about which there can be no difference of opinion in the minds of intelligent persons accustomed to the service."[86] A master has a right to conduct his business in a dangerous way, if it is not unlawful

Ohio Riv. R. R. Co., 40 W. Va. 188, 20 S. E. 922; Skidmore v. W. Va., etc., R. R. Co., 41 W. Va. 293, 23 S. E. 713; Richards v. Riverside Iron Works, 56 W. Va. 510.

[84] Iowa Gold Min. Co. v. Diefenthaler, 32 Colo. 391, 76 Pac. 981; Ryan v. Chelsea Paper Mfg. Co., 69 Conn. 454, 37 Atl. 1062; Daniel v. Forsythe, 106 Ga. 568, 32 S. E. 621; Gunning System v. La Pointe, 212 Ill. 274, 72 N. E. 393; Schillinger Bros. Co. v. Smith, 225 Ill. 74; Rietman v. Stolle, 120 Ind. 314, 22 N. E. 304; McCarthy v. Mulgrew, 107 Ia. 76, 77 N. W. 527; Flockhart v. Hocking Coal Co., 126 Ia. 576, 102 N. W. 494; Southern Kansas Ry. Co. v. Moore, 49 Kan. 616, 31 Pac. 138; Missouri, etc., Ry. Co. v. Puckett, 62 Kan. 770, 64 Pac. 631; Bogenschutz v. Smith, 84 Ky. 330; Wilson v. Chesapeake & W. Co., 117 Ky. 567, 78 S. W. 453; Baltimore, etc., R. R. Co. v. State, 41 Md. 268; Jones v. Mfg. Co., 92 Me. 565, 43 Atl. 512, 69 Am. St. Rep. 535; Goodnow v. Walpole Emery Mills, 146 Mass. 261, 15 N. E. 576; Yates v. McCullough Iron Co., 69 Md. 370, 16 Atl. 280; Mushinski v. Vincent, 135 Mich. 26, 97 N. W. 43; Steinhauser v. Spraul, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; Harff v. Green, 168 Mo. 308, 67 S. W. 576; Missouri Pac. R. R. Co. v. Baxter, 42 Neb 793, 60 N. W. 1044; Foley v. Jersey City Elec. Lt. Co., 54 N. J. L. 411, 24 Atl. 487; McDonald v. Standard Oil Co., 69 N. J. L. 445, 55 Atl. 289; Gibson v. New York & Erie R. R. Co., 63 N. Y. 449, 20 Am. Rep. 552; Kaare v. Troy Steel & I. Co., 139 N. Y. 369, 34 N E. 901; Knisley v. Pratt, 148 N Y. 372, 42 N. E. 986, 32 L. R. A 367; Johnston v. Oregon Short Line, 23 Ore. 94, 31 Pac. 283; Bernish v. Roberts, 143 Pa. St. 1, 21 Atl. 998; Pintorelli v. Horton, 22 R. I. 374, 48 Atl. 142; Gann v. Railroad Co., 101 Tenn. 380, 47 S. W. 493, 70 Am. St. Rep. 687; Williamson v. Sheldon Marble Co., 66 Vt. 427, 29 Atl. 669; Robinson v. Dinniny, 96 Va. 41, 30 S. E. 442; Week v. Tremont Mill Co., 3 Wash. 629, 29 Pac. 215; French v. First Ave. Ry. Co., 24 Wash. 83, 63. Pac. 1108; Foss v. Bigelow, 102 Wis 413, 78 N. W. 570; Groth v. Thomann, 110 Wis. 488, 86 N. W. 178.

[85] *Ante.* § 266; Emporia v. Kowalski 66 Kan. 64, 71 Pac. 232.

[86] Johnston v. Oregon Short Line, 23 Ore. 94, 31 Pac. 283.

as he might discover by the exercise of ordinary care and prudence on his part.[88] But this probably means no more than that he assumes the usual and ordinary risks of the business and such as are obvious and patent, not that he is to make any positive effort to ascertain defects and dangers, nor that he assumes risks that he might have ascertained by investiga-

[87] State v. South Baltimore Car Works, 99 Md. 461, 58 Atl. 447; Williamson v. Sheldon Marble Co., 66 Vt. 427, 29 Atl. 669; Robinson v. Dininny, 96 Va. 41, 30 S. E. 442; Russell Creek Coal Co. v. Wells, 96 Va. 416, 31 S. E. 614; Seldonridge v. Chesapeake, etc., Ry. Co., 46 W. Va. 569, 33 S. E. 293; Osborne v. Lehigh Valley Coal Co., 97 Wis. 27, 71 N. W. 814; Fort Wayne, etc., R. R. Co. v. Gildersleeve, 33 Mich. 133; Ladd v. New Bedford, etc., R. R. Co., 119 Mass. 412, 20 Am. Rep. 331; Gibson v. Erie R. Co., 63 N. Y. 449, 20 Am. Rep. 552; Belair v. Chicago, etc., R. R. Co., 43 Iowa, 662; St. Louis, etc., R. R. Co. v. Britz, 72 Ill. 256; Woodley v. Met. R. R. Co., L. R. 2 Ex. D. 384.

[88] Indianapolis, etc., Rapid Transit Co. v. Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; Flockhart v. Hocking Coal Co., 126 Ia. 576, 102 N. W. 494; Shemwell v. Owensboro, etc., R. R. Co., 117 Ky. 556; Cunningham v. Bath Iron Works, 92 Me. 501, 43 Atl. 106; Yates v. McCullough Iron Co., 69 Md. 370, 16 Atl. 280; Balle v. Detroit Lumber Co., 73 Mich. 158, 41 N. W. 216; Scharenbroich v. St. Cloud Fiber Ware Co., 59 Minn. 116, 60 N. W. 1093; Boyce v. Johnson, 72 N. H. 41, 54 Atl. 707; Coyle v. Griffing Iron Co., 63 N. J. L. 609, 44 Atl. 665, 47 L. R. A. 147; Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Stager v. Troy Laundry Co., 38 Ore. 480, 63 Pac. 645, 53 L. R. A. 459; Masterson v. Eldridge, 208 Pa. St. 242, 57 Atl. 515; Desrosiers v. Bourn, 26 R. I. 6; Latremoille v. Bennington, etc., R. R. Co., 63 Vt. 336, 22 Atl. 656; Southern Ry. Co. v. Manzy, 98 Va. 692, 37 S. E. 285; Showalter v. Fairbanks, 88 Wis. 376, 60 N. W. 257; Osborne v. Lehigh Valley Coal Co., 97 Wis. 27, 71 N. W. 814; Diesenreiter v. Malting Co., 97 Wis. 279, 72 N. W. 735; Mielke v. Chicago, etc., Ry. Co., 103 Wis. 1, 78 N. W. 402, 74 Am. St. Rep. 834; Cudahy Packing Co. v. Marcan, 106 Fed. 645, 45 C. C. A. 515; King v. Morgan, 109 Fed. 446, 48 C. C. A. 507. "A servant assumes the perils incident to his service of which he is informed, or which ordinary care would disclose to him." Henderson v. Williams, 66 N. H. 405, 413, 23 Atl. 365. If the servant has as good an opportunity as the master to know the danger, he assumes the risk. Crane v. Chicago, etc., Ry. Co., 124 Ia. 81, 99 N. W. 169; Roth v. Eccles, 28 Utah, 456, 79 Pac. 918.

however they may arise, against which he may protect himself, by the exercise of ordinary observation and care.[90] The doctrine of assumption of risk applies as well to those risks which arise or become known to the servant during the service as to those in contemplation at the time of the original hiring.[91]

Another proposition, which follows from what has already been said and which is held in many cases, is that if a servant, with full knowledge of a defect or danger, enters or continues in the service, he assumes the risk of such defect or danger, whether it is due to the negligence of the master or otherwise.[92] "However gross the fault of the master in subjecting

[89] Silveira v. Iverson, 128 Cal. 187, 60 Pac. 687; Murphy v. Marston Coal Co., 183 Mass. 385, 67 N. E. 342. A servant is not expected to go about scrutinizing, testing and measuring. Johnston v. Oregon Short Line, 23 Ore. 94, 31 Pac. 283; Henderson Tobacco Extracts Works v. Wheeler, 116 Ky. 322, 76 S. W. 34.

[90] Staubley v. Potomac Elec. Power Co., 21 App. D. C. 160; Durand v. New York, etc., R. R. Co., 65 N. J. L. 656, 48 Atl. 1013; Kaufhold v. Arnold, 163 Pa. St. 269, 29 Atl. 883.

[91] Dillenberger v. Weingartner, 64 N. J. L. 292, 45 Atl. 638.

[92] Louisville, etc., R. R. Co. v. Stutts, 105 Ala. 368, 17 So. 29, 53 Am. St. Rep. 127; Arkadelphia Lumber Co. v. Bettea, 57 Ark. 76, 20 S. W. 808; Iowa Gold Min. Co. v. Diefenthaler, 32 Colo. 391, 76 Pac. 981; Butter v. Frazee, 25 App. D. C. 392; South Florida R. R. Co. v. Weese, 32 Fla. 212, 13 So. 436; Harvey v. Alturas Gold Min. Co., 3 Idaho, 510, 31 Pac. 819; Chicago, etc., R. R. Co. v. Geary, 110 Ill. 383; Herdman-Harrison Milling Co. v. Spehr, 145 Ill. 329, 33 N. E. 944; Umback v. Lake Shore, etc., Ry. Co., 83 Ind. 191; Indianapolis, etc., Ry. Co. v. Watson, 114 Ind. 20, 14 N. E. 721, 5 Am. St. Rep. 578; Meador v. Lake Shore, etc., Ry. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384; Indianapolis, etc., Rapid Transit Co. v. Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; Money v. Lower Vein, etc., Co., 55 Ia. 671; Worden v. Humeston, etc., Co., 72 Ia. 201, 33 N. W. 629; Buehner v. Creamery Package Co., 124 Ia. 445, 100 N. W. 345, 104 Am. St. Rep. 354; McQueen v. Central, etc., R. R. Co., 30 Kan. 689; Morbach v. Home Min. Co., 53 Kan. 731, 37 Pac. 122; Ray v. Jeffries, 86 Ky. 367, 5 S. W. 867; Breckenridge Co. v. Hicks, 94 Ky. 362, 22 S. W. 554, 42 Am. St. Rep. 361; Wood v. Heiges, 83 Md. 275, 34 Atl. 872; State v. Lazaretto Guano Co., 90 Md. 177, 44 Atl. 1017; Swoboda v. Ward, 40 Mich. 420; Harff v. Green, 168 Mo. 306, 67 S. W. 576; McAndrews v. Mont. Union Ry. Co., 15 Mont. 290, 39 Pac. 85;

consents to incur the risk to which he is exposed thereby, he is deemed to assume such risk and to waive any claim for damages against his master in case of injury."[93] In some jurisdictions this rule is modified to the extent that, if the servant might reasonably suppose that he could safely continue in the service by taking due care, notwithstanding the defect or danger, then his knowledge of the defect or danger and his continuance in the service will not necessarily bar a recovery

Missouri Pac. R. R. Co. v. Baxter, 42 Neb. 793, 60 N. W. 1044; Enright v. Oliver, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710; Alexander v. Tennessee, etc., Min. Co., 3 N. M. 255; Odell v. New York Central, etc., R. R. Co., 120 N. Y. 323, 24 N. E. 478, 17 Am. St. Rep. 650; Drake v. Auburn City Ry. Co., 173 N. Y. 466, 66 N. E. 121; Roth v. Northern Pac. Lumbering Co., 18 Ore. 205, 22 Pac. 842; Mansfield Coal Co. v. McEnery, 91 Pa. St. 185, 36 Am. Rep. 662; Philadelphia, etc., R. R. Co. v. Hughes, 119 Pa. St. 301, 13 Atl. 286; Disano v. New Eng. Steam Brick Co., 20 R. I. 452, 40 Atl. 7; Gulf, etc., Ry. Co. v. Grentford, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377; Gulf, etc., Ry. Co. v. Johnson, 83 Tex. 628, 19 S. W. 151; Fritz v. Salt Lake, etc., Elec. Lt. Co., 18 Utah, 483, 56 Pac. 90; Carbin's Admr. v. Bennington, etc., R. R. Co., 61 Vt. 348, 17 Atl. 491; Skinner v. Central Vt. R. R. Co., 73 Vt. 336, 50 Atl. 1099; Norfolk, etc., R. R. Co. v. McDonald, 88 Va. 352, 13 S. E. 706; McDonald v. Norfolk, etc., R. R. Co., 95 Va. 98, 27 S. E. 821; Grout v. Tacoma Eastern R. R. Co., 33 Wash. 524, 74 Pac. 665; Oliver v. Ohio Riv. R. R. Co., 42 W. Va. 703, 26 S. E. 444; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 447, 9 Am. St. Rep. 806; Sweet v. Ohio Coal Co., 78 Wis. 127, 47 N. W. 182, 9 L. R. A. 861; Promer v. Milwaukee, etc., Ry. Co., 90 Wis. 215, 63 N. W. 90, 48 Am. St. Rep. 905; Erdman v. Illinois Steel Co., 95 Wis. 1, 69 N. W. 993, 60 Am. St. Rep. 66; Washington, etc., R. R. Co. v. McDade, 135 U. S. 554, 10 S. C. Rep. 1044, 34 L. Ed. 235; Mississippi Riv. Logging Co. v. Schneider, 74 Fed. 195, 20 C. C. A. 390; Pierce v. Clavin, 82 Fed. 550, 27 C. C. A. 227; Lindsay v. New York, etc., R. R. Co., 112 Fed. 384, 50 C. C. A. 298; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477.

[93] Carey v. Sellars, 41 La. Ann. 500, 6 So. 813; Pollich v. Sellars, 42 La. Ann. 623, 7 So. 786. "The rule of the assumption of obvious risks does not rest wholly upon the implied agreement of the employee, but on an independent act of waiver, evidenced by his continuing in the employment with a

person of ordinary prudence, acting with such prudence, would, under all the circumstances, have refused to incur the risk."[95] In some of the cases continuing in the service with knowledge of the danger is regarded as contributory negligence, not as a waiver or assumption of risk.[96]

It is essential to the assumption of risk, not only that the servant should know the defect out of which the danger arises, but that he should appreciate the danger, or that the danger should be manifest to a man of ordinary intelligence and experience in the line of work in which the servant is engaged.[97]

full knowledge of all the facts." Drake v. Auburn City Ry. Co., 173 N. Y. 466, 473, 66 N. E. 121.

[94] Cole v. St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Curtis v. McNair, 173 Mo. 270, 73 S. W. 167; Southern Pac. Co. v. Yeargin, 109 Fed. 436, 48 C. C. A. 497; Williams v. Birmingham B. & M. Co., (1899) 2 Q. B. 338; Going v. Ala. Steel & Wire Co., 141 Ala. 537; Pressly v. Yarn Mills, 138 N. C. 410, 51 S. E. 69; Hicks v. Manufacturing Co., 138 N. C. 319, 50 S. E. 403; Marks v. Cotton Mills, 138 N. C. 401, 50 S. E. 769; Texas, etc., R. R. Co. v. Kelly, 98 Tex. 123, 80 S. W. 79; Richmond, etc., R. R. Co. v. Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827; Lyberg v. Northern Pac. R. R. Co., 39 Minn. 15, 38 N. W. 632.

[95] Norfolk, etc., R. R. Co. v. Arnpley, 93 Va. 108, 25 S. E. 226.

[96] Highland Ave., etc., R. R. Co. v. Walters, 91 Ala. 435, 8 So. 357; Louisville, etc., R. R. Co. v. Banks, 104 Ala. 508, 16 So. 547; Harff v. Green, 168 Mo. 308, 67 S. W. 576; Curtis v. McNair, 173 Mo. 270, 73 S. W. 167; Cole v. St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138. See Graham v. Newburg, etc., Co., 38 W. Va. 273, 18 S. E. 584; Eldridge v. Atlas S. S. Co., 134 N. Y. 187, 32 N. E. 66. Assumption of risk and contributory negligence are considered and distinguished in St. Louis Cordage Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477.

[97] Choctaw, etc., R. R. Co. v. Jones, 77 Ark. 367; Mullin v. California Horseshoe Co., 105 Cal. 77, 38 Pac. 535; Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Montgomery Coal Co. v. Baringer, 218 Ill. 327; Stomme v. Hanford Produce Co., 108 Ia. 137, 78 N. W. 841; Myhan v. Louisiana Elec. L. &. P. Co., 41 La. Ann. 964, 6 So. 799, 17 Am. St. Rep.. 436, 7 L. R. A. 172; Gualden v. K. C. Southern Ry. Co., 106 La. 409, 30 So. 889; Fickett v. Lisbon Falls Fibre Co., 91 Me. 268, 39 Atl. 996; Jensen v. Kyer, 101 Me. 106; Anderson v. Clark, 155 Mass. 368, 29 N. E. 589; McKee v. Tourtellotte, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; Sullivan v. Hannibal, etc., R. R. Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. Rep. 388; Demars v. Glen Mfg. Co., 67 N. H. 404, 40 Atl. 902; Burns v. Delaware, etc., Tel.

sumed to possess ordinary intelligence and capacity and is held in law to know and comprehend the dangers which are open and obvious to a person of ordinary understanding and experience, and he cannot show a want of such capacity without also showing that the master had notice of the fact.[99]

In determining whether a risk has been assumed by the servant, other circumstances are to be considered besides the fact of continuance in the service with knowledge of the danger. Where an engine became defective during a trip, it was held that the engineer did not assume the risk by continuing to the end of the trip.[1] So where a seaman was ordered to operate a winch which he knew to be defective and dangerous and obeyed, because otherwise he would be punished.[2] The assurance of the master, or of one placed in authority by him, that there is no danger, or that a place or appliance is safe, is an important element to be considered. Though the servant may think there is some danger, yet if there is any reason to

Co., 70 N. J. L. 745, 59 Atl. 220, 67 L. R. A. 956; Welle v. Celluloid Co., 175 N. Y. 401, 67 N. E. 609; Sims v. Lindsay, 122 N. C. 678, 30 S. E. 19; Stager v. Troy Laundry Co., 38 Ore. 480, 63 Pac. 645, 53 L. R. A. 459; Langlois v. Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910; Knoxville Iron Co. v. Pace, 101 Tenn. 476, 48 S. W. 232; Williamson v. Sheldon Marble Co., 66 Vt. 427, 29 Atl. 669; Shoemaker v. Bryant, etc., Co., 27 Wash. 637, 68 Pac. 380; Northern Pac. Coal Co. v. Richmond, 58 Fed. 756, 7 C. C. A. 485; Cudahy Packing Co. v. Marcan, 106 Fed. 645, 45 C. C. A. 515; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477. That a servant may know of the defects in an appliance without being held to know and accept the risk arising therefrom, see Russell v. Minn., etc., Co., 32 Minn. 230; Cook v. St. Paul, etc., Co., 34 Minn. 45; Wuotilla v. Duluth, etc., Co., 37 Minn. 153, 33 N. W. 551; Lasure v. Graniteville, etc., Co., 18 S. C. 275.

[98] St. Louis Cordage Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477; King v. Morgan, 109 Fed. 446, 48 C. C. A. 507. A minor assumes risks which he knows and is able to appreciate such as the liability to slip on a greasy floor. Cudahy Packing Co. v. Marcan, 106 Fed. 645, 45 C. C. A. 515.

[99] Diesenrieter v. Malting Co., 97 Wis. 279, 72 N. W. 735.

[1] Olney v. Boston, etc., R. R. Co., 71 N. H. 427, 52 Atl. 1097.

[2] Eldridge v. Atlas S. S. Co., 134 N. Y. 187, 32 N. E. 66.

and the servant is able to understand and appreciate it as well as his superior, he is not justified in relying upon such assurances.[4] And it makes no difference that the servant is told to go on with his work or quit the employment.[5]

It is well settled that the servant does not assume the risk of the master's negligence.[6] "Whatever the danger of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered."[7] The servant cannot bind himself, even by an express agreement, to assume the consequences of the master's negligence, for such an agreement is held to be against public policy and void.[8] An agreement to assume the risk of future

[3] Consolidated Coal Co. v. Wombacker, 134 Ill. 57, 24 N. E. 627; Larch v. Stratton, 101 Ky. 672, 42 S. W. 756; Faren v. Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256; Cole v. St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; McKinnon v. Riter-Conley Mfg. Co., 186 Mass. 155, 71 N. E. 296; Duerst v. St. Louis Stamping Co., 163 Mo. 607, 63 S. W. 827; Lee v. Smart, 45 Neb. 318, 63 N. W. 940; Reese v. Clark, 198 Pa. St. 312, 47 Atl. 994; Williams v. Clark, 204 Pa. St. 416, 54 Atl. 315; Record v. Cooperage Co., 108 Tenn. 657, 69 N. W. 334; Grout v. Tacoma Eastern R. R. Co., 33 Wash. 524, 74 Pac. 665.

[4] Toomey v. Eureka Iron & S. Works, 89 Mich. 249, 50 N. W. 842; Vogt v. Honstain, 81 Minn. 174, 83 N. W. 533; Pintorelli v. Horton, 22 R. I. 374, 48 Atl. 142; Showalter v. Fairbanks, 88 Wis. 376, 60 N. W. 257.

[5] Wells & French Co. v. Kapaczynski, 218 Ill. 159, 75 N. E. 751; Lamson v. Am. Ax & Tool Co., 177 Mass. 144; Ittner Brick Co. v. Killian, 67 Neb 589, 93 N. W. 951.

[6] Chicago, etc., R. R. Co. v. Avery, 109 Ill. 314, 322; Chicago, etc., R. R. Co. v. Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; Chicago, etc., R. R. Co. v. Maroney, 170 Ill. 520, 525, 48 N. E. 953, 62 Am. St. Rep. 396; Baltimore, etc., R. R. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627; Rhoades v. Varney, 91 Me. 222, 226, 39 Atl. 552; Ford v. Fitchburg R. R. Co., 110 Mass. 240, 260, 14 Am. Rep. 598; Anthony v. Leeret, 105 N. Y. 591, 599, 12 N. E. 561; Hough v. Railroad Co., 100 U. S. 213, 217; George v. Clark, 85 Fed. 608, 29 C. C. A. 374; Merrill v. Oregon Short Line, 29 Utah, 264.

[7] Lord Herschell in Smith v. Baker & Sons, (1891) A. C. 325, 362.

[8] Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149; Curtis v. McNair, 173 Mo. 270, 73 S. W. 167; Little Rock, etc., R. R. Co. v. Eubanks, 48 Ark. 460, 3 S. W. 808; Kansas,

but which is fully known and understood by the servant and against which he can protect himself by declining or leaving the service. The servant has a right to assume that the master has done his duty.[9]

In case of statutory duties imposed upon the master for the purpose of protecting the servant from injury or for other purposes, there is a difference of opinion as to whether the servant may assume the risk of their violation or not. Some cases hold that there is no difference in the essential quality of a duty whether it is founded upon a statute or has its origin in the common law, that such statutes were not intended to interfere with the freedom of contract and that, consequently, the doctrine of assumption of risk applies to statutory duties under the same conditions as to common-law duties.[10] Other cases hold the contrary, putting their decisions upon the ground of public policy and the inequality of terms upon which the parties deal.[11]

etc., R. R. Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630; *post*, § 356.

[9] Pennsylvania Coal Co. v. Kelly, 156 Ill. 9, 40 N. E. 938; Caven v. Bodwell Granite Co., 99 Me. 278, 59 Atl. 285; Delude v. St. Paul City Ry. Co., 55 Minn. 63, 56 N. W. 461; Carter v. Oliver Oil Co., 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; Missouri, etc., Ry. Co. v. Haning, 91 Tex. 347, 43 S. W. 508; Norfolk, etc., R. R. Co. v. Nunnally, 88 Va. 546, 14 S. E. 367; Texas, etc., Ry. Co. v. Archibald, 170 U. S. 665, 18 S. C. Rep. 777; New York, etc., R. R. Co. v. O'Leary, 93 Fed. 737, 35 C. C. A. 562; Silveira v. Iverson, 128 Cal. 187, 60 Pac. 687; Steinhauser v. Spraul, 114 Mo. 551, 21 S. W. 515, 859.

[10] Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986; O'Maley v. South Boston G. L. Co., 158 Mass. 135, 32 N. E. 1119; Love v. Am. Mfg. Co., 160 Mo. 608, 624, 61 S. W. 678; Higgins Carpet Co. v. O'Keefe, 79 Fed. 900, 902, 25 C. C. A. 220; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 509, — C. C. A. —; Glenmont L. Co. v. Roy, 126 Fed. 524, — C. C. A. —; Britton v. Gt. Western Cotton Co., L. R. 7 Exch. 130; Griffiths v. Earl Dudley, L. R. 9 Q. B. D. 357.

[11] Davis Coal Co. v. Polland, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; Monteith v. Kokomo Wood Enamelling Co., 159 Ind. 449, 64 N. E. 610, 58 L. R. A. 944; Island Coal Co. v. Swaggerty, 159 Ind. 664, 65 N. E. 1026; Green v. Am. Car & Foundry Co., 163 Ind. 135, 71 N. E. 268; Buehner Chair

and not plainly open to view, nor risks which are not readily appreciated by a servant of ordinary care, intelligence and experience.[12] If the servant undertakes to do something not in

Co. v. Feulner, 164 Ind. 368, 73 N. E. 816; Davis v. Mercer L. Co., 164 Ind. 413, 73 N. E. 899; Kansas, etc., R. R. Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630; Grenlee v. Southern Ry. Co., 122 N. C. 977, 982, 30 S. E. 115, 65 Am. St. Rep. 734, 41 L. R. A. 399; Elmore v. Seaboard Air Line Ry. Co., 132 N. C. 865, 44 S. E. 620; Kilpatrick v. Grand Trunk Ry. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; S. C., Kilpatrick v. Grand Trunk Ry. Co., 72 Vt. 263, 47 Atl. 827, 82 Am. St. Rep. 939; Green v. Western Am. Co., 30 Wash. 87, 70 Pac. 310; Hall v. West & S. Mill Co., 39 Wash. 447, 81 Pac. 915; Erickson v. McNeeley & Co., 41 Wash. 509, 84 Pac. 3; Narramore v. Cleveland, etc., Ry. Co., 96 Fed. 298, 37 C. C. A. 499. In the last case the court says: "The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that." p. 302. *Contra*, Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986.

[12] Gisson v. Schwabacher, 99 Cal. 419, 34 Pac. 104; Colorado Midland Ry. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701; McCormick Harvesting Machine Co. v. Burandt, 136 Ill. 170, 26 N. E. 588; Consolidated Coal Co. v. Hoenni, 146 Ill. 614, 35 N. E. 162; Mobile, etc., R. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416; Illinois Central R. R. Co. v. Langan, 116 Ky. 318, 76 S. W. 32; Campbell v. Eveleth, 83 Me. 50, 21 Atl. 784; Murphy v. Marston Coal Co., 183 Mass. 385, 67 N. E. 342; Ribich v. Lake Supr. Smelting Co., 123 Mich. 401, 82 N. W. 279, 81 Am. St. Rep. 215, 48 L. R. A. 649; Sims v. Lindsay, 122 N. C. 678, 30 S. E. 19; Pilling v. Narragansett Machine Co., 19 R. I. 666, 36 Atl. 129, 61 Am. St. Rep. 805; St. Louis, etc., Ry. Co. v. McClain, 80 Tex. 85, 15 S. W. 789; Gulf, etc., Ry. Co. v. Hill, 95 Tex. 629, 69 S. W. 136; New York, etc., R. R. Co. v. O'Leary, 93 Fed. 737, 35 C. C. A. 562; Texas, etc., Ry. Co. v. Archibald, 170 U. S. 665, 18 S. C. Rep. 777; Ingham v. Honor Co., 113 La. 1040, 37 So. 963; Levins v. Bancroft, 114 La. 105, 38 So. 72. In Black v. Va. Portland Cement Co., — Va.—, 51 S. E. 831,

that the servant assumed the risk in question and the matter should be specially pleaded to be available as a defense.[14] In a Massachusetts case it is said: "The doctrine of assumption of the risk of his employment by an employe has usually been considered from the point of view of a contract, express or implied; but as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *Volenti non fit injuria.* One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case, there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of duty."[15]

it is held that the servant does not assume risks that may be obviated by the master.

[13] Hamrick v. Belfour Quarry Co., 132 N. C. 282, 43 S. E. 820; Pittsburg, etc., Ry. Co. v. Adams, 105 Ind. 151; Osborne v. Knox, etc., Co., 68 Me. 49; Railroad Co. v. McDaniel, 12 Lea, 386. If there is a safe and an unsafe way of doing a thing and the servant chooses the latter, he does so at his own risk. Benson v. New York, etc., R. R. Co., 26 R. I. 405.

[14] Mace v. Boedker, 127 Ia. 721; Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035; Dowd v. New York, etc., R. R. Co., 170 N. Y. 459, 63 N. E. 541; Faulkner v. Mammouth Min. Co., 23 Utah, 437, 66 Pac. 799; Oregon Short Line, etc., Ry. Co. v. Tracy, 66 Fed. 931, 14 C. C. A. 199. But if the plaintiff's evidence discloses the fact, it is available though not pleaded. Iowa Gold Min. Co. v. Diefenthaler, 32 Colo. 391, 76 Pac. 981. In Illinois it is held that the burden is on the plaintiff to show that he did not assume the risk. Chicago, etc., R. R. Co. v. Heerey, 203 Ill. 492; Wells & French Co. v. Kapaczynski, 218 Ill. 149. In Evans Laundry Co. v. Cranford, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814, it is held that the assumption of risks not ordinarily incident to the service must be pleaded but that the assumption of the ordinary risks need not be.

[15] O'Maley v. South Boston G. L. Co., 158 Mass. 135, 32 N. E

with a particular machine or appliance, or to do a particular piece of work, he has a right to assume that there are no unusual or concealed dangers or hazards connected with the work, and if such exist and he has not been warned or instructed in regard to them and is ignorant of their existence, and is injured in consequence, he may recover.[16] If the servant knows the danger, or if it is obvious to him as to any one

1119. Quoted and approved in Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986. See elaborate note on assumption of risk in 47 L. R. A. 161.

[16] Turner v. Southern Pac. Co., 142 Cal. 580, 76 Pac. 384; Hilton, etc., Lumber Co. v. Ingram, 119 Ga. 652, 46 S. E. 895, 100 Am. St. Rep. 204; Consolidated Coal Co. v. Wombacher, 134 Ill. 57, 24 N. E. 627; Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N. E. 651; Western Stone Co. v. Muscial, 196 Ill. 382, 63 N. E. 664; Springfield B. & M. Co. v. Parks, 222 Ill. 355; Republic I. & S. Co. v. Berkes, 162 Ind. 517, 70 N. E. 815; Connors v. Morton, 160 Mass. 333, 35 N. E. 860; Brown v. Ann Arbor R. R. Co., 118 Mich. 205, 76 N. W. 407; Carlson v. N. W. Tel. Exch. Co., 63 Minn. 428, 65 N. W. 914; Holman v. Kempe, 70 Minn. 422, 73 N. W. 180; Sullivan v. Hannibal, etc., R. R Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. Rep. 388; Schroeder v. Chicago, etc., R. R. Co., 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; Steinhauser v. Spraul, 114 Mo. 551, 21 S. W. 515, 859; Foster v. Mo. Pac. R. R. Co., 115 Mo. 165, 21 S. W. 916; Bane v. Irwin, 172 Mo. 306, 72 S. W. 522; McGovern v. Cent. Vt. R. R. Co., 123 N. Y. 280, 25 N. E. 373; Van Duzen Gas, etc., Co. v. Schelies, 61 Ohio St. 298, 55 N. E. 998; Logan v. North Carolina R. R. Co., 116 N. C. 940, 21 S. E. 959; Michael v. Roanoake Machine Works, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927; Reed v. Stockmeyer, 74 Fed. 186, 20 C. C. A. 381. Where the servant is ordered to do a piece of work and is left to his own way of doing it and he adopts a dangerous mode and is injured, the rule does not apply and the master is not liable. Northern Ohio R. R. Co. v. Rigby, 69 Ohio St. 184, 68 N. E. 1046. In some cases the foreman or superior giving the order is held to be a fellow servant of the workman and his negligence in giving the order, if any, is held to be the negligence of a fellow servant for which the master is not responsible. Moody v. Hamilton Mfg. Co., 159 Mass. 70, 34 N. E. 185, 38 Am. St. Rep. 396; Randa v. Detroit Screw Works, 134 Mich. 343, 94 N. W. 454; Vitto v. Keogan, 15 App. Div. 329, 44 N. Y. S. 1; Stegman v. Humbers, 2 Ohio C. C. 51; Mast v. Kern, 34 Ore. 247, 54 Pac. 950, 75 Am. St. Rep. 580; Casey v. Pennsylvania Asphalt Pav. Co., 198 Pa. St. 348, 47 Atl. 1128; Minneapolis v Lundin, 58 Fed. 525, 7 C. C. A. 344.

is instant obedience, the danger should be obvious at a glance to impose the risk upon him. He is justified in obeying, unless the risk is so great and so manifest that no reasonably prudent man would have done so under the circumstances.[18] In determining the question much weight is due to the relative situation of the parties. It is said by the supreme court of Ohio: "There is much reason in the rule that allows a favorable construction to be placed on the act of the servant done in obe-

[17] Greeley v. Foster, 32 Colo. 292, 75 Pac. 351; Roul v. East. Tenn., etc., Ry. Co., 85 Ga. 197, 11 S. E. 558; World v. Georgia R. R. Co., 99 Ga. 283, 25 S. E. 646; Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N. E. 651; Western Stone Co. v. Muscial, 196 Ill. 382, 63 N. E. 664; Wells & French Co. v. Kapaczynski, 218 Ill. 149; Connors v. Morton, 160 Mass. 333, 35 N. E. 860; Burke v. Davis, 191 Mass. 20; Truly v. North Lumber Co., 83 Miss. 430, 36 So. 4; Harff v. Green, 168 Mo. 308, 67 S. W. 576; Ittner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951. In some of the cases obedience is regarded as contributory negligence. Fear of discharge for disobedience will not excuse the servant. Russell v. Tillotson, 140 Mass. 201; Harff v. Green, 168 Mo. 308, 67 S. W. 576. A seaman, who is liable to punishment for disobedience, is not necessarily precluded from recovering for an injury received in obeying an order which he knows to be attended with danger. Eldridge v. Atlas S. S. Co., 134 N. Y. 187, 32 N. E. 66; Keating v. Pacific Steam Whaling Co., 21 Wash. 415, 58 Pac. 224.

[18] Colorado Midland Ry. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701; Chicago & P. B. Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816; Connors v. Morton, 160 Mass. 333, 35 N. E. 860; Bartolomeo v. McKnight, 178 Mass. 242, 59 N. E. 804; McKinnon v. Riter-Conley Mfg. Co., 186 Mass. 155, 71 N. E. 296; Carlson v. N. W. Tel. Exch. Co,. 63 Minn. 428, 65 N. W. 914; Stephens v. Hannibal, etc., Co., 86 Mo. 221; Stephens v. Hannibal, etc., R. R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; Chicago, etc., Ry. Co. v. McCarty, 49 Neb. 475, 69 N. W. 633; Van Duzen Gas, etc., Co. v. Schelies, 61 Ohio St. 298, 55 N. E. 998; Electric Ry. Co. v. Lawson, 101 Tenn. 406, 47 S. W. 489; Houston, etc., Ry. Co. v. De Wall, 96 Tex. 121, 70 S. W. 531, 97 Am. St. Rep. 877; Norfolk, etc., R. R. Co. v. Ward, 90 Va. 687, 19 S. E. 849, 44 Am. St. Rep. 945, 24 L. R. A. 717; Christianson v. Pacific Bridge Co., 27 Wash. 582, 68 Pac. 191.

the servant. He obeys without much questioning the prudence of the order. It is expected that he will do so, and without such obedience the business of the master could not be successfully conducted. It is then both reasonable and proper that the master should be held to a reasonable responsibility for what he orders his servants to do; and the conduct of a servant in obeying an order, under such circumstances, should not be too closely criticised by courts in administering the law. Whilst the law will not excuse the servant, where the thing ordered is plainly and manifestly perilous, it will do so where a man of ordinary prudence and care would, under the circumstances have obeyed the order, although involving danger."[19]

§ 277. **Risk of fellow-servant's negligence—General rule.** The rule which exempts the master from responsibility for injuries to his servants, proceeding from risks incidental to the employment, extends to cases where the injury results from the negligence of other servants in the same employment.[20] Whatever controversy there may for a time have been on this point may now be said, by an overwhelming weight of authority, to have been thoroughly quieted and settled.[21] Some dis-

[19] Van Duzen Gas, etc., Co. v. Schelies, 61 Ohio St. 298, 310, 55 N. E. 998. "The master and servant do not stand upon an equal footing, even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior knowledge and skill of the master. The servant is not entirely free to act upon his own suspicions of danger. If, therefore, the master orders the servant into a place of danger, and the servant is injured, he is not guilty of contributory negligence, unless the danger was so glaring that a reasonably prudent person would not have entered into it." Shartel v. St. Joseph, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317. And see McKee v Tourtelotte, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; Jensen v. Kyer, 101 Me. 106.

[20] The leading cases are Priestley v. Fowler, 3 M. & W. 1; Farwell v. Boston, etc., R. R. Co., 4 Met. 49, 38 Am. Dec. 339; Murray v. Railroad Co., 1 McMullen, 385 See Pollock, Torts (7th ed.) p. 96; Flike v. Boston, etc., R. R Co., 53 N. Y. 549, 552, 13 Am. Rep. 545.

[21] Walker v. Bolling, 22 Ala. 294; Whatley v. Zenida Coal Co. 122 Ala. 118, 26 So. 124; Southern Pacific Co. v. McGill, 5 Arizona, 36, 44 Pac. 302; St. Louis, etc.,

the rule *respondeat superior* does not itself spring directly from

Ry. Co. v. Rice, 51 Ark. 467, 11 S. W. 639, 4 L. R. A. 173; Fordyce v. Briney, 58 Ark. 206, 24 S. W. 250; Hogan v. Central Pacific R. R. Co., 49 Cal. 129; McDonald v. Hazeltine, 53 Cal. 35, Stevens v. San Francisco, etc., R. R. Co., 100 Cal. 554, 35 Pac. 165; Summerhays v. Kansas Pac. Ry. Co., 2 Colorado, 484; Denver, etc., R. R. Co. v. Sipes, 23 Colo. 226, 47 Pac. 287; Hayden v. Smithville Manf. Co., 29 Conn. 548; Sullivan v. New York, etc., R. R. Co., 62 Conn. 209, 25 Atl. 711; Parrish v. Pensacola, etc., R. R. Co., 28 Fla. 251, 9 So. 696; Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698; Colley v. Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932; Snyder v. Viola M. & S. Co., 3 Idaho, 28, 26 Pac. 127; Illinois Central R. R. Co. v. Cox, 21 Ill. 20, 71 Am. Dec. 298; Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713; World's Columbian Exposition v. Lehigh, 196 Ill. 612, 63 N. E. 1089; Columbus, etc., R. R. Co. v. Arnold, 31 Ind. 174, 99 Am. Dec. 615; Taylor v. Evansville, etc., R. R. Co., 121 Ind. 124, 22 N. E. 876, 16 Am. St. Rep. 372; Justice v. Pennsylvania Co., 130 Ind. 321, 30 N. E. 303; Sullivan v. Railroad Co., 11 Iowa, 421; Thelman v. Moeller, 73 Ia. 108, 34 N. W. 765, 5 Am. St. Rep. 663; Treka v. Burlington, etc., Ry. Co., 100 Ia. 205, 69 N. W. 422; Kansas Pacific R. R. Co. v. Salmon, 11 Kan. 83; Casey v. Louisville, etc., R. R. Co., 84 Ky. 79; Cincinnati, etc., Ry. Co. v. Roberts, 110 Ky. 856, 62 S. W. 901; Lawler v. Androscoggin R. R. Co., 62 Me. 463, 16 Am. Rep. 492; Stewart v. International Paper Co., 96 Me. 30, 51 Atl. 237; Wonder v. Baltimore, etc., R. R. Co., 32 Md. 411, 3 Am. Rep. 143; Hanrathy v. Nor. Cent. R. R. Co., 46 Md. 280; Yates v. McCullough Iron Co., 69 Md. 370, 16 Atl. 280; Farwell v. Boston, etc., R. R. Co., 4 Met. 49, 38 Am. Dec. 339; Moody v. Hamilton Mfg. Co., 159 Mass. 70, 34 N. E. 185, 38 Am. St. Rep. 396; O'Connor v. Rich, 164 Mass. 560, 42 N. E. 111, 49 Am. St Rep. 483; Davis v. Detroit, etc., R. R. Co., 20 Mich. 105, 4 Am. Rep. 364; Randa v. Detroit Screw Works, 134 Mich. 343, 94 N. W. 454; Foster v. Minnesota R. R. Co., 14 Minn. 360; Neal v. Northern Pacific R. R. Co., 57 Minn. 365, 59 N. W. 312, 47 Am. St. Rep. 618; McMaster v. Illinois Cent. R. R. Co., 65 Miss. 264, 4 So. 59, 7 Am. St. Rep. 653; Louisville, etc., Ry. Co. v. Petty, 67 Miss. 255, 7 So. 351, 19 Am. St. Rep. 304; Harper v. Indianapolis, etc., R. R. Co., 47 Mo. 567, 4 Am. Rep. 353; Grattis v. Kansas City, etc., Ry. Co., 153 Mo. 380, 55 S. W. 108, 77 Am. St. Rep. 721, 48 L. R. A. 399; Hastings v. Montana Union Ry. Co., 18 Mont. 493, 46 Pac. 264; Hanley v. Grand Trunk Ry. Co., 62 N. H. 274; McLaine v. Head, etc., Co., 71 N. H. 294, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462; Harrison v. Central R. R. Co., 31 N. J. L. 293; Pfeiffer v. Dia-

protection of the community; and that, in view of the unjust consequences which may ensue from its application for injuries by co-servants, the same principles of public policy demand its limitation, and that while the general rule was demanded for the protection of the community, the exception is demanded for the protection of the employer, especially in view of the

logue, 64 N. J. L. 707, 46 Atl. 772; Cerillos Coal R. R. Co. v. Deserant, 9 N. M. 49, 49 Pac. 807; Sherman v. Rochester, etc., R. R. Co., 17 N. Y. 153; Hussey v. Coger, 112 N. Y. 614, 20 N. E. 556, 8 Am. St. Rep. 787, 3 L. R. A. 559; Vogel v. Am. Bridge Co., 180 N. Y. 373, 73 N. E. 1; Ponton v. Wilmington, etc., R. R. Co., 6 Jones, L. 245; Hobbs v. Atlantic, etc., R. R. Co., 107 N. C. 1, 12 S. E. 129, 9 L. R. A. 838; Eli v. Northern Pacific R. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97; Pittsburg, Ft. Wayne & Chicago R. R. Co. v. Devinney, 17 Ohio St. 197; Kelly Island L. & T. Co. v. Pachuta, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep. 706; Mast v. Kern, 34 Ore. 247, 54 Pac. 950, 75 Am. St. Rep. 580; Hays v. Millar, 77 Pa. St. 238, 18 Am. Rep. 445; Prescott v. Ball Engine Co., 176 Pa. St. 459, 35 Atl. 224, 53 Am. St. Rep. 683; Spees v. Boggs, 198 Pa. St. 112, 47 Atl. 875, 82 Am. St. Rep. 792, 52 L. R. A. 933; Hanna v. Granger, 18 R. I. 507, 28 Atl. 659; Sullivan v. Nicholson File Co., 21 R. I. 540, 45 Atl. 549; Murray v. R. R. Co., 1 McMullen, 385; Evans v. Chamberlain, 40 S. C. 104, 18 S. E. 213; Fox v. Sandford, 4 Sneed, 36, 67 Am. Dec. 587; Railroad Co. v. Jackson, 106 Tenn. 438, 61 S. W. 771; Houston, etc., Co. v. Miller, 51 Tex. 270; Galveston, etc., Ry. Co. v. Smith, 76 Tex. 611, 13 S. W. 562, 18 Am. St. Rep. 18; Stephani v. Southern Pac. Co., 19 Utah, 196, 57 Pac. 34; Hard v. Vermont, etc., R. R. Co., 32 Vt. 473; Norfolk, etc., R. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Richmond Locomotive Works v. Ford, 94 Va. 627, 27 S. E. 509; Sayward v. Carlson, 1 Wash. 29, 23 Pac. 830; Millett v. Puget Sound I. & S. Works, 37 Wash. 438, 79 Pac. 980; Berns v. Gaston Coal Co., 27 W. Va. 285, 55 Am. Rep. 304; Anderson v. Milwaukee R. R. Co., 37 Wis. 321; Wiskie v. Montello Granite Co., 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885; Railroad Co. v. Fort, 17 Wall. 553; Northern Pac. R. R. Co. v. Hambly, 154 U. S. 349, 14 S. C. Rep. 983, 38 L. Ed. 1009; Northern Pac. Ry. Co. v. Dixon, 194 U. S. 338, 24 S. C. Rep. 683, 48 L. Ed. 1006; Bartonshill Coal Co. v. Reid, 3 Macq., H. L. 266; Hutchinson v. Railway Co., 5 Exch. 343; Morgan v. Railway Co., L. R. 1 Q. B. 149; Hedley v. Pinkney & Sons S. S. Co., (1894) A. C. 222.

superior grade or rank. In some quarters a strong disposition has been manifested to hold the rule not applicable to the case of a servant who, at the time of the injury, was under the general direction and control of another, who was entrusted with duties of a higher grade, and from whose negligence the injury resulted.[23] But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it

[22] Flike v. Boston, etc., R. R. Co., 53 N. Y. 549, 552, 13 Am. Rep. 545; Farwell v. Boston, etc., Ry. Co., 4 Met. 49, 38 Am. Dec. 389.

[23] Little Miami R. R. Co. v. Stevens, 20 Ohio, 415; Cleveland, etc., R. R. Co. v. Keary, 3 Ohio St. 201. See these cases explained in Pittsburgh, etc., R. R. Co. v. Devinney, 17 Ohio St. 197. See also Louisville, etc., R. R. Co. v. Collins, 2 Duv. 114; Same v. Robinson, 4 Bush, 507; Toledo, etc., R. R. Co. v. O'Connor's Admx., 77 Ill. 391; Denver, etc., R. R. Co. v. Driscoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243; Wabash, etc., Ry. Co. v. Hawk, 121 Ill. 259, 12 N. E. 253, 2 Am. St. Rep. 82; Pittsburg Bridge Co. v. Walker, 170 Ill. 550, 48 N. E. 915; Nall v. Louisville, etc., Ry. Co., 129 Ind. 260, 28 N. E. 183; Baldwin v. St. Louis, etc., Ry. Co., 75 Ia. 297, 39 N. W. 507; Evans v. La. Lumber Co., 111 La. 534, 35 So. 736; Carlson v. N. W. Tel. Exch. Co, 63 Minn. 428, 65 N. W. 914; Peterson v. Am. Grass. Twine Co., 90 Minn. 343, 96 N. W. 913; Stephens v. Hannibal, etc., R. R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; Dayharsh v. Hannibal, etc., R. R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; Sullivan v. Hannibal, etc., R. R. Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. Rep. 388; Russ v. Wabash Western Ry. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; Union Pac. R. R. Co. v. Doyle, 50 Neb. 555, 70 N. W. 43; Logan v. North Carolina R. R. Co., 116 N. C. 940, 21 S. E. 959; Louisville, etc., R. R. Co. v. Northington, 91 Tenn. 56, 17 S. W. 880, 16 L. R. A. 268; Electric Ry. Co v. Lawson, 101 Tenn. 404, 47 S. W. 489; Missouri Pac. Ry. Co. v. Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867; Nix v. Texas Pac. Ry. Co., 82 Tex. 473, 18 S. W. 571, 27 Am. St. Rep. 897; Cunningham v. Union Pac. Ry. Co., 4 Utah, 206, 7 Pac. 795; Armstrong v. Oregon Short Line, etc., Co., 8 Utah, 420, 32 Pac. 693; Richmond Granite Co. v. Bailey, 92 Va. 554, 24 S. E. 232; Zintek v. Stinson Mill Co., 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055; Bailey v. Cascade Timber Co., 32 Wash. 319, 73 Pac. 385, Woods v. Lindvall, 48 Fed. 62, 1 C. C. A. 34; Chicago House Wrecking Co. v. Birney, 117 Fed. 72, 54 C. C. A. 458.

to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class. Nor on grounds of public policy could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful. And in this regard it can make little difference what is the grade of servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to report it. These views are supported by very numerous decisions, and the great weight of authority now is, that the mere fact that one servant has authority over another does not create an exception to the general rule that exempts the master from liability for an injury to one servant by the negligence of a fellow-servant.[24]

[24] St. Louis, etc., Ry. Co. v. Rice, 51 Ark. 467, 11 S. W. 639, 4 L. R. A. 173; Stephens v. Doe, 73 Cal. 26, 14 Pac. 378; Noyes v. Wood, 102 Cal. 389, 36 Pac. 766; Nixon v. Selby Smelting Co., 102 Cal. 458, 36 Pac. 803; Donovon v Ferris, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25; Sullivan v. New York, etc., R. R. Co., 62 Conn. 209, 25 Atl. 711; Whittlesey v. New York, etc., R. R. Co., 77 Conn. 100, 107 Am. St. Rep. 21; Chicago, etc., R. R. Co. v. Keefe, 47 Ill. 108, Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713; Columbus, etc., R. R. Co. v. Arnold, 31 Ind. 174, 99 Am. Dec. 615, Taylor v. Evansville, etc. R. R. Co., 121 Ind. 124, 22 N. E. 876, 16 Am. St. Rep. 372; Peterson v. Whitebreast, etc., Co., 50 Ia. 673, 32 Am. Rep. 143; Couley v. Portland, 78 Me. 217; Small v. Allington, etc., Mfg. Co., 94 Me. 551, 48 Atl. 177; O'Connell v. B. & O. R. R. Co., 20 Md. 212, 83 Am. Dec. 549; Hayes v. Western R. R. Co., 3 Cush. 270; Benson v. Goodwin, 147 Mass. 237, 17 N. E. 517; Moody v. Hamilton Mfg. Co., 159 Mass. 70, 72, 34 N. E. 185, 38 Am. St. Rep. 396; Kalleck v. Deering, 161 Mass. 469, 37 N. E. 450, 42 Am. St. Rep. 421; Caniff v. Blanchard, etc., Co., 66 Mich. 638, 33 N. W. 744; Harrison v. Detroit, etc., R. R. Co., 79 Mich. 409, 44 N. W

of the general rule the case of a servant injured by the negligence of another who, though employed in the same general

1034, 19 Am. St. Rep. 180, 7 L. R. A. 623; Randa v. Detroit Screw Works, 134 Mich. 343, 94 N. W. 454; Olson v. St. Paul, etc., Ry. Co., 38 Minn. 117, 35 N. W. 866; Lindvall v. Woods, 41 Minn, 212, 42 N. W. 1020, 4 L. R. A. 793; McMaster v. Illinois Cent. R. R. Co., 65 Miss. 264, 4 So. 59; Lagroue v. Mobile, etc., R. R. Co., 67 Miss. 592, 7 So. 432; Hastings v. Montana Union Ry. Co., 18 Mont. 493. 46 Pac. 264; McLaine v. Head, etc., Co., 71 N. H. 294, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462; O'Brien v. Am. Dredging Co., 53 N. J. L. 291, 21 Atl. 324; Gilmore v. Oxford Iron, etc., Co., 55 N. J L. 39, 25 Atl. 707; Enright v. Oliver, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710; Deserant v. Cerrillos Coal R. R. Co.,-9 N. M. 495, 55 Pac. 290; Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Hussey v. Coger, 112 N. Y. 614, 20 N. E. 556, 8 Am. St. Rep. 787, 3 L. R. A. 559; Keenan v. New York, etc., R. R. Co., 145 N. Y. 190, 39 N. E. 711, 45 Am. St. Rep. 604; Quigley v. Levering, 167 N. Y. 58, 60 N. E. 276, 54 L. R. A. 62; Malbie v. Belden, 167 N. Y. 307, 60 N. E. 645, 54 L. R. A. 52; Vogel v. Am. Bridge Co., 180 N. Y. 373, 73 N. E. 1; Kirk v. Railway Co., 94 N. C. 625, 55 Am. Rep. 621; Eli v. Northern Pac. R. Co.. 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97; Pittsburgh, etc., R. R. Co. v. Devinney, 17 Ohio St. 197; Kelly Island L. & T. Co. v. Pachuta, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep. 706; Mast v. Kern, 34 Ore. 247, 54 Pac. 950, 75 Am. St. Rep. 580; Johnson v. Portland Stone Co., 40 Ore. 436, 67 Pac. 1013, 68 Pac. 425; Keystone, etc., Co. v. Newbury, 96 Pa. St. 246, 42 Am. Rep. 543; Spancake v. Philadelphia, etc., R. R. Co., 148 Pa. St. 184, 23 Atl. 1006, 33 Am. St. Rep. 821; Prevost v. Citizens' Ice, etc., Co., 185 Pa. St. 617, 40 Atl. 88, 64 Am. St. Rep. 659; Duffy v. Platt, 205 Pa. St. 296, 54 Atl. 1000; Di Marcho v. Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328; Morgridge v. Prov. Telephone Co., 20 R. I. 386, 39 Atl. 328, 78 Am. St. Rep. 879; Brabham v. Am. Tel. Tel. Co., 71 S. C. 53, 50 S. E. 716; Allen v. Goodwin, 92 Tenn. 385, 21 S. W. 760; Hard v. Vermont, etc., R. R. Co., 32 Vt. 473; Moore Lime Co. v. Richardson, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; Russell Creek Coal Co. v. Wells, 96 Va. 416, 31 S. E. 614; Mathews v. Case, 61 Wis. 491, 50 Am. Rep. 151; Wiskie v. Montello Granite Co., 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885; Okonski v. Pennsylvania, etc., Fuel Co., 114 Wis. 448, 90 N. W. 429; Northern Pac. R. R. Co. v. Peterson, 162 U. S. 346, 16 S. C. Rep. 843, 40 L. Ed. 994; Alaska Min. Co. v. Whelan, 168 U. S. 86, 18 S. C. Rep. 40, 42 L. Ed. 390; Kansas, etc., Ry. Co. v. Waters. 70 Fed. 28, 16 C. C. A. 609; Balch v. Haas, 73 Fed. 974,

case of a laborer on the track of a railroad injured by the carelessness of an engine driver;[25] a carpenter employed on buildings injured by the negligence of a yardmaster in making up trains; and the like.[26] But in the main the authorities agree that the general rule must apply to such cases, and that, on the reasons on which the rule is rested, they cannot be distinguished from those in which the service of both persons was in the same line.[27] Where the persons composing a ship's company were divided into three classes called departments: (1) The deck department, comprising the first and second officers, the purser, the carpenter and the sailors; (2) the engineer's department, comprising the engineers, firemen and coal

20 C. C. A. 151; McDonald v. Buckley, 109 Fed. 290, 48 C. C. A. 372.

[25] See Nashville, etc., R. R. Co. v. Carroll, 6 Heisk, 347; Ryan v. Chicago, etc., R. R. Co., 60 Ill. 171, 14 Am. Rep. 32; Toledo, etc., R. R. Co. v. Moore, 77 Ill. 217; Chicago, etc., Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; North Chicago, etc., Co. v. Johnson, 114 Ill. 57; Chicago, etc., Co. v. Hoyt, 122 Ill. 369, 12 N. E. 225; Fay v. Minn., etc., Co., 30 Minn. 231; Tierney v. Minn., etc., Co., 33 Minn. 311; Davis v. Centr. Vt., etc., Co., 55 Vt. 84, 45 Am. Rep. 590; St. Louis, etc., Co. v. Harper, 44 Ark. 524; Calvo v. Railroad Co., 23 S. C. 526, 55 Am. Rep. 28; St. Louis, etc., Co. v. Weaver, 35 Kan. 412, 57 Am. Rep. 176; Miss., etc., Co. v. Dwyer, 36 Kan. 58, 12 Pac. 352; Houston, etc., Co. v. Marcelles, 59 Tex. 334; Texas, etc., Co. v. Kirk, 62 Tex. 227; James v. Emmet Min. Co., 55 Mich. 335; Condon v. Miss., etc., Co., 78 Mo. 567; Kentucky, etc., Co. v. Ackley, 87 Ky. 278, 8. S. W. 691. See elaborate notes on who are fellow servants, to McLeod v. Ginther, 8 A. & E. R. R. Cas. 162; Chicago, etc., Co. v. Ross, 17 A. & E. R. R. Cas. 514.

[26] Morgan v. Railway Co., L. R. 1 Q. B. 149.

[27] Smoot v. Mobile, etc., R. R. Co., 67 Ala. 13; Capper v. Louisville, etc., R. R. Co., 103 Ind. 305; Holden v. Fitchburg, etc., R. R. Co., 129 Mass. 268, 37 Am. Rep. 343; Mackin v. Boston, etc., R. R. Co., 135 Mass. 201, 46 Am. Rep. 456; Smith v. Potter, 46 Mich. 258; Roberts v. Chicago, etc., R. R. Co., 33 Minn. 218; Connelly v. Minn., etc. R. R. Co., 38 Minn. 80, 35 N. W. 582; Chicago, etc., R. R. Co. v. Doyle, 60 Miss. 977; Railroad Co. v. Fitzpatrick, 42 Ohio St. 318; New York, etc., R. R. Co. v. Bell, 112 Pa. St. 400; East Tenn., etc., R. R. Co. v. Rush, 15 Lea, 145; Dallas v. Gulf, etc., R. R. Co., 61 Tex. 196; Houston, etc., R. R. Co. v. Rider, 62 Tex. 267; Toner v. Chicago, etc., R. R. Co., 69 Wis. 188, 31 N. W. 104, 33 N. W. 433; Randall v. Baltimore, etc., R. R. Co., 109 U. S. 478.

that the division was for convenience of administration merely, and that the members of all departments were fellow-servants.[28] The crews on different trains, operated by the same company are fellow-servants.[29] Those who load cars or whose duty it is to see that they are properly loaded are held to be fellow-servants of those who move them.[30] But those who inspect and repair cars and engines are generally held not to be fellow-servants of those who operate them.[31] All employes of the same master engaged in the erection of a building are fellow-servants, though they may be doing different lines of

[28] Quebec S. S. Co. v. Merchant, 133 U. S. 375, 10 S. C. Rep. 397, 33 L. Ed. 656. The stewardess was injured by the negligence of the carpenters and it was held there was no liability.

[29] Denver, etc., R. R. Co. v. Sipes, 23 Colo. 226, 47 Pac. 287; McMaster v. Illinois Central, etc., R. R. Co., 65 Miss. 264, 4 So. 59, 7 Am. St. Rep. 653; Relyea v. Kansas City, etc., R. R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; Miller v. Central R. R. Co., 69 N. J. L. 413, 55 Atl. 245; Healey v. New York, etc., R. R. Co., 20 R. I. 136, 37 Atl. 676; Norfolk, etc., R. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Oakes v. Mase, 165 U. S. 363, 17 S. C. Rep. 345, 41 L. Ed. 747; Northern Pac. R. R. Co. v. Poirier, 167 U. S. 48, 17 S. C. 741, 42 L. Ed. 72; St. Louis, etc., Ry. Co. v. Needham, 63 Fed. 107, 11 C. C. A. 56; Northern Pac. R. R. Co. v. Mase, 63 Fed. 114, 11 C. C. A. 63; Rosney v. Erie R. R Co., 135 Fed 311, — C. A. A. —. *Contra:* Kentucky Central R R. Co. v. Ackley, 87 Ky. 278, 8 S. W. 691, 12 Am. St. Rep. 480; Daniel v. Chesapeake, etc., Ry Co., 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870, 16 L. R. A. 383.

[30] Byrnes v. New York, etc., R. R. Co., 113 N. Y. 251, 21 N. E. 50, 4 Am. St. Rep. 151; Ford v. Lake Shore, etc., R. R. Co., 117 N. Y. 638, 22 N. E. 946; Galveston, etc., Ry. Co. v. Farmer, 73 Tex. 85, 11 S. W. 156. *Contra:* Atchison, etc., R. R. Co. v. Seeley, 54 Kan. 21, 37 Pac. 104.

[31] Chicago, etc., R. R. Co. v. Hoyt, 122 Ill. 369, 12 N. E. 225; Marsh v. Lehigh Valley R. R. Co., 206 Pa. St. 558, 56 Atl. 52; International, etc., Ry. Co. v. Kernan, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; Daniels v. Union Pac. Ry. Co., 6 Utah, 357, 23 Pac. 762; Norfolk, etc., Ry. Co. v. Phillips, 100 Va. 362, 41 S. E. 726; Terre Haute, etc., R. R. Co. v. Mansberger, 65 Fed. 196, 12 C. C. A. 574; Texas, etc., Ry. Co. v. Barrett, 67 Fed. 214, 14 C. C. A. 373; Texas, etc., Ry. Co. v. Thompson, 70 Fed. 944, 17 C. C. A. 524. See Philadelphia, etc., R. R. Co. v. Hughes, 119 Pa. St. 301, 13 Atl. 286.

who are employed by the same master on any particular work or enterprise, although there may be graduations of rank, or different lines of work, or they may be divided into different squads or gangs.[33] But the workmen of different contractors or masters who are working on the same building or job, or otherwise for the same proprietor on the same premises, are not fellow-servants.[34]

The doctrine that servants in different departments of the master's business are not fellow-servants has probably had its chief development in Illinois, and the doctrine as now held in that state is not so much a question of departments as of association in the work of the master and of opportunity to influence one another to caution and to guard against each other's negligence. In order to constitute two employes of the same master fellow-servants, it is held to be "essential that they should be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their duties shall bring them into habitual association so that they may exercise an influence upon each other, promotive of proper caution."[35] The Illinois rule prevails in Nebraska, Kentucky

[32] Hoar v. Merritt, 62 Mich. 386, 29 N. W. 15; Enright v. Oliver, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710; Omstead v. Raleigh, 130 N. C. 243, 41 S. E. 292.

[33] World's Columbian Exposition v. Lehigh, 196 Ill. 612, 63 N. E. 1089; Ryan v. McCully, 123 Mo. 636, 27 S. W. 533; Pfeiffer v. Dialogue, 64 N. J. L. 707, 46 Atl. 772; Maher v. McGrath, 58 N. J. L. 469, 33 Atl. 945; Buck v. N. J. Zinc Co., 204 Pa. St. 132, 53 Atl. 740, 60 L. R. A. 453; Neal v. Northern Pac. R. R. Co., 57 Minn. 365, 59 N. W. 312, 47 Am. St. Rep. 618.

[34] John Spry Lumber Co. v. Duggan, 182 Ill. 218, 54 N. E. 1002; Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Jansen v. Jersey City, 61 N. J. L. 243, 39 Atl. 1025; Sanford v. Standard Oil Co., 118 N. Y. 571, 24 N. E. 313, 16 Am. St. Rep. 787; McCafferty v. Dock Co., 11 Ohio C. C. 457; Johnson v. Linsday, (1891) A. C. 371; Cameron v. Nystrom, (1893) A. C. 308.

[35] Pagels v. Meyer, 193 Ill. 172, 176, 179, 61 N. E. 1111. See also Chicago, etc., R. R. Co. v. Hoyt, 122 Ill. 369, 12 N. E. 225; Joliet Steel Co. v. Shields, 134 Ill. 209, 25 N. E. 569; Peoria, etc., Ry. Co. v. Rice, 144 Ill. 227, 33 N. E. 951; Joliet Steel Co. v. Shields, 146 Ill. 603, 34 N. E. 1108; Chicago City Ry. Co. v. Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216. In World's Columbian Exposition v. Lehigh, 196 Ill. 612, 63 N. E. 1089,

The Illinois doctrine is expressly repudiated in many of the states and is not generally regarded in determining who are fellow-servants.[39]

§ 280. Negligence of servant in distinct business. As the servant only undertakes to assume the hazards of his own employment, it must follow that if the master carries on another and wholly distinct business, an injury occasioned by the negligence of a servant in such other business, not being within the contemplation of the employment, will give ground for an action under the same circumstances which would render liable any stranger who might have been the employer of the negligent servant. In a Washington case, where a mining company had two tunnels, each in charge of a superintendent, one being 800 feet above the other on the side of a mountain, the men employed in the different tunnels were held not to be fellow-servants in a case where an employe in the lower tunnel was injured by a rock negligently discharged from the upper tunnel.[40] Here the two tunnels were regarded as distinct businesses. The crews of two vessels, navigating the high seas, though the vessels belong to the same company, are not fellow-servants.[41] And two departments of the same service may be

members of different gangs under the same foreman were held to be fellow servants.

[36] Union Pac. R. R. Co. v. Erickson, 41 Neb. 1, 16, 59 N. W. 347, 29 L. R. A. 137; Angel v. Jellico Coal Min. Co., 115 Ky. 728, 74 S. W. 714; Daniels v. Union Pac. Ry. Co., 6 Utah, 357, 23 Pac. 762. And see Fisher v. Oregon Short Line, 22 Ore. 533, 30 Pac. 425, 16 Am. St. Rep. 519.

[37] East Tennessee, etc., R. R. Co. v. De Armond, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. Rep. 816; Louisville, etc., R. R. Co v. Lahr, 86 Tenn. 335 6. S. W. 063; Railroad Co. v. Jackson, 106 Tenn. 438, 61 S. W. 771; Freeman v. Railroad Co., 107 Tenn. 340, 64 S. W. 1: Stuber v. Louisville, etc., R. R. Co., 113 Tenn. 305, 87 S. W. 411

[38] Coal Creek Min. Co. v. Davis, 90 Tenn. 711, 18 S. W. 387; Virginia Iron, etc., Co. v. Hamilton, 107 Tenn. 705, 65 S. W. 401.

[39] See Colley v. Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932; Brodeur v. Valley Falls Co., 16 R. I. 448, 17 Atl. 54; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342.

[40] Uren v. Golden Tunnel Min. Co., 24 Wash. 261, 64 Pac. 174.

[41] The Petrel, L. R. (1893) Prob. 320.

ments so far separated from each other as to exclude the probability of contact, and of danger from the negligent performance of their duties by employes of the different departments? If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow-servant in such other department."[42]

§ 281. Test of who are fellow-servants. According to some authorities the test of liability is to be found in whether the servants in question were engaged in a common employment. "All serving a common master, working under the same control, deriving authority and compensation from the same source and engaged in the same general business, although in different grades and departments, are fellow-servants, and take the risk of each other's negligence."[43] The rule has been variously phrased,[44] but the gist of it is that those engaged in a common service or employment are fellow-servants.[45] As to what constitutes a common service or employ-

[42] Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 207, 21 S. E. 342. And see cases cited in the following section.

[43] Norfolk, etc., R. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342; Wonder v. Baltimore, etc., R. R. Co., 32 Md. 411, 3 Am. Rep. 143.

[44] "When persons are employed in a common undertaking, all sustain toward each other the relation of fellow servants when exercising only the ordinary duties of their employment, even when they cannot see each other, or are working apart and not in conjunction." Wilson v. Charleston, etc., Ry. Co., 51 S. C. 79, 96, 28 S. E. 91. All engaged in a common service are fellow servants. Northern Pac. R. R. Co. v. Peterson, 162 U. S. 346, 16 S. C. Rep. 843, 40 L Ed. 994.

[45] Colley v. Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932; Enright v. Oliver, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710; Wilson v. Charleston, etc., Ry. Co., 51 S. C. 79, 28 S. E. 91; Norfolk, etc., R. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342; Quebec S. S. Co. v. Merchant, 133 U. S. 375, 10 S. C. Rep. 397, 33 L. Ed. 656; Baltimore, etc., R. R. Co. v. Baugh, 149 U. S. 368, 13 S. C. Rep. 914, 37 L. Ed. 772; Northern Pac. R. R. Co v. Peterson, 162 U. S. 346, 16 S. C. Rep. 843, 40 L. Ed. 994; Northern Pac. R. R. Co. v. Charliss, 162 U. S. 359, 16 S. C. Rep. 848, 40 L. Ed.

city, ought to foresee when accepting their employment that his negligence would probably expose them to injury."[46] And this is the test of common employment generally adopted and approved.[47] But in a multitude of cases in which a recovery has been sustained the servant injured and the servant by whose fault the injury happened, were engaged in a common employment within the definition. Therefore, the question of common employment is not decisive. We have already seen that the question of grade or rank is not a satisfactory test, although it has been applied in many cases, especially in the earlier ones.[48]

The tendency of the modern authorities, in determining the question of liability or assumption of risk, is to consider the nature of the act or omission from which the injury results. "The test whether the individual employes concerned were fellow-servants is not found in the fact that they were engaged in a common employment under the same general control and paid by the same principal, but is whether the negligent servant, in the act or omission complained of, represented the master in the performance of any duty owed by the master to the servant injured. The responsibility of the master is determined by the nature of the act in question, and not by a difference in rank or grade of service between particular servants."[49] The rule "now unquestionably established and supported by the great weight of authority, both in this country and in England, is that the liability of the master depends

999; Alaska Min. Co. v. Whelan, 168 U. S. 86, 18 S. C. Rep. 40, 42 L. Ed. 390.

[46] Mann v. O'Sullivan, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149. And see Baird v. Pettit, 70 Pa. St. 477, 482; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342.

[47] Farwell v. Boston, etc., R. R. Co., 4 Met. 49, 38 Am. Dec. 389; The Petrel, L. R. (1893) Prob. 320; Morgan v. Vale of Neath. Ry. Co., 5 B. & S. 570, 580; S. C. affirmed, L. R. 1 Q. B. 149; Bartonshill Coal Co. v. Reid, 3 Macq H. L. C. 266.

[48] *Ante*, § 278.

[49] McLaine v. Head, etc., Co., 71 N. H. 294, 295, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462.

employe. * * * The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master, or is the act of a co-servant, is, was the offending employe in the performance of the master's duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows; if not, he was a mere co-servant, engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or to his control over them."[50] These views are supported by a multitude of cases, many of which have already been referred to in the sections treating of the master's duties to the servant.[51]

[50] Mast v. Kern, 34 Ore. 247, 250, 252, 54 Pac. 950, 75 Am. St. Rep. 580.

[51] Alabama Gt. So. Ry. Co. v. Vail, 142 Ala. 134; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Shelton v. Pacific Lumber Co., 140 Cal. 507, 74 Pac. 13; Deep Min. & Dr. Co. v. Fitzgerald, 21 Colo. 533, 43 Pac. 210; Carleton M. & M. Co. v. Ryan, 29 Colo. 401, 68 Pac. 279; McElligott v. Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; Kelly v. New Haven Steamboat Co., 74 Conn. 343, 50 Atl. 871, 92 Am. St. Rep. 220, 57 L. R. A. 494; Brennan v. Berlin Iron Bridge Co., 74 Conn. 382, 50 Atl. 1030; Peterson v. New York, etc., R. R. Co., 77 Conn. 351, 59 Atl. 502; Chicago, etc., R. R. Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826; Chicago, etc., R. R. Co. v. Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396; Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713; Chicago Union Traction Co. v. Sawusch, 218 Ill. 130; Schillinger Bros. Co. v. Smith, 225 Ill. 74; Taylor v. Evansville, etc., R. R Co., 121 Ind. 124, 22 N. E. 876, 16 Am. St. Rep. 372; Nall v. Louisville, etc., Ry. Co., 129 Ind. 260, 28 N. E. 183; Justice v. Pennsylvania Co., 130 Ind. 321, 30 N. E. 303; Scott v. Chicago, etc., Ry. Co., 113 Ia. 381, 85 N. W. 631; Beresford v. Am. Coal Co., 124 Ia. 34, 98 N. W. 902; Collingwood v. Ill. & Ia. Fuel Co., 125 Ia. 537, 101 N. W. 283; Atchison, etc., R. R. Co. v. Seeley, 54 Kan. 21, 37 Pac. 104; Small v. Allington, etc., Mfg. Co., 94 Me. 551, 48 Atl. 177; Sadowski v. Michigan Car Co., 84 Mich. 100, 47 N. W. 598; Wellihan v. National Wheel Co., 128 Mich. 1, 87 N. W. 75; Mikolojczak v. North Am. Chemical Co., 129 Mich. 80, 88 N. W. 75; Randa v. Detroit Screw Works, 134 Mich. 343, 94 N. W. 454; Page v. Battle Creek Pure Food Co., 142 Mich. 17; Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793; McLaine v. Head, etc., Co., 71 N. H. 294, 52

rule as to assumption of risk and the burden is on the plaintiff

Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462; Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604; Smith v. Erie R. R. Co., 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302; Burns v. Delaware, etc., Tel. & Tel. Co., 70 N. J. L. 745, 59 Atl. 220, 67 L. R. A. 956; Hussey v. Coger, 112 N. Y. 616, 20 N. E. 556, 8 Am. St. Rep. 787, 3 L. R. A. 559; Hankins v. New York, etc., R. R. Co., 142 N. Y. 416, 37 N. E. 466, 40 Am. St. Rep. 616, 25 L. R. A. 396; Vogel v. Am. Bridge Co., 180 N. Y. 373, 73 N. E. 1; Eli v. Northern Pacific R. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97; Mast v. Kern, 34 Ore. 247, 54 Pac. 950, 75 Am. St. Rep. 580; Brunell v. Southern Pac. Co., 34 Ore. 256, 56 Pac. 129; Wagner v. Portland, 40 Ore. 389, 60 Pac. 985, 67 Pac. 300, 91 Am. St. Rep. 485; Ross v. Walker, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160; Prevost v. Citizens' Ice, etc., Co., 185 Pa. St. 617, 40 Atl. 88, 64 Am. St. Rep. 659; Ricks v. Flynn, 196 Pa. St. 263, 46 Atl. 360; Casey v. Pa. Asphalt Pav. Co., 198 Pa. St. 348, 47 Atl. 1128; Hughes v. Leonard, 199 Pa. St. 123, 48 Atl. 862; Morgridge v. Providence Tel. Co., 20 R. I. 386, 39 Atl. 328, 78 Am. St. Rep. 879; Vartaman v. New York, etc., R. R. Co., 25 R. I. 398, 56 Atl. 184; Wilson v. Charleston, etc., Ry. Co., 51 S. C. 79, 28 S. E. 91; Louisville, etc., R. R. Co. v. Lahr, 86 Tenn. 335, 6 S. W. 663; Allen v. Goodwin, 92 Tenn. 385, 21 S. W. 760; Railroad Co. v. Bolton, 99 Tenn. 273, 41 S. W. 442; Gann v. Railroad Co., 101 Tenn. 380, 47 S. W. 493, 70 Am. St. Rep. 687; Ohio Riv., etc., Ry. Co. v. Edwards, 111 Tenn. 31, 76 S. W. 897; Galveston, etc., Ry. Co. v. Smith, 76 Tex. 611, 13 S. W. 562, 18 Am. St. Rep. 78; Merrill v. Oregon Short Line, 29 Utah, 264; Norfolk, etc., R. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342; Southern Ry. Co. v. Manzy, 98 Va., 692, 37 S. E. 285; Norfolk, etc., Ry. Co. v. Phillips, 100 Va. 362, 41 S. E. 726; McDonough v. Great Northern Ry. Co., 15 Wash. 244, 46 Pac. 334; Jackson v. Norfolk, etc., R. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; Dwyer v. Am. Express Co., 82 Wis. 307, 52 N. W. 304, 33 Am. St. Rep. 44; Kliegel v. Weisel, etc., Mfg. Co., 84 Wis. 148, 53 N. W. 1119; Wiskie v. Mantello Granite Co., 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885; Okonski v. Pa., etc., Coal Co., 114 Wis. 448, 90 N. W. 429; Horn v. La Crosse Box Co., 123 Wis. 399, 101 N. W. 935; Baltimore, etc., R. R. Co. v. Baugh, 149 U. S. 368, 387, 13 S. C. Rep. 914, 37 L. Ed. 772. See Northern Pac. R. R. Co. v. Peterson, 162 U. S. 346, 16 S. C. Rep. 843, 40 L. Ed. 994; Northern Pac. R. R. Co. v. Charliss, 162 U. S. 359, 16 S. C. Rep.

the question of who are fellow-servants is one of law for the court,[53] but ordinarily it is a mixed question of law and fact. "It is for the court by proper instructions, to explain and define the relation of fellow-servants, so far as it is capable of legal definition, and for the jury, in considering the evidence, to determine whether the relation as thus defined, in fact existed."[54]

§ 282. **Effect of master's promise to repair or remove defect or danger.** If the master promises to repair the defect or remove the danger he thereby assumes the risk arising therefrom, and the servant may continue for a reasonable time at the master's risk.[55] If the servant, having a right to abandon

848, 40 L. Ed. 999; Alaska Treadwell Gold Min. Co. v. Whelan, 64 Fed. 462, 12 C. C. A. 225.

[52] Chicago City Ry. Co. v. Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216; McGowan v. St. Louis, etc., R. R. Co., 61 Mo. 528.

[53] Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; West Chicago, etc., R. R. Co. v. Dwyer, 162 Ill. 482, 44 N. E. 815; Whitmore v. Boston, etc., R. R. Co., 150 Mass. 477, 23 N. E. 220; McGinty v. Athol Reservoir Co., 155 Mass. 183, 187, 29 N. E 510; Neal v. Northern Pac. R. R. Co., 57 Minn. 365, 369, 59 N. W. 312; Relyea v. Kansas City, etc., R. R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; National Fertilizer Co. v. Travis, 102 Tenn. 16, 49 S. W. 832; East Tennesse, etc., R. R. Co. v. De Armond, 86 Tenn 73, 5 S. W. 600, 6 Am. St. Rep 816; Quebec S. S. Co. v. Merchant, 133 U. S. 375.

[54] Lake Erie, etc., R. R. Co. v. Middleton, 142 Ill. 550, 32 N. E. 453; Wilson v. Charleston, etc., Ry. Co., 5 S. C. 79, 28 S. E. 91. "The definition of fellow servants is a question of law. Whether a given case falls within that definition is a question of fact." Chicago, etc., R. R. Co. v. Swan, 176 Ill. 424, 439, 52 N. E. 916.

[55] Anderson v. Seropian, 147 Cal. 201, Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. 714; Chicago, etc., Co. v. Van Dam, 149 Ill. 337, 36 N. E. 1024; Taylor v. Felsing. 164 Ill. 331, 45 N. E. 161; Gunning System v. Lapointe, 212 Ill. 274, 72 N. E. 393; McFarlan Carriage Co. v. Potter, 153 Ind. 107. 53 N. E. 465; Foster v. Chicago, etc., Ry. Co., 127 Ia. 84; Southern Kansas Ry. Co. v. Crocker, 41 Kan. 747, 21 Pac. 785, 13 Am. St. Rep. 320; Missouri, etc., Ry. Co. v. Puckett, 62 Kan. 770, 64 Pac. 631; Atchison, etc., Ry. Co. v. Sledge, 68 Kan. 321, 74 Pac. 1111; Breckenridge Co. v. Hicks, 94 Ky. 362. 22 S. W. 554, 42 Am. St. Rep. 361; Brown v. Levy, 108 Ky. 163, 55 S. W. 1079; Roux v. Blodgett, etc., Co., 85 Mich. 519, 48 N. W. 1092, 24 Am. St. Rep. 102, 13 L. R. A. 728; Lyberg v. Northern Pac. R. R. Co., 39 Minn. 15, 38 N. W. 632;

the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding be-

Rothenberger v. N. W. Consol. M. Co., 57 Minn. 461, 59 N. W. 531; Smith v. Backus Lumber Co., 64 Minn. 447, 67 N. W. 358; Gray v. Red Lake Falls Lumber Co., 85 Minn. 24, 88 N. W. 24; Taylor v. Nevada, etc., Ry. Co., 26 Nev. 415, 55 Pac. 828; Dunkerly v. Webendorfer Machine Co., 71 N. J. L. 160; Rice v. Eureka Paper Co., 174 N. Y. 385, 66 N. E. 979, 95 Am. St. Rep. 585; Jones v. New Am. File Co., 21 R. I. 125, 42 Atl. 509; Collins v. Harrison, 25 R. I. 489, 56 Atl. 678, 64 L. R. A. 156; Bodie v. Charleston, etc., Ry. Co., 61 S. C. 468, 39 S. E. 715; Powers v. Standard Oil Co., 53 S. C. 358, 31 S. E. 276; Trotter v. Furniture Co., 101 Tenn. 257, 47 S. W. 425; Railroad Co. v. Kenley, 92 Tex. 207, 21 S. W. 326; Texas, etc., R. R. Co. v. Bingle, 91 Tex. 287, 42 S. W. 971; Hilje v. Hettich, 95 Tex. 321, 67 S. W. 90; Virginia, etc., Co. v. Chalkley, 98 Va. 62, 34 S. E. 976; Newport News Pub. Co. v. Beaumeister, 102 Va. 677, 47 S. E. 821; Virginia, etc., Co. v. Harris, 103 Va. 708, 49 S. E. 991; Crooker v. Pacific, etc., Co., 29 Wash. 30, 69 Pac. 359; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 447, 9 Am. St. Rep. 806; Erdman v. Illinois Steel Co., 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 66; Maitland v. Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137; Yerkes v. Northern Pac. Ry. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961; New Jersey, etc., R. R. Co. v. Young, 49 Fed. 723, 1 C. C. A. 428. In Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 103, it is held that the master does not necessarily assume the risk by making the promise but that it is a question of fact as to which assumes the risk in such cases. The rule does not apply to a servant who is to execute the repairs. Shackelton v. Manistee, etc., R. R. Co., 107 Mich. 16, 64 N. W. 728. The promise need not be made to plaintiff in person but, if made to others and communicated to plaintiff it is sufficient. Odin Coal Co. v. Tadlock, 216 Ill. 624, 75 N. E. 322. So if made to a body or gang of workmen, though not addressed to any one in particular. Atchison, etc., R. R. Co. v. Sadler, 38 Kan. 198, 16 Pac. 46.

What is a reasonable time during which the servant may continue work at the master's risk, while awaiting the fulfillment of the promise to repair, is a question of fact for the jury.[57] After a reasonable time has elapsed, or, if a definite time is fixed, then after that has expired, the risk is again upon the servant.[58] Though the risk is on the master, the servant must exercise a reasonable degree of care in view of the danger to which he is exposed.[59] If the danger is obvious and such

[56] See Patterson v. Wallace, 1 Macq. H. L. 748, S. C. 28 Eng. L. & Eq. 48; Laning v. N. Y. Cent. R. R. Co., 49 N. Y. 521; Patterson v. Pittsburgh, etc., R. R. Co., 76 Penn. St. 389, 18 Am. Rep. 412; Conroy v. Vulcan Iron Works, 6 Mo. App. 102. The master is liable if the defect or danger is such that an ordinarily prudent servant would continue at the work after promise. Hough v. Railway Co., 100 U. S. 213. Otherwise not. Dist. of Col. v. McElligott, 117 U. S. 621. If in the particular case the business of the master is entrusted to another, his assurance must be taken as that of the master himself, but the assurance of any subordinate servant could not be so taken. Fort Wayne, etc., R. R. Co. v. Gildersleeve, 33 Mich. 133. See Wilson v. Winona, etc., Co., 37 Minn. 326, 33 N. W. 908; Indiana, etc., Co. v. Watson, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824.

[57] Rothenberger v. N. W. Consolidated Milling Co., 57 Minn. 461, 59 N. W. 531; Smith v. Backus Lumber Co., 64 Minn. 447, 67 N. W. 358; Taylor v. Nevada, etc., Ry. Co., 26 Nev. 415, 55 Pac. 828; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 447, 9 Am. St. Rep. 806.

[58] Eureka, etc., Co. v. Buss, 81 Ala. 220; Rice v. Eureka Paper Co, 174 N. Y. 385, 66 N. E. 979, 95 Am. St. Rep. 585; Jones v. New Am. File Co., 21 R. I. 125, 42 Atl. 509; Trotter v. Furniture Co., 101 Tenn. 257, 47 S. W. 425; Texas, etc., R. R. Co. v. Bingle, 91 Tex. 287, 42 S. W. 971; Hilje v. Hettich, 95 Tex. 321, 67 S. W. 90; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 447, 9 Am. St. Rep. 806. Where the repairs could have been made in two or three hours and the plaintiff was injured on the fourth day, the reasonable time was held to have expired. Gunning System v. Lapointe, 212 Ill. 274, 72 N. E. 393.

[59] Jones v. New Am. File Co., 21 R. I. 125, 42 Atl. 509; Collins v. Harrison, 25 R. I. 489, 56 Atl. 678, 64 L. R. A. 156; Gulf, etc., Ry. Co. v. Brentford, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377; Johnson v. Anderson, etc., Co., 31 Wash. 554, 72 Pac. 107. See Missouri, etc., Ry. Co. v. Puckett, 62 Kan. 770, 64 Pac. 631. Where the promise is to repair at a definite time the servant may assume that the repairs have been made as promised. Olney v. Boston, etc., R. R. Co., 71 N. H. 427, 52 Atl. 1097; Nelson v. Shaw, 102 Wis. 274, 78 N. W. 417. *Contra:* Schultz

§ 283. Negligence of master and fellow-servant combined. If a servant is injured by the negligence of a fellow-servant and that of the master combined, he may recover of the master for the injury,[61] for the master is at least one of two joint

v. Rohe, 149 N. Y. 132, 43 N. E. 420. If the repairer assures the servant that the repairs are made and that the machine is all right he may rely upon the assurance. Lawrence v. Hagemeyer, 93 Ky. 591, 20 S. W. 704.

[60] Taylor v. Felsing, 164 Ill. 331, 45 N. E. 161; Gunning System v. Lapointe, 212 Ill. 274, 72 N. E. 393; Indianapolis, etc., Ry. Co. v. Watson, 114 Ind. 20, 14 N. E. 721, 5 Am. St. Rep. 578; Meador v. Lake Shore, etc., Ry. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384; Atchison, etc., Ry. Co. v. Sledge, 68 Kan. 321, 74 Pac. 1111; Shemwell v. Owensboro, etc., R. R. Co., 117 Ky. 556; Newport News Pub. Co. v. Beaumeister, 102 Va. 677, 47 S E. 821; Virginia, etc., Co. v. Harris, 103 Va. 708, 49 S. E. 991; Erdman v. Illinois Steel Co., 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 66.

[61] Paulmier v. Erie R. R. Co., 34 N. J. L. 151; Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700; Pittsburgh, etc., Co. v. Henderson, 37 Ohio St. 549; Cone v. Del., etc., Co., 81 N. Y. 206, 37 Am. Rep. 491; Ellis v. New York, etc., Co., 95 N. Y. 546; Stringham v. Stewart, 100 N. Y. 516; Booth v. Boston, etc., Co., 73 N. Y. 38; Elmer v. Locke, 135 Mass. 575; Tanner v. Harper, 32 Colo. 156, 75 Pac. 404; Colley v. Southern Cotton Oil Co., 120 Ga. 258. 47 S. E. 932: Armour v. Golkowska, 202 Ill. 144, 66 N. E. 1037; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; Siegel, Cooper & Co. v. Treka, 218 Ill. 559; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Buehner v. Creamery Package Co., 124 Ia. 445, 100 N. W. 345, 104 Am. St. Rep. 354; Schwarzschild v. Drysdale, 69 Kan. 119, 76 Pac. 441; McGinn v. McCormick, 109 La. 396, 33 So. 382; Fuller v. Tremont Lumber Co., 114 La. 266, 38 So. 164; McDonald v. Mich. Cent. R. R. Co. 108 Mich. 7, 65 N. W. 597; Noble v. Bessemer S. S. Co., 127 Mich. 103, 86 N. W. 520, 89 Am. St. Rep 461, 54 L. R. A. 456; Young v Shickle, etc., Co., 103 Mo. 324, 15 S. W. 771; Cole v. St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Freeman v. Sand Couler Coal Co., 25 Mont. 194, 64 Pac. 347; Matthews v. Clough, 70 N. H. 600, 49 Atl. 637; Campbell v. Gillespie Co., 69 N. J. L. 279, 55 Atl. 276; Coppins v. New York Central, etc., R. R. Co., 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523; Kaiser v. Flaccus, 138 Pa. St. 332, 22 Atl. 88; St. Louis, etc., Ry. Co. v. McClain, 80 Tex. 85, 15 S. W. 789; Wright v. Southern Pac. Co., 14 Utah, 383, 46 Pac. 374; Jenkins v. Mammouth Min. Co., 24 Utah, 513, 68 Pac. 845; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342; Norfolk, etc., R. R. Co. v. Ampley, 93 Va. 108, 25 S.

rules heretofore given. And many cases hold that an action will lie against the master and delinquent servant jointly.[63]

§ 284. **Contributory negligence.** Where the master is sued by his servant for an injury which it is claimed has been occasioned by his negligence, it is very properly and justly held that the plaintiff is not to recover if his own negligence contributed with that of the defendant in producing the injury.[64]

E. 226; Sherman v. Lumber Co., 72 Wis. 122, 39 N. W. 365, 1 L. R. A. 173; Gila Valley, etc., Ry. Co. v Lyon, 203 U. S. 465.

[62] *Ante*, § 39.

[63] Ibid.; Davis v. Southern Pac. Co., 98 Cal. 19, 32 Pac. 708; Hinds v. Harbon, 58 Ind. 121, 126; Martin v. Louisville, etc., R. R. Co., 95 Ky. 612, 618, 26 S. W. 801; Schumpert v. Southern Ry. Co., 55 S. C. 332, 43 S. E. 813; Greenberg v. Whitcomb L. Co., 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439.

[64] Columbus, etc., Ry. Co. v. Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58; Columbus, etc., Ry. Co. v. Bradford, 86 Ala. 574, 6 So. 90; Louisville, etc., R. R. Co. v. Banks, 104 Ala. 508, 16 So. 547; George v. Mobile, etc., R. R. Co., 109 Ala. 245, 19 So. 784; St. Louis, etc., Ry. Co. v. Rice, 51 Ark. 467, 11 S. W. 639, 4 L. R. A. 173; Long v. Coronado R. R. Co., 96 Cal. 269, 31 Pac. 170; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Thompson v. Central R. R. Co., 54 Ga. 509; Western, etc., R. R. Co. v. Adams, 55 Ga. 279; Illinois Cent. R. R. Co. v. Patterson, 69 Ill. 650; Chicago, etc., R. R. Co. v. Bragonier, 119 Ill. 51; Illinois Central R. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737; Diamond Plate Glass Co. v. Deboritz, 143 Ind. 381, 40 N. E. 681; Rasmussen v. Chicago, etc., R. R. Co., 65 Ia. 236; Wormell v. Maine Cent. R. R. Co., 79 Me. 397, 10 Atl. 49; Judkins v. Me. Cent. R. R. Co., 80 Me. 417, 14 Atl. 735; Burns v. Boston, etc., R. R. Co., 101 Mass. 50; Lyon v. Detroit, etc., R. R. Co., 31 Mich. 429; Brewer v. Flint, etc., Ry. Co., 56 Mich. 620; Vicksburg, etc., R. R. Co. v. Wilkins, 47 Miss. 404; Hulett v. Kansas, etc., R. R. Co., 67 Mo. 239; Harff v. Green, 168 Mo. 308, 67 S. W. 576; Haviland v. Kansas City, etc., R. R. Co., 172 Mo. 106, 72 S. W. 515; McMahon v. O'Donnell, 32 Neb. 27, 48 N. W. 824; Mulherrin v. Delaware, etc., R. R. Co., 81 Pa. St. 366; Cooper v. Butler, 103 Pa. St. 412; Gillen v. Rowley, 134 Pa. St. 209, 19 Atl. 504; Norfolk, etc., Ry. Co. v. Cromer, 99 Va. 763, 40 S. E. 54; Larson v. Knapp, Stout & Co , 98 Wis. 178, 73 N. W. 992. It is such negligence if the servant is injured from disobedience of the rules or orders of the master. Penn., etc., Co. v. Whitcomb, 11 Ind. 212; Deeds v. Chicago, etc., Co., 74 Ia 154, 37 N. W. 124; North, Centr Ry. Co. v. Husson, 101 Pa. St. 1; Pilkenton v. Gulf etc., Ry Co., 70 Tex. 226, 7 S. W. 805; Daley v. Haller Mfg. Co., 48 La. Ann. 214.

cumstances, rest upon the servant to report dangers to the master. It has often been held that if a servant sues the master for an injury which has resulted from a peril which had come to the knowledge of the plaintiff and ought to have been known to the master, it may justly be held to be contributory negligence on the plaintiff's part if he failed to report it.[65] The servant may always assume that the master has done his duty and he is not chargeable with negligence for failure to make investigation in that regard.[66] To be a bar to recovery

19 So. 116; Fickett v. Lisbon Falls Fibre Co., 91 Me. 268, 39 Atl. 996; Johnson v. Chesapeake, etc., Ry. Co., 38 W. Va. 206, 18 S. E. 573.

[65] Ladd v. New Bedford, etc., R. R. Co., 119 Mass. 412, 20 Am. Rep. 331; LeClair v. St. Paul, etc., R. R. Co., 20 Minn. 9; Sullivan v. Louisville Bridge Co., 9 Bush, 81; Patterson v. Pittsburgh, etc., R R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Malone v. Hawley, 46 Cal. 409; Dillon v. Union Pacific R. R. Co., 3 Dill. 319; Belair v. Chicago, etc., R. R. Co., 43 Iowa, 662; Davis v. Detroit, etc., R. R. Co., 20 Mich. 105, 4 Am. Rep. 364; Mad River, etc., R. R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312; St. Louis, etc., R. R. Co. v. Britz, 72 Ill. 256; Louisville, etc., R. R. Co. v. Stutts, 105 Ala. 368, 17 So. 29, 53 Am. St. Rep. 127; Mangum v. Bullion, etc., Min. Co., 15 Utah, 534, 50 Pac. 834.

[66] Pennsylvania Coal Co. v. Kelly, 156 Ill. 9, 40 N. E. 938; Chicago, etc., R. R. Co., Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396; Whitney & Starrette Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; Ross v. Shanley, 185 Ill. 390, 56 N. E. 1105; Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 73 N. E. 787; Emporia v. Kowalski, 66 Kan. 64, 71 Pac. 232; Lawrence v. Hagemeyer, 93 Ky. 591, 20 S. W. 704; Henderson Tobacco Extracts Works v. Wheeler, 116 Ky. 322, 76 S. W. 34; Helm v. O'Rourke, 46 La. Ann. 178, 15 So. 400; Caven v. Bodwell Granite Co., 99 Me. 278, 59 Atl. 285; Delude v. St. Paul City Ry. Co., 55 Minn. 63, 56 N. W. 461; Carlson v. N. W. Tel. Exch Co., 63 Minn. 428, 65 N. W. 914; Thompson v. Bartlett, 71 N. H 174, 51 Atl. 633, 93 Am. St. Rep. 504; Carroll v. Tide Water Oil Co. 67 N. J. L. 679, 52 Atl. 279; East land v. Clark, 165 N. Y. 420, 59 N E. 202; Wilkie v. Raleigh, etc., R. R. Co., 127 N. C. 203, 37 S E. 204; Davis v. Turner, 69 Ohio St 101, 68 N. E. 819; Miller v. Inman, 40 Ore. 161, 66 Pac. 713; McDonald v. Postal Tel. Co., 22 R. I. 131, 46 Atl. 407; Carter v. Oliver Oil Co., 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; Freeman v. Railroad Co., 107 Tenn. 340, 64 S. W. 1; International, etc., Ry. Co. v. Kernan, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; Missouri, etc., Ry. Co. v. Haning,

a cause it is no bar.[67]

§ 285. Burden of proof. It may also be remarked that in all cases where the servant claims to recover on the ground of the master's negligence, the burden of proof will be upon him, not only because as a plaintiff he must make out his case, but also because all presumptions will favor the proper performance of duty.[68] "If the accident might have resulted from

91 Tex. 347, 43 S. W. 508; Chapman v. Southern Pac. Co., 12 Utah, 30, 41 Pac. 551; Houston v. Brush, 66 Vt. 331, 29 Atl. 380; Norfolk, etc., R. R. Co. v. Nunnally, 88 Va. 546, 14 S. E. 367; Texas, etc., Ry. Co. v. Swearingen, 196 U. S. 51, 25 S. C. 164; New York, etc., R. R. Co. v. O'Leary, 93 Fed. 737, 35 C. C. A. 562; Texas, etc., Ry. Co. v. Archibald, 170 U. S. 665, 18 S. C. Rep. 777.

[67] Certain repairs were being made in a mill at night and plaintiff was injured by reason of the defendant's negligence. The plaintiff had been told to go home prior to the accident. Held his remaining was not contributory negligence. McElligott v. Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181. So where a workman was going from one part of a mill to another and stopped for a moment to talk with another workman and just then was hit by the breaking of a defective belt. Moore v. Pickering Lumber Co., 105 La. 504, 29 So. 990. It was not necessarily contributory negligence for a servant to expose himself to danger in an attempt to save his master's property or to rescue a fellow servant put in peril by the master's negligence. Bessemer L. & L. Co. v. Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 15; Pullman Pal. Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Saylor v. Parsons. 122 Ia. 679, 98 N. W. 500, 101 Am. St. Rep. 283, 64 L. R. A. 542; Frank v. Bullion, etc., Min. Co., 19 Utah, 35, 56 Pac. 419. See Malbie v. Belden, 167 N. Y. 307, 60 N. E. 645, 54 L. R. A. 52.

[68] See Gilman v. Eastern R. R. Co., 10 Allen 233; Wright v. N. Y. Central R. R. Co., 25 N. Y. 562; Hildebrand v. Toledo, etc., R. R. Co., 47 Ind. 399; Crandall v. McIlrath, 24 Minn. 127; Stafford v. Chicago, etc., R. R. Co., 114 Ill. 244; Pingree v. Leyland, 135 Mass. 398; Heath v. Whitebreast Coal, etc., Co., 65 Ia. 747; Louisville, etc., Co. v. Allen, 78 Ala. 494; Painton v. Nor. Centr. Ry. Co., 83 N. Y. 7; Murphy v. St. Louis, etc., Co., 71 Mo. 202; St. Louis, etc., Ry Co. v. Harper, 44 Ark. 524; East Tenn., etc., Co. v. Stewart, 13 Lea, 432; Madden v. Occidental, etc., S. S. Co., 86 Cal. 445, 25 Pac. 5; Murray v. Denver, etc., R. R. Co., 11 Colo. 124, 17 Pac. 484; Greeley v. Foster, 32 Colo. 292, 75 Pac. 351; Western, etc., R. R. Co. v. Bradford, 113 Ga. 276, 38 S. E. 823; Minty v. Union Pac. Ry. Co., 2 Ida-

cause for which the master is liable, for it is not the province of a court or jury to speculate or guess from which cause the accident happened."[69]

§ 286. **Liability of servant.** If a servant by his negligence in the master's business injures a fellow-servant, the former is liable to the latter for the damages sustained.[70] So a servant

ho, 471, 21 Pac. 660; Sack v. Dolese, 137 Ill. 129, 27 N. E. 62; Kansas City, etc., R. R. Co. v. Ryan, 52 Kan. 637, 35 Pac. 292; South Baltimore Car Works v. Schaeffer, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560; Essex County Elec. Co. v. Kelly, 57 N. J. L. 100, 29 Atl. 427; Baldwin v. Atlantic City, etc., R. R. Co., 64 N. J. L. 232, 45 Atl. 810; Potter v. New York Central, etc., R. R. Co., 136 N. Y. 77, 32 N. E. 603; Welsh v. Cornell, 168 N. Y. 508, 61 N. E. 891; Neely v. S. W. Cotton Seed Oil Co., 13 Okl. 356, 75 Pac. 537; Kincaid v. Oregon Short Line, 22 Ore. 35, 29 Pac. 3; Duntley v. Inman, 42 Ore. 334, 70 Pac. 529, 59 L. R. A. 785; Higgins v. Fanning, 195 Pa. St. 599, 46 Atl. 102; Johnson v. Chesapeake, etc., Ry. Co., 36 W. Va. 73, 14 S. E. 432; Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; Cochran v. Shanahan, 51 W. Va. 137, 41 S. E. 140; Pierce v. Kile, 80 Fed. 865, 26 C. C. A. 201; Weeks v. Sharer, 111 Fed. 330, 49 C. C. A. 372. Where the servant was injured by the fall of a scaffold provided by the master, negligence was presumed. Steward v. Ferguson, 164 N. Y. 553, 58 N. E. 662. "The burden of proof is upon the servant to establish, first, that the appliance or place was defective; second, that the master had notice thereof, or knowledge, or ought to have had; and third, that the servant did not know of the defect, and had not equal means of knowing with the master." Montgomery Coal Co. v. Barringer, 218 Ill, 327, 75 N. E. 980.

[69] Goranson v. Riter-Conley Mfg. Co., 186 Mo. 300, 307, 85 S. W. 338; Trigg v. Ozark L. & L. Co., 187 Mo. 227, 86 S. W. 222; Moore Lime Co. v. Johnston, 103 Va. 84, 48 S. E. 557.

[70] Rogers v. Overton, 87 Ind. 410; Hare v. McIntire, 82 Me. 240, 19 Atl. 453, 17 Am. St. Rep. 476, 8 L. R. A. 450; Atkins v. Field, 89 Me. 281, 36 Atl. 375, 56 Am St. Rep. 424; Osborne v. Morgan 130 Mass. 102, 39 Am. Rep. 437; Osborne v. Morgan, 137 Mass 1; Griffiths v. Woolfram, 22 Minn. 185; Steinhauser v. Spraul, 114 Mo. 551, 21 S. W. 515; O'Brien v. Traynor, 69 N. J. L. 239, 55 Atl. 307; Lawton v. Waite, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616; Wiggett v. Fox, 11 Exch. 832, 839; Degg v. Midland Ry. Co., 11 H. & N. 773, 781.

ants or third parties for misfeasance but not for non-feasance. "If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable."[72] But this distinction is repudiated in many cases and the servant held liable both for misfeasance and non-feasance.[73] The servant is liable over to the master for damages he has been compelled to pay by reason of the servant's negligence.[74]

[71] Stiewell v. Borman, 63 Ark. 30, 37 S. W. 404; Baird v. Shipman, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128; Lough v. Davis, 30 Wash. 204, 70 Pac. 491, 94 Am. St. Rep. 848, 59 L. R. A. 802; Lough v. Davis, 35 Wash. 449, 77 Pac. 732. A superior servant is not liable to a third party for the negligence of a servant under him. Bilen v. Paisley, 18 Ore. 47, 21 Pac. 934, 4 L. R. A. 840.

[72] Burns v. Pethcal, 75 Hun, 437, 26 N. Y. S. 700. See also Murray v. Usher, 117 N. Y. 542, 23 N. E. 564; Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Feltus v. Twan, 62 Miss. 415; Drake v. Hagan, 108 Tenn. 265, 67 S. W. 470; Labadie v. Hawley, 61 Tex. 177, 48 Am. Rep. 278; Warax v. Cincinnati, etc., Ry. Co., 72 Fed. 637.

[73] Mayer v. Thompson-H. Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433; Baird v. Shipman, 132 Ill. 16, 23 N. E. 384, 22 Am. St. Rep. 504, 7 L. R. A. 128; Hare v. McIntire, 82 Me. 240, 19 Atl. 453, 17 Am. St. Rep. 476, 8 L. R. A. 450; Ellis v. McNaughton, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308; Ellis v. Southern Ry. Co., 72 S. C. 465; Lough v. Davis, 30 Wash. 204, 70 Pac. 491, 94 Am. St. Rep. 848, 59 L. R. A. 802; Lough v. Davis, 35 Wash. 449, 77 Pac. 732.

[74] Georgia Southern, etc., Ry. Co. v. Jossey, 105 Ga. 271, 31 S. E. 179; Costa v. Yochini, 104 La. 170, 28 So. 992; Memphis, etc., R. R. Co. v. Greer, 87 Tenn. 698, 11 S. W. 931, 4 L. R. A. 858. See *ante*, p. 105. Master and servant held jointly liable. Schumpert v. Southern Ry. Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802; Gardner v. Southern Ry. Co., 65 S. C. 341, 43 S. E. 816; Riser v. Southern Ry. Co., 67 S. C. 419, 46 S. E. 47; Carson v. Southern Ry. Co., 68 S. C. 55, 46 S. E. 525; Bedenbaugh v. Southern Ry. Co., 69 S. C. 1, 48 S. E. 53.

statutes affect especially the defense of common employment and assumption of risk and they also impose special duties upon the master for the benefit of the servant, in enlargement of and in addition to his common-law duties. Space will not permit of any adequate discussion of these statutes, but the reader is referred to a recent work on master and servant, where they are fully stated and considered.[75]

[75] Labatt, M. & S., pp. 1873–2204.

CHAPTER XVII.

NUISANCES.

§ 288. Definition of nuisance. In the commentaries of Mr. Justice Blackstone a nuisance is defined as being anything done to the hurt or annoyance of the lands, tenements or hereditaments of another.[1] By the hurt or annoyance here is meant, not a physical injury necessarily, but an injury to the owner or possessor thereof, as respects his dealing with, possessing or enjoying them. Strictly construed the definition would include those injuries done by the direct application of force, and which are known in the law as trespasses; but these were not meant to be embraced, although some of them may be treated either as trespasses or nuisances, at the option of the party injured. For example, to keep a vicious animal after notice of his vicious propensity, is to maintain a nuisance;[2] but when the vicious beast attacks and injures an individual, the party injured may treat this violence as the unlawful violence of the owner and bring suit in trespass.[3]

It should be observed also that a nuisance which will support a private action may consist in such interference with a public easement or with any other public right as specially annoys or injures an individual; such, for instance, as the blocking up of a public way of any sort when one is endeavoring to make use of it. In these cases the public nuisance be-

[1] 3 Bl. Com. 215. The intention is immaterial to the inquiry whether an act is a nuisance. Bonnell v. Smith, 53 Ia. 281. See Joyce, Nuisances, § 43.

[2] Brown v. Hoburger, 52 Barb. 15; Milman v. Shockley, 1 Houst. 444; Meibus v. Dodge, 38 Wis. 300, 20 Am. Rep. 6.

[3] Van Leuven v. Lyke, 1 N. 515, 516, 49 Am. Dec. 346; Wales v. Ford, 8 N. J. L. 267; Dolph v. Ferris, 7 W. & S. 367, 42 Am. Dec. 246; Morse v. Nixon, 6 Jones (N. C.) 293; Coggswell v. Baldwin, 15 Vt. 404. See further as to the distinction between nuisance and trespass, Joyce, Nuisances, § 17; 2 Jaggard, Torts, p. 745.

mitted which injures or annoys another in the enjoyment of his legal rights.[4]

§ 289. **Nuisances per se.** It is common to speak of a thing as being or not being a nuisance *per se*. By this is meant that it is a nuisance in and of itself, without regard to circumstances.[5] Thus a livery stable is not a nuisance *per se*, but whether it is a nuisance or not will depend upon its condition and location.[6] On the other hand a house of ill-fame is a nuisance, irrespective of where it is located or how it is conducted.[7]

§ 290. **Annoyances without fault.** As the definition assumes the existence of wrong, those things which may be annoying and damaging, but for which no one is in fault, are not to be deemed nuisances, though all the ordinary consequences of nuisances may flow from them.[8] For example, the swamps and marshes that, from their exhalations, prove injurious to the health of those living near them, are not nuisances pro-

[4] See Hoadley v. Seward & Son Co., 71 Conn. 640, 42 Atl. 997; Savannah v. Mulligan, 95 Ga. 323, 51 Am. St. Rep. 86, 29 L. R. A. 303; Laflin & R. P. Co. v. Tearney, 131 Ill. 322, 33 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; Bliss v. Grayson, 24 Nev. 422, 56 Pac. 231; Cardington v. Fredericks, 46 Ohio St. 442, 21 N. E. 766; Stokes v. Pennsylvania R. R. Co., 214 Pa. St. 415. Many judicial definitions are quoted in note 6, § 2, of Joyce on Nuisances.

[5] Hundley v. Harrison, 123 Ala. 292, 296, 26 So. 294; Burdick, Torts, p. 396; Joyce, Nuisances, § 12.

[6] Phillips v. Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; Kaspar v. Dawson, 71 Conn. 405, 42 Atl. 78; Gallagher v. Flury, 99 Md. 181, 57 Atl. 672; Dargan v. Waddill, 9 Ired, 244, 49 Am. Dec. 421; Kirkman v. Handy, 11 Humph. 406, 54 Am. Dec. 45.

[7] Neaf v. Palmer, 103 Ky. 496, 45 S. W. 546; Hamilton v. Whittridge, 11 Md. 128, 132, 69 Am. Dec. 184; Givens v. Van Studdiford, 86 Mo. 149, 156, 56 Am. Rep. 421; Blagen v. Smith, 34 Ore. 394, 56 Pac. 292, 44 L. R. A. 522; Weakley v. Paige, 102 Tenn. 178, 53 S. W. 551, 46 L. R. A. 552; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513.

[8] The obstruction of a running stream occasioned by the washing down of its banks does not, in law, constitute a nuisance, unless the obstruction is attributable to the acts or agency of man. Mohr v. Gault, 10 Wis. 513, 28 Am. Dec. 687.

ious effects. No authority in the state to compel their owners to abate them by drainage is recognized, though the state may doubtless assume the duty and provide for it by special levies.[9] But the moment anything is done by the owner upon or in respect to the lands which increases the deleterious effects, or sensibly renders his lands offensive in a new or different way, he becomes responsible. There is then a nuisance on his own land, which exists by his wrong, and it is his duty to abate it.[10]

Annoyances without fault are also those which come under the head of *damnum absque injuria*, damage without injury, or damage without the violation of any legal right. All such damage, inconvenience and annoyance as result from the lawful use of property are of this sort. There being no legal wrong, there can be no legal remedy.[11]

§ 291. **Classification of nuisances—Public and private nuisances.** Recurring to the definition of a nuisance it will be perceived that it must embrace a very large proportion of those injuries that are commonly redressed in special actions on the case. An attempt to classify nuisances is, therefore, almost equivalent to an attempt to classify the indefinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights. It is very seldom, indeed, that even a definition of a nuisance has been attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general it is likely to define nothing. A classification would be equally difficult, because it must either be greatly extended or it must omit many cases. Indeed, new and peculiar cases are arising constantly.

[9] See Reeves v. Treasurer, etc., 8 Ohio St. 333, and cases collected in Cooley on Taxation, pp. 510, 511.

[10] See Woodruff v. Fisher, 17 Barb. 224; Hartwell v. Armstrong, 19 Barb. 166. Unwholesome vapor from an artificial pond is a nuisance. Adams v. Popham, 76 N. Y. 410. Where for his own protection one changes the bed of a stream upon his own land and in flood time the opposite bank is thereby injured, he is not liable if a person of ordinary prudence would not have anticipated such injury. Railroad Co. v. Carr, 38 Ohio St. 448, 43 Am. Rep. 428.

[11] See *post*, § 292; Joyce, Nuisances, § 32.

or that injuriously affects the community at large, or some considerable portion of it.[12] "The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence."[13] A private nuisance is one which obstructs a person in the enjoyment of a private right or which affects one or more as private citizens and not as part of the public.[14]

A purpresture may or may not be a public nuisance. A purpresture may be defined "as an enclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large."[15] If the public suffers inconvenience or annoyance thereby then it is a public nuisance, otherwise not.[16]

§ 292. Lawful use of property as respects the question of nuisance. Most nuisances arise from the use or improvement of property. The complaint usually is that something done or suffered on the defendant's property causes inconvenience, annoyance and damage to the neighboring property of the plaintiff, or to the occupants of such property. The question in all such cases is, whether the thing which the defendant has done is a lawful and proper use of his property. The rule applied

[12] Hundley v. Harrison, 123 Ala. 292, 26 So. 294; Ex parte Foote, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63; State v. Luce, 9 Houst. 396, 32 Atl. 1076; Hackney v. State, 8 Ind. 494; State v. Ohio Oil Co., 150 Ind. 21, 37, 49 N. E. 809, 47 L. R. A. 627; Kissel v. Lewis, 156 Ind. 233, 240, 59 N. E. 278; State v. Crawford, 28 Kan. 726, 733; Queen v. Price, L. R. 12 Q. B. D. 247.

[13] Nolan v. New Britain, 69 Conn. 668, 678, 38 Atl. 703.

[14] Powell v. Furniture Co., 34 W. Va. 804, 807, 12 S. E. 1085, 12 L. R. A. 53; Veazie v. Dwinel, 50 Me. 479; Cardington v. Fredericks, 46 Ohio St. 442, 21 N. E. 766; and cases cited in the last two notes.

[15] Attorney General v. Evart Brewing Co., 34 Mich. 462.

[16] Ibid.; People v. Park, etc., R. R. Co., 76 Cal. 156, 18 Pac. 141; Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; Revell v. People, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790. See generally Joyce, Nuisances, §§ 59-66.

interpretation of this maxim is, that each one must so use his own property as not to violate the legal rights of others.[17] If the use violates the legal rights of others it is unlawful, and the question turns upon what constitutes a lawful or unlawful use of property. This in turn is a question of what is reasonable under all the circumstances. One may make a reasonable use of his property, though such use may cause loss, inconvenience or annoyance to his neighbor. But if one, by an unreasonable use of his property cause such loss, inconvenience or annoyance, the use is a nuisance and an action will lie.[18] No general rule can be laid down by which to determine what is a reasonable use of property.[19] "A use is reasonable which does not unreasonably prejudice the rights of others. In determining the question of reasonableness, the effect of the use upon the interests of both parties, the benefits derived from it by one, the injury caused by it to the other, and all the circumstances affecting either of them, are to be considered."[20] It depends upon the nature of the use, and the kind and degree of harm done, considered in the light of expediency and

[17] Hoadley v. Seward & Son Co., 71 Conn. 640, 42 Atl. 997; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Bohan v. Port Jervis G. L. Co., 122 N. Y. 18, 25 N. E. 246, 7 L. R. A. 711; Bliss v. Grayson, 24 Nev. 422, 56 Pac. 231. "The meaning of the rule is that one may not use his own property to the injury of any legal right of another." Booth v. Rome, etc., R. R. Co., 140 N. Y. 267, 275, 35 N. E. 592, 24 L. R. A. 105. "He must so use his rights as not to injure the rights of others." Moses v. State, 58 Ind. 185, 187.

[18] Ibid.; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 99 Am. St. Rep. 35, 64 L. R. A. 236; Hurlbut v. McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; Middlesex Co. v. McCue, 149 Mass. 103, 21 N. E. 230, 14 Am. St. Rep. 402; Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 251; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514.

[19] Middlesex Co. v. McCue, 149 Mass. 103, 21 N. E. 230, 14 Am. St. Rep. 402; Campbell v. Seaman, 63 N. Y. 568, 577, 20 Am. Rep. 567.

[20] Rindge v. Sargent, 64 N. H. 294, 9 Atl. 723. See also Bassett v. Salisbury Mfg. Co., 43 N. H 569, 82 Am. Dec. 179; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Franklin v. Durgin, 71 N. H. 186, 51 Atl. 911.

the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy."[22] Whether a particular use is reasonable is, in general, a question of fact to be submitted to the jury under proper instructions, but in a clear case may be decided by the court as a question of law.[23]

The whole matter is very ably summed up in a New York case as follows: "It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non laedas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do an injury to his neighbor or his property. Such a rule could not be enforced in a civilized society. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in a city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. * * *

"But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he make unreasonable, unwarrantable or unlawful use of it, so as to produce material annoyance,

[21] Middlesex Co. v. McCue, 149 Mass. 103, 104, 21 N. E. 230, 14 Am. St. Rep. 402; Phillips v. Lawrence, etc., Co., 72 Kan. 643, 82 Pac. 787.

[22] Booth v. Rome, etc., R. R. Co., 140 N. Y. 267, 277, 35 N. E. 592, 24 L. R. A. 105.

[23] Middlesex Co. v. McCue, 149 Mass. 103, 21 N. E. 230, 14 Am. St. Rep. 402; Basset v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687.

him responsible for the consequent damage. As to what is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which under other circumstances, would be unlawful, unreasonable and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable and inconvenient."[24]

§ 293. Degree of annoyance necessary to constitute a nuisance. It is not every inconvenience and annoyance causing personal discomfort that is an actionable nuisance. One living in organized society must submit, without remedy, to a certain amount of personal discomfort, for else the business of society and the ordinary avocations of life could not be carried on.[25] The rule by which the relative rights of the parties are to be regulated is laid down for England by the case of *St. Helen's Smelting Co. v. Tipping*. The Lord Chancellor, in that case, speaking for the court, said, that with regard to the personal inconvenience and interference with one's enjoyment,

[24] Campbell v. Seaman, 63 N. Y. 568, 577, 20 Am. Rep. 567. Same quoted and approved in Hoadley v. Seward & Son Co., 71 Conn. 640, 646, 42 Atl. 997. See generally on the subject, Barnard v. Shirley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 41 Am. St. Rep. 454, 24 L. R. A. 568; Barnard v. Shirley, 151 Ind. 160, 47 N. E. 671, 41 N. E. 437; Townsend v. State, 147 Ind. 624, 47 N. E. 19; State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809; S. C. affirmed, Ohio Oil Co. v. Indiana, 177 U. S. 190, 22 S. C. Rep. 576; Barclay v. Abraham, 121 Ia. 619, 96 N. W. 108, 100 Am. St. Rep. 365, 64 L. R. A. 255; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep 595, 9 L. R. A. 737; Susquehanna Fertilizer Co. v. Spangler, 86 Md 562, 39 Atl. 270, 63 Am. St. Rep. 533; Pfeiffer v. Brown, 165 Pa. St. 267, 30 Atl. 844, 44 Am. St. Rep. 660; Jones v. Forest Oil Co., 194 Pa. St. 379, 44 Atl. 1074; Powell v. Furniture Co., 34 W. Va. 804, 12 S E. 1085, 12 L. R. A. 53; Huber v. Merkel, 117 Wis. 355, 94 N. W 354, 62 L. R. A. 589.

[25] Gaunt v. Fynney, L. R. 8 Ch App. 8; McCaffrey 's Appeal, 105 Pa. St. 253, 257; English v. Progress Elec. L. & M. Co., 95 Ala. 259, 267.

doubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. In a case of that description the submission that is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors would not apply to circumstances the immediate result of which is sensible injury to the value of the property.[26] Every business should be carried on in a suitable and convenient place, and by convenient is meant, not a place which may be convenient to the party himself, looking at his interest merely, but a place suitable and convenient when the interests of others are considered.[27] "All that can

[26] St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; S. C. Big. Lead. Cas. 454. And see Bamford v. Turnley, 3 Best & S. 66, questioning Hole v. Barlow, 4 C. B. (N. S.) 334; Cavey v. Leadbitter, 13 C. B. (N. S.) 470; Walter v. Selfe, 4 De G. & S. 315; S. C. 4 Eng. L. & Eq. 15; Gaunt v. Fynney, L. R. 8 Ch. App. 8. S. C. 4 Moak, 718.

[27] Williams, J., in Bamford v. Turnley, 3 Best & S. 65, 75, citing Jones v. Powell, Palm. 536; S. C. Hutt. 135. "In the eye of the law, no place can be convenient for carrying on a business which is a nuisance and which causes substantial injury to the property of another." Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737.

of a city, business of no kind is desirable or welcome. On the other hand, one who becomes a resident of a trading or manufacturing neighborhood, or who remains while in the march of events a residence district gradually becomes a trading or manufacturing neighborhood, should be held bound to submit to the ordinary annoyances, discomforts and injuries which are fairly incidental to the reasonable and general conduct of such business in his chosen neighborhood. The true rule would be that any discomfort or injury beyond this would be actionable; anything up to that point would not be actionable." [28]

The subject received very careful consideration by the supreme court of Maryland in a case where the defendant carried on a factory for the manufacture of fertilizers, adjoining the property of the plaintiff, which consisted of a hotel and dwellings. It was shown that the factory emitted noxious and offensive gases which were a very material annoyance to the occupants of the plaintiff's property and which actually produced physical injury to the property by injuriously affecting the paint, glass, metals, etc. The defendant had a large

[28] Eller v. Koehler, 68 Ohio St. 51, 67 N. W. 89. See generally English v. Progress Elec. Lt. & M. Co., 95 Ala. 259, 10 So. 134; Whitney v. Bartholomew, 21 Conn. 213; Hurlbut v. KcKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; Harley v. Merrill Brick Co., 83 Ia. 73, 48 N. W. 1000; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533; Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316; Bacon v. Boston, 154 Mass. 100, 28 N. E. 9; Gilbert v. Showerman, 23 Mich. 448; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Davis v. Whitney, 68 N. H. 66, 44 Atl. 78; Ladd v. Granite State Brick Co., 68 N. H. 185, 37 Atl. 1041; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Bohan v. Port Jervis Gas Lt. Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Huckenstein's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669; Price v. Grantz, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 601; Kirkman v. Handy, 11 Humph. 406, 54 Am. Dec. 45; Powell v. Bentley, etc., Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; McCann v. Strong, 97 Wis. 551, 72 N. W. 1117; Dolan v. Chicago, etc., Ry. Co., 118 Wis. 362, 95 N. W. 385.

In giving judgment for the plaintiff the court said: "No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie. And this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business." [29] The annoyance must be material and substantial, but "it is not necessary to a right of action that the owner should be driven from his dwelling; it is enough that the enjoyment of life and property be rendered uncomfortable." [30]

§ 294. **Effect upon ordinary people the criterion.** In respect to those things which are a nuisance because of the annoyance and discomfort they produce, they are to be judged by the effect they are calculated to produce upon ordinary

[29] Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533. "As a general proposition, it may be said that any establishment erected on the premises of the owner, though for the purpose of trade or business lawful in itself, which, from the situation, the inherent qualities of the business, or the manner in which it is conducted directly causes substantial injury to the property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is a nuisance." English v. Progress Elec. Lt. & M. Co., 95 Ala. 259, 264, 10 So. 134. See also to same effect: People v. Detroit White Leads Work, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Bohan v. Port Jervis Gas Lt. Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89.

[30] Bohan v. Port Jervis Gas Lt. Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Price v. Grantz, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 601; McCann v. Strong, 97 Wis. 551, 72 N. W. 1117; Hundley v. Harrison, 123 Ala. 292, 26 So. 294; Kasper v. Dawson, 71 Conn. 405, 42 Atl. 78.

hand, by their effect upon those who are abnormally indifferent to such things, or who by long experience have learned to endure them without inconvenience.[31] The inconvenience must be something more than mere fancy, mere delicacy or fastidiousness; "it must," as said by an English judge, "be an inconvenience materially interfering with the ordinary comfort, physically, of human existence; not merely according to elegant and dainty modes and habits of living, but according to plain, sober and simple notions among the English people."[32]

§ 295. **Things which produce mental disquietude or offend the taste.** In order that a thing causing personal discomfort shall be a nuisance it must affect one physically and not merely mentally, and this is so because there is no common standard by which to measure mental effects.[33] The only true rule in judging of injuries from alleged nuisances is held to be, "such as naturally and necessarily result to all alike who come within their influence. Not to one on account of peculiar sentiments, feelings or tastes, if it would have no effect on another, or all others without these peculiar sentiments or tastes. Not to a sectarian if it would not be to one belonging to no church. It must be something about the effects of which all agree; otherwise that which might be no nuisance to the majority might be claimed to deteriorate property by particular persons. Noises which disturb sleep, bodily rest being a physical necessity, noxious gases, sickening smells, currupted waters and the like, usually affect the mass of community in one and the same way, and may be testified to by all possessed of their natural senses, and can be judged of by their probable effect on health

[31] Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316; Powell v. Bentley, etc., Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; McCann v. Strong, 97 Wis. 551, 72 N. W. 1117; Joyce, Nuisances, §§ 93, 163, 183.

[32] V. C. Knight-Bruce in Walter v. Selfe, 4 De G. & S. 315. And see Soltan v. De Held, 2 Sims. (N. S.) 133, 159; Columbus Gas Co. v. Freeland, 12 Ohio St. 392; Sparhawk v. Union Pass. Ry. Co., 54 Pa. St. 401; Price v. Grantz, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 701.

[33] Wohle v. Reimbach, 76 Ill 322, 327; Cleveland v. Citizens' Gas Co., 20 N. J. Eq. 201; Ross v. Butler, 19 N. J. Eq. 294.

disturb another. There can be no general rule or experience as to this; it is incapable of being judged of, like those things which affect health or comfort." [34]

So of things which merely offend the taste, such as an unsightly building near a residence,[35] or a dumping ground for rubbish; [36] or things which annoy by reason of their associations, such as an undertaker's establishment,[37] or a private burying ground,[38] or a jail.[39] An exception exists in case of those things which offend common decency [39a] or which produce a reasonable apprehension of danger or calamity.[40]

In Indiana a duly licensed saloon, next door to the plaintiff's residence in the city of Indianapolis, and in a residence locality, the effect of which was to diminish the rentable and salable value of the plaintiff's property, was held to be an actionable nuisance.[41] The complaint was not based upon the

[34] This was said in a case where it was sought to enjoin the running of cars on Sunday as a nuisance. Sparhawk v. Union Pass. Ry. Co., 54 Pa. St. 401, 427. And see Owen v. Henman, 1 W. & S. 548.

[35] Trulock v. Merte, 72 Ia. 510, 34 N. W. 307.

[36] Lane v. Concord, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643.

[37] Wescott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490; S. C. affirmed, 44 N. J. Eq. 297, 18 Atl. 80.

[38] Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315. See Ex parte, Wygant, 39 Ore. 429, 64 Pac. 867, 87 Am. St. Rep. 673, 54 L. R. A. 636.

[39] Bacon v. Walker, 77 Ga. 336; Long v. Ellerton, 109 Ga. 28, 34 S. E. 333, 77 Am. St. Rep. 363, 46 L. R. A. 428.

[39a] It is a nuisance to stand stallions or jacks for mares near a dwelling. Farwell v. Cook, 16 Neb. 483, 49 Am. Rep. 721; Hayden v. Tucker, 37 Mo. 214. So of a bawdy house. Redway v. Moore, 3 Idaho, 312, 29 Pac. 104; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514; Blagen v. Smith, 34 Ore. 394, 56 Pac. 292, 44 L. R. A. 522; Weakley v. Page, 102 Tenn. 178, 53 S. W. 551, 46 L. R. A. 552; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513. Burning a dead body within view of people. Queen v. Price, L. R. 12 Q. B. D. 247.

[40] Barnes v. Hathorn, 54 Me. 124; *post*, 310.

[41] Haggart v. Stehlin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577 Compare Levin v. Goodwin, 191 Mass. 341.

its occupants were physically affected in any way. It was simply a case of mental annoyance and depreciation of value, which have frequently been held insufficient to make out a nuisance, whether separately or in combination.[42]

§ 296. Care and intent in general immaterial. The law of negligence, or due care, has in general no application to cases of nuisance.[43] Where a trade or business materially interferes with the comfortable enjoyment of life by the plaintiff, or materially affects his health or property, it is no defense to show that it is conducted with care and skill and with the best appliances.[44] So, as a general rule, the intention of the defendant is immaterial in determining whether the act complained of is a nuisance.[45] "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious." [46]

§ 297. Improvements upon land. The right to make a reasonable use of one's property, includes the right to put up such buildings and other structures thereon as the owner may choose, regardless of his motive in doing so and regardless of the effect upon adjoining property. Such adjoining owner cannot complain of such improvements because they are unsightly,[50] or because they are not appropriate to the surroundings,[51] or because they cut off his light, air or prospect,[52] or

[42] Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315; Falloon v. Schilling, 29 Kan. 207, 44 Am. Rep. 642.

[43] Laflin & R. P. Co. v. Tearney, 131 Ill. 322, 33 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; Stokes v. Pennsylvania R. R. Co., 214 Pa. St. 415.

[44] Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Bohan v. Port Jervis El. Lt. Co. 122 N. Y. 18, 25 N. E. 246, 7 L. R A. 711.

[45] Bonnell v. Smith, 53 Ia. 281, [illegible] N. W. 1281; Falloon v. Schilling 29 Kan. 207, 44 Am. Rep. 642; People v. Burtleson, 14 Utah, 258, 262 47 Pac 87; *ante*, § 17.

[46] Bradford v. Pickles, (1895) A. C. 587; Fisher v. Fiege, 137 Cal 39, 69 Pac. 618, 59 L. R A. 333.

[50] Trulock v. Merte, 72 Ia. 510 34 N. W 307.

[51] Falloon v. Schilling, 29 Kan 207, 44 Am Rep. 642.

[52] *Ante*, § 210.

neighbor's line, this is a nuisance, even though no damage is suffered or even anticipated from it, for it constitutes an intrusion on the owner's freehold in its extension upwards.[54] So if one's wall encroaches upon his neighbor's land.[55] So it is a nuisance if the branches of one's trees extend over the premises of another, and the latter may abate it by sawing them off.[56]

§ 298. **Things kept or produced upon land which escape to adjoining land.** It is said in an early case that where one has filthy deposits on his premises, he whose dirt it is must keep it that it may not trespass.[57] Therefore, if filthy matter from a privy or other place of deposit percolates through the soil of the adjacent premises, or breaks through into the neighbor's cellar, or finds its way into his well, this is a nuisance.[58]

[53] *Ante*, § 17.

[53a] A stand to which spectators are admitted erected on one's land so as to overlook a fenced ball park is not a nuisance of which the ball club can complain. Detroit Base Ball Club. v. Deppert, 61 Mich. 63, 27 N. W. 856.

[54] Meyer v. Metzler, 51 Cal. 142; Codman v. Evans, 5 Allen, 308, 81 Am. Dec. 748; Cherry v. Stein, 11 Md. 1; Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645; Grove v. Fort Wayne, 45 Ind. 429, 15 Am. Rep. 262; Wilmarth v. Woodcock, 58 Mich. 482. So a bay window over a street is a public nuisance. Reimer's App. 100 Penn. St. 182, 45 Am. Rep. 373.

[55] McGann v. Hamilton, 58 Conn. 69, 19 Atl. 376; Pile v. Pedrick, 167 Pa. St. 296, 31 Atl. 646, 46 Am. St. Rep. 677.

[56] Lemmar v. Webb, (1895) A. C. 1; Earl of Lonsdale v. Nelson, 2 B. & C. 302, 311; Grandona v. Lovdal, 70 Cal. 161. See Countryman v. Lighthill, 24 Hun, 405; Cowhurst v. Amersham, etc., Board, L. R. 4 Exch. D. 5.

[57] Tenant v. Goldwin, 1 Salk. 360; S. C. 6 Mod. 311.

[58] Tenant v. Goldwin, 1 Salk. 360; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Columbus Gas Co. v. Freeland, 12 Ohio St. 392; St. Helens Chemical Co. v. St. Helens, L. R. 1 Exch. Div. 196; Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170; Pottstown Gas. Co. v. Murphy, 39 Pa. St. 257; Tate v. Parrish, 7 T. B. Mon. 325; Greene v. Nunnemacher, 36 Wis., 50; Haugh's App. 102 Pa. St. 42, 48 Am. Rep. 193; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 So. 593; Livezey v. Schmidt, 96 Ky. 441, 29 S. W. 25; Kinnard v. Standard Oil Co., 11 Ky. L. R. 692, 12 S. W. 937; Brady v. Detroit Steel, etc., Co., 102 Mich. 277, 60

tion of liability one depending on degrees of care to prevent it.[59] So if one excavates his land and lets in the sea which percolates into his neighbor's well he will be liable.[60] So if one collects water upon his premises which, by overflow or percolation, injures his neighbor's land.[61] In some of the cases the liability is put on the ground of negligence. The discharge of roof waters so near the boundary line that they must escape upon the adjacent premises is a nuisance.[62] So if one constructs his buildings so as to cast water therefrom upon the land of his neighbor, he commits an actionable wrong;[62a] but

N. W. 687, 26 L. R. A. 175; Beatrice Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711; Anheuser-Busch Brewing Ass'n v. Peterson, 41 Neb. 897, 60 N. W. 373; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. 453; Pfeiffer v. Brown, 165 Pa. St. 267, 30 Atl. 844, 44 Am. St. Rep. 660; Garigan v. Atlantic Ref. Co., 186 Pa. St. 604, 40 Atl. 834; Price v. Oakfield, etc., Creamery Co., 87 Wis. 536, 58 N. W. 1039, 24 L. R. A. 333. See Lowe v. Prospect Hill Cem. Ass'n, 58 Neb. 94, 78 N. W. 488; Humphries v. Cousins, L. R. 2 C. P. D. 239.

[59] Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Hodgkinson v. Ennor, 4 Best & S. 229. See Ballard v. Tomlinson, L. R. 29 Ch. D. 115.

[60] Mears v. Dole, 135 Mass. 508.

[61] Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. 329; McCarthy v. Boise City Canal Co., 2 Ida. 245, 10 Pac. 623; Quinn v. Chicago, etc. R. R. Co., 63 Ia. 510; Morison, etc., Co. v. Fuller, 15 Pick. 554; Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Shields v. Orr Extension Ditch Co., 22 Nev. 349, 47 Pac. 194; Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179; Slater v. Mesereau, 64 N. Y. 138; Southard v. Brooklyn, 1 App. Div. 175, 37 N. Y. S. 136; Delaware & H. Canal Co. v. Goldstein, 125 Pa. St. 246, 17 Atl. 442; Lisonbee v. Monroe Irr. Co., 18 Utah. 343, 54 Pac. 1009, 72 Am. St. Rep. 784; Schuster v. Albrecht, 98 Wis. 241, 73 N. W. 990, 67 Am. St. Rep 804; Hurdman v. Northeastern Ry. Co., L. R. 3 C. P. D. 168; Snow v. Whitehead, L. R. 27 Ch. D. 588. But where water collects in a worked-out mine and flows by gravitation into a lower mine there is no liability. Wilson v. Waddell, L. R. 2 App. Cas. 95; Lord v. Carbon Iron Co., 42 N. J. Eq. 157; Nat. Copper Co. v. Minn. Min. Co., 57 Mich. 83; Williams v. Pomeroy Coal Co., 37 Ohio St. 583.

[62] Bellows v. Sackett, 15 Barb. 96; Underwood v. Waldron, 33 Mich. 232; Beach v. Gaylord, 43 Minn. 476, 45 N. W. 1095.

[62a] Baker's Case, 9 Co. 53b; Jackson v. Pesked, 1 M. &. S. 234; Tucker v. Newman, 11 Ad. & El. 40; Ashley v. Ashley, 6 Cush. 70; Shipley v. Fifty Associates, 106 Mass. 194; Hazelton v. Edgmand, 35 Kan. 202; Chandler v. Lazarus, 55 Ark. 312, 18 S. W. 181; Arm-

them in proper order, and is guilty of no negligence in this regard, an adjoining proprietor can have no legal complaint against him for injuries resulting from extraordinary or accidental circumstances, for which no one is in fault; and such injuries must be left to be borne by those on whom they fall.[62b]

Where one is lawfully making use of water pipes upon his own premises, or in pursuance of a license or easement on the lands of another, if injuries are caused by the bursting of the pipes, or by leakage from other cause, the question of liability is dependent upon the observance or neglect of care.[63] It is lawful to gather water on one's premises for useful and ornamental purposes, subject to the obligation to construct reservoirs with sufficient strength to retain the water under all contingencies which can reasonably be anticipated, and afterwards to preserve and guard it with due care. For any negligence, either in construction or in subsequent attention, from which injury results, parties maintaining such reservoirs must be responsible.[64] But in the English case of *Rylands v. Fletcher* it was held that the party maintaining a reservoir of water,

strong v. Luco, 102 Cal. 272, 36 Pac. 674; Schlitz Brewing Co. v. Crompton, 142 Ill. 511, 32 N. E. 693, 34 Am. St. Rep. 92, 18 L. R. A. 390; Conner v. Woodfill, 126 Ind. 85, 25 N. E. 876, 22 Am. St. Rep. 568; Fitzpatrick v. Welch, 174 Mass. 486, 55 N. E. 178, 48 L. R. A. 278; Beach v. Gaylord, 43 Minn. 476, 45 N. W. 1095; Peters v. Lewis, 28 Wash. 366, 68 Pac. 869; Huber v. Stark, 124 Wis. 359, 102 N. W. 12; Gould v. McKenna, 86 Pa. St. 297, 27 Am. Rep. 705; Hooten v. Barnard, 137 Mass. 36.

[62b] Underwood v. Waldron, 33 Mich. 232; Barry v. Peterson, 48 Mich. 263.

[63] Carstairs v. Taylor, L. R. 6 Exch. 217; Blyth v. Proprietors, etc., 11 Exch. 781; Ortmayer v. Johnson, 45 Ill. 469; Killion v. Power, 51 Pa. St. 429, 91 Am. Dec. 127; Moore v. Goedel, 7 Bosw. 591, 34 N. Y. 527; Schwab v. Cleveland, 28 Hun, 458. The same rule applies to irrigating ditches. Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. 329. And see cases cited in note 61 *ante*.

[64] New York v. Bailey, 2 Denio, 433; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; Monson Mfg. Co. v. Fuller, 15 Pick. 554; Wendell v. Pratt, 12 Allen, 464; Fuller v. Chicopee Mfg. Co., 16 Gray, 46; Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Ipswich v. County Commissioners, 108 Mass. 363; China v. Southwick, 12 Me. 238; Lapham v. Curtis, 5 Vt. 371; Everett v. Hydraulic Co., 26 Cal.

original defects, of which he was ignorant, is responsible for the injury, though chargeable with no negligence.[65] Says Mr. Justice Blackburn, with the approval of the house of lords, "We think that the true rule of law is, that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God."[66] The case of *Fletcher v. Rylands* has not, in general, been followed in this country and liability in such cases is held to depend upon negligence.[67]

Where the defendant stored ice in his building, the walls of which were within two inches of the walls of the plaintiff's house, and the dampness from the melting ice penetrated through both walls, and rendered the plaintiff's house damp and uncomfortable, the defendant's use of his property was held to be a nuisance.[68] So where the defendant stored large quantities of crude petroleum, which escaped onto plaintiff's property, he was held liable, irrespective of negligence.[69] If one places a large pile of earth on his land he must take meas-

225; Widekind v. Water Co., 83 Cal. 198, 23 Pac. 311; Cox v. Odell, 1 Cal. App. 682.

[65] Fletcher v. Rylands, L. R. 1 Exch. 265, affirmed in the House of Lords, L. R. 3 H. L. Cas. 330, 339. See, also, Smith v. Fletcher, L. R. 7 Exch. 305; S. C. L. R. 9 Exch. 64. Compare Smith v. Kenrick, 7 C. B. 515.

[66] See Nichols v. Marshland, L. R. 10 Exch. 255; S. C. 14 Moak, 538, 542; Madras R. Co. v. The Zemindar, L. R. 1 Ind. App. 364; S. C. 9 Moak, 289; Crompton v. Lea, L. R. 19 Eq. Cas. 115; S. C. 11 Moak, 719. And see Mr. Bigelow's comments on Rylands v. Fletcher, Lead. Cas. on Torts, 492 *et seq.*

[67] Jones v. Robertson, 116 Ill. 543, 56 Am. Rep. 786; Gray v. Harris, 107 Mass. 492; New York v. Bailey, 2 Denio, 433; Myers v. Fritz, (Penn.) 10 Atl. 30; Gulf, etc., R. R. Co. v. Pomeroy, 67 Tex. 498; Rich v. Keshena, etc., Co. 56 Wis. 287. See Cahill v. Eastman, 18 Minn. 324, 10 Am. Rep. 184; Joyce, Nuisances, § 382, note 1.

[68] Barrick v. Schifferdecker, 123 N. Y. 52, 25 N. E. 365.

[69] Berger v. Minneapolis Gas L. Co., 60 Minn. 296, 62 N. W. 336.

A pile of sand which is blown upon adjoining land and into houses is a nuisance.[71] Where the defendant put up a stove near the division wall of his house which made the plaintiff's wine cellar on the other side of the wall unfit for the storage of wine, the use of the stove in the location was held a nuisance.[72] The same rule has been applied to electricity as to heat, and one who generates electricity and allows it to escape through the ground to adjoining premises, is liable for the damages caused thereby.[73] The keeping of pigeons which are allowed to fly abroad and which frequent the plaintiff's premises and defile them and annoy the occupants, may be a nuisance.[74] Allowing thistles or other noxious weeds to grow and scatter seed upon adjoining land was held not to be a nuisance.[75]

§ 299. Interfering with surface water. There is much diversity of opinion as to the rights of land owners respecting surface water. Some of the states hold that surface water is a common enemy which each proprietor may get rid of as best he can, that one may erect barriers to prevent surface water coming upon his land, even though it is thereby made to flow upon the land of another to his damage, and that he may use and improve his land as he pleases, though he may increase or change the flow of surface water upon adjoining lands.[76] In others, the rule of the civil law has been adopted

[70] Abrey v. Detroit, 127 Mich. 374, 86 N. W. 785; Varnes v. Masterson, 38 App. Div. 612, 56 N. Y. S. 939; American S. & T. Co. v. Lyon, 21 App. D. C. 122.

[71] Dunsbach v. Hollister, 49 Hun, 352, 2 N. Y. S. 94; Wilmot v. Bell, 76 App. Div. 252, 78 N. Y. S. 591.

[72] Reinhardt v. Mentasti, 42 L. R. Ch. 685. To same effect, Grady v. Wolsner, 46 Ala. 381.

[73] National Tel. Co. v. Baker, (1893) 2 Ch. 186; Hudson Riv. Tel. Co. v. Watervliet T. & R. Co., 135 N. Y. 393, 409, 410, 32 N. E. 148, 31 Am. St. Rep. 838; Cumberland T. & T. Co. v. United Elec. Ry. Co., 93 Tenn. 492, 512–515, 29 S. W. 104, 27 L. R. A. 36.

[74] Taylor v. Granger, 19 R. I. 410, 34 Atl. 153.

[75] Giles v. Walker, 24 Q. B. D. 656; Harndon v. Stultz, 124 Ia. 734, 100 N. W. 851.

[76] Luther v. Winnisimmet Co., 9 Cush. 171; Flagg v. Worcester, 13 Gray, 601; Gannon v. Hargadon, 10 Allen 106, 87 Am. Dec. 625; Grant v. Allen, 41 Conn. 156;

water to flow off over it as it had been accustomed to do.[77] No doubt all the states would recognize an exception in favor

Chadeayne v. Robinson, 55 Conn. 345, 11 Atl. 592; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Cairo, etc., R. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Clay v. Pittsburg, etc., Ry. Co., 164 Ind. 439, 73 N. E. 904; Atchison, etc., R. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Missouri Pac. Ry. Co. v. Renfro, 52 Kan. 237, 34 Pac. 802, 39 Am. St. Rep. 344; Bryant v. Merritt, 71 Kan. 272, 80 Pac. 600; Hovey v. Mayo, 43 Me. 322; Murphy v. Kelly, 68 Me. 521; Abbott v. Kansas City, etc. R. R. Co., 83 Mo. 271; Bunderson v. Burlington, etc., R. R. Co., 43 Neb. 545, 61 N. W. 721; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Bowlsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Edwards v. Charlotte, etc., R. R. Co., 39 S. C. 472, 18 S. E. 58, 39 Am. St. Rep. 746, 22 L. R. A. 246; Baltzeger v. Carolina Mid. Ry. Co., 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789, Gross v. Lampasas, 74 Tex. 195, 11 S. W. 1086; Barnett v. Matagorda, etc., Co., 98 Tex. 355; Norfolk, etc., R. R. Co. v. Carter, 91 Va. 587, 22 S. E. 517; Cass v. Dicks, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859; Neal v. Ohio Riv. R. R. Co., 47 W. Va. 316, 34 S. E. 914; O'Connor v. Fond du Lac., etc., Ry. Co., 52 Wis. 526; Johnson v. Chicago, etc., R. R. Co., 80 Wis. 640, 50 N. W. 771, 27 Am. St. Rep. 76, 14 L. R. A. 495.

[77] Martin v. Riddle, 26 Pa. St. 415; Kauffman v. Greismer, 26 Pa. St. 407; Delahoussaye v. Judice, 13 La. Ann. 587; Butler v. Peck, 16 Ohio St. 334, 88 Am. Dec. 452; Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Beard v. Murphy, 37 Vt. 99; Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Gillham v. Madison Co. R. R. Co., 49 Ill. 484; Nininger v. Norwood, 72 Ala. 277; Boyd v. Conklin, 54 Mich. 583, 52 Am. Rep. 831; Louisville, etc., R. R. Co. v. Hays, 11 Lea, 382, 47 Am. Rep. 291, Jacksonville, etc., R. R. Co. v. Cox, 91 Ill. 500; Eufaula v. Simmons, 86 Ala. 515, 6 So. 47; Central of Georgia Ry. Co. v. Windham, 126 Ala. 552, 28 So. 392; Larned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976, 35 Am. St. Rep. 163, 21 L. R. A. 593; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92; Connally v. Hall, 84 Ga. 198, 10 S. E. 738; Totel v. Bonnefoy, 123 Ill. 653, 14 N. E. 687, 5 Am. St. Rep. 570; Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163; Vannest v. Fleming, 79 Ia. 638, 44 N. W. 906, 18 Am. St. Rep. 387, 8 L. R. A. 277; Willetts v. Chicago, etc., Ry. Co., 88 Ia. 281, 55 N. W. 313, 21 L. R. A. 601; Foley v. Godchaux, 48 La. Ann. 466, 19 So. 247; Philadelphia, etc., R. R. Co. v. Davis, 68 Md. 281, 11 Atl. 822, 6 Am. St. Rep. 440; Gregory v. Bush, 64 Mich. 37, 31 N. W. 90; Chapel v. Smith, 80 Mich. 100, 45 N. W. 69; Finkbinder v. Ernst, 135

the flow of surface water upon his land[79] or discharge it in increased quantities or unusual channels upon the proprietor below.[80] All the authorities will agree that one may reasonably use and improve his land for agricultural purposes, though the flow of surface water may thereby be changed to the detriment of other proprietors.[81] Thus one may lawfully drain his lands into a natural water-course, even though a lower proprietor is injured by the increased flow.[82] There is also substantial agreement in the proposition that where the surface waters are collected and cast in a body upon the proprietor below, the lower proprietor sustains a legal injury, and may have his action therefor.[83] In Iowa, in a carefully considered case, it

Mich. 226, 97 N. W. 684; Kelly v. Dunning, 39 N. J. Eq. 482; Field v. West Orange, 46 N. J. Eq. 183; Staton v. Norfolk, etc., R. R. Co., 109 N. C. 337, 13 S. E. 933; Mizell v. McGowan, 120 N. C. 134, 26 S. E. 783; Torry v. Scranton, 133 Pa. St. 173, 19 Atl. 351; Garland v. Aurin, 103 Tenn. 555, 53 S. W. 940, 76 Am. St. Rep. 699, 48 L. R. A. 862.

[78] Vanderwiele v. Taylor, 65 N. Y. 341; Chadeayne v. Robinson, 55 Conn. 345, 11 Atl. 592; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Bowlsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216; Hall v. Rising, 141 Ala. 431.

[79] Martin v. Riddle, 26 Pa. St. 415; Beard v. Murphy, 37 Vt. 99; Earle v. De Hart, 12 N. J. L. 280; Tootle v. Clifton, 22 Ohio St. 247; Laney v. Jasper, 39 Ill. 46; Porter v. Durham, 74 N. C. 767; Gray v. Knoxville, 85 Tenn. 99.

[80] Kauffman v. Greismer, 26 Pa. St. 407; Livingston v. McDonald, 21 Ia. 160; Hays v. Hinkleman, 68 Pa. St. 324; Porter v. Durham, 74 N. C. 767; Adams v. Walker, 34 Conn. 466.

[81] Rindge v. Sargent, 64 N. H. 294, 9 Atl. 723; Franklin v. Durger, 71 N. H. 186, 51 Atl. 911; Bangor v. Lansil, 51 Me. 521; Flagg v. Worcester, 13 Gray, 601; Goodale v. Tuttle, 29 N. Y. 459; Hoyt v. Hudson, 27 Wis. 656. See Sheehan v. Flynn, 59 Minn. 436.

[82] Woodward, J., in Kauffman v. Greismer, 26 Pa. St. 407, 414, 67 Am. Dec. 437; Meixall v. Morgan, 149 Pa. St. 415, 24 Atl. 216, 34 Am. St. Rep. 614; Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632.

[83] Eufaula v. Simmons, 86 Ala. 515; Springfield, etc., R. R. Co. v. Henry, 44 Ark. 360; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92; Atkinson v. Atlanta, 81 Ga. 625, 7 S. E. 692; Albany v. Sikes, 94 Ga. 30, 20 S. E. 257; Elgin v. Kimball, 90 Ill. 569, 25 N. E. 689; Graham v Keene, 143 Ill. 425, 32 N. E. 180; Weddell v. Hapner, 124 Ind. 315,

of the line of the plaintiff's, had the effect to increase the quantity of water on the plaintiff's land to his injury, or, without increasing it, threw the water upon the land in a different manner from what the same would naturally have flowed upon it, to his injury, the defendant would be liable for the injury, even though the ditch was constructed by the defendant in the course of the ordinary use and improvement of his farm.[84] So in Wisconsin it has been decided that the owner of land on which there is a pond or reservoir of surface water

24 N. E. 368; Patoka Tp. v. Hopkins, 131 Ind. 142, 30 N. E. 896; Williamson v. Oleson, 91 Ia. 290, 59 N. W. 267; Stinson v. Fishel, 93 Ia. 656, 61 N. W. 1063; Schofield v. Cooper, 126 Ia. 334, 102 N. W. 1110; Litchins v. Frostburg, 68 Md. 100, 11 Atl. 826; Gregory v. Bush, 64 Mich. 37, 31 N. W. 90; Olson v. St. Paul, etc., R. R. Co., 38 Minn. 419, 37 N. W. 953; Illinois Central R. R. Co. v. Miller, 68 Miss. 760, 10 So. 61; Paddock v. Somes, 102 Mo. 226, 14 S. W. 746; Fremont, etc., R. R. Co. v. Marley, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; Lincoln St. Ry. Co. v. Adams, 41 Neb. 737, 60 N. W. 83; Jacobson v. Van Boening, 48 Neb. 80, 66 N. W. 993, 58 Am. St. Rep. 684, 32 L. R. A. 229; Field v. West Orange, 46 N. J. Eq. 183; Staton v. Norfolk, etc., R. R. Co., 111 N. C. 278, 16 S. E. 181; Weir v. Plymouth, 148 Pa. St. 566, 24 Atl. 94; Bohan v. Avoca, 154 Pa. St. 404, 26 Atl. 604; Tyrus v. Kansas City, etc., R. R. Co., 114 Tenn. 579; Austin, etc., R. R. Co. v. Anderson, 79 Tex. 427, 15 S. W. 484; Norfolk, etc., R. R. Co. v. Carter, 91 Va. 587, 22 S. E. 517; Northwood v. Raleigh, 3 Ontario, 347; Stalker v. Dunwick, 15 Ontario, 342; Miner v. Buffalo, etc., R. R. Co., 9 U. C. C. P. 280; Rowe v. Rochester, 22 U. C. C. P. 319. But see Brown v. Winona, etc., Ry. Co., 53 Minn. 259, 55 N. W. 123, 39 Am St. Rep. 603.

[84] Livingston v. McDonald, 21 Ia. 160, 89 Am. Dec. 563. To same effect, Williamson v. Oleson, 91 Ia. 290, 59 N. W. 267; Stinson v. Fishel, 93 Ia. 656, 61 N. W. 1063. See Vannest v. Fleming, 79 Ia. 638, 44 N. W. 906, 18 Am. St. Rep. 387, 8 L. R. A. 277; Willitts v. Chicago, etc., Ry. Co., 88 Ia. 281, 55 N. W. 313, 21 L. R. A. 601; Reynolds v. Clark, Ld. Raym. 1399; Laney v. Jasper, 39 Ill. 46. To substantially the same effect are McCormick v. Kansas City, etc., R. R. Co., 70 Mo. 359, 35 Am. Rep. 431; Hicks v. Silliman, 93 Ill. 255; West Orange v. Field, 37 N. J. Eq. 600; Templeton v. Voshloe, 72 Ind. 134, 37 Am. Rep. 150; Hogenson v. St. Paul., etc., Ry. Co., 31 Minn. 224; Gillison v. Charleston, 16 W. Va. 282, 37 Am. Rep. 763; Knight v. Brown, 25 W. Va. 808; Mitchell v. New York, etc., R. R. Co., 36 Hun, 177; Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Crab-

prietor may consume all the surface water that comes upon his land and the lower proprietor cannot complain that he is deprived of its flow.[87] As has been forcibly said, one party cannot insist upon another maintaining his field as a mere water table for the other's benefit.[88]

§ 300. **Subterranean waters.** If one by an excavation on his own land draws off the subterraneous waters from the land of his neighbor to the prejudice of the latter, no action will lie for the consequent damage. This is fully settled in England by the leading case of *Acton v. Blundell*,[89] and in a later case it is decided that prescriptive rights cannot be gained in subterraneous waters, which will preclude such excavations on adjoining grounds as may draw them off.[90] In a

tree v. Baker, 75 Ala. 91, 51 Am. Rep. 424; Adams v. Walker, 34 Conn. 466, 91 Am. Dec. 742.

[85] Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50. And see Proctor v. Jennings, 6 Nev. 83; Vernum v. Wheeler, 35 Hun, 53; Davis v. Fry, 14 Okl. 340, 78 Pac. 180. The defendant had a pond on his land with no outlet. He proposed to drain it by a tile drain 1,400 feet long onto low land adjoining the plaintiff. The effect would be to saturate the defendant's land and to cause percolation on to plaintiff's land. The construction of the drain was enjoined. Schuster v. Albrecht, 98 Wis. 241, 73 N. W. 990, 67 Am St. Rep. 804.

[86] Brandenberg v. Zeigler, 62 S. C. 18, 39 S. E. 790, 89 Am. St. Rep. 887, 55 L. R. A. 414; Noyes v. Cosselman, 29 Wash. 635, 70 Pac. 61, 92 Am. St. Rep. 937; Sullivan v. Johnson, 30 Wash. 72, 70 Pac. 246; Butler v. Peck, 16 Ohio St. 334, 88 Am. Rep. 452; 1 Lewis, Em. Dom. § 91.

[87] Buffum v. Harris, 5 R. I. 243; Cott v. Lewiston, 36 N. H. 214, 217.

[88] Rawstron v. Taylor, 11 Exch. 369, 383. To the same effect is Broadbent v. Ramsbotham, 11 Exch. 602, in which it is said (p. 615) that "the water belongs absolutely to the defendant, on whose land it falls." See, also, Curtiss v. Ayrault, 47 N. Y. 73; Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563; Wheatley v. Baugh, 25 Pa. St. 528, 44 Am. Dec. 721; Boynton v. Gilman, 53 Vt. 17; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241.

[89] Acton v. Blundell, 12 M. & W. 324.

[90] Chasemore v. Richards, 7 H. L. Cas. 349; S. C. in Ex. Ch. 2 H. & N. 168. See, also, New River Co. v. Johnson, 2 El. & El. 435; Hammond v. Hall, 10 Sim. 551; Smith v. Kenrick, 7 C. B. 515;

motive or purpose of the defendant was immaterial.[91] These decisions have been generally followed in this country, and it may be considered settled law that if the well dug by one man or other excavation made by him ruins the well or spring of his neighbor by drawing off its water, it is *damnum absque injuria*.[92] As applied to ordinary wells and excavations into which the water has flowed in obedience to natural forces and where the result could not have been foreseen or prevented, the rule is the only practical one. But the rule cannot justly be applied to give one an absolute dominion over the sub-sur-

The Queen v. Metropolitan Board of Works, 3 B. & S. 710; Popplewell v. Hodkinson, L. R. 4 Exch. 248.

[91] Bradford v. Pickle, (1895) A. C. 587.

[92] Greenleaf v. Francis, 18 Pick. 117; Wheatley v. Baugh, 25 Pa. St. 528; Haldeman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511; Frazier v. Brown, 12 Ohio St. 294; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Bliss v. Greeley, 45 N. Y. 671, 6 Am. Rep. 152; Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. 433; New Albany, etc., R. R. Co. v. Peterson, 14 Ind. 112, 77 Am. Dec. 60; Chatfield v. Wilson, 28 Vt. 49; Clark v. Conroe, 38 Vt. 469; Chase v. Silverstone, 62 Me. 175, 16 Am. Rep. 412; Morrison v. Bucksport, etc., R. R. Co., 67 Me. 353; Commonwealth v. Richter, 1 Pa. St. 467; Ocean Grove Ass'n v. Comrs. of Asbury Park, 40 N. J. Eq. 447; Springfield W. W. Co. v. Jenkins, 62 Mo. App. 74; Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. 433, 2 Am. St. Rep. 443; Herrman Irr. Co. V. Butterfield, M. & M. Co., 19 Utah, 453, 57 Pac. 537, 51 L. R. A. 930; Wheelock v. Jacobs, 70 Vt. 162, 40 Atl. 41, 67 Am. St. Rep. 659, 43 L. R. A. 105; Miller v. Black Rock Springs Imp. Co., 99 Va. 747, 40 S. E. 27, 86 Am. St. Rep. 924; Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 98 Am. St. Rep. 933, 62 L. R. A. 589; McNab v. Robertson, (1897) A. C. 129. The same rule has been applied to polluting waters underground. Upjohn v. Richland, 46 Mich. 542. A railroad company dug a well, and used the water for its engines to the extent of 25,000 gallons a day, whereby the plaintiff's well was dried up. It was held that there was no liability. Houston, etc., R. R. Co. v. East, 98 Tex. 146.

The principles applicable to percolating water have been applied to natural gas. One cannot enjoin his neighbor from "shooting" his well with explosives because the effect will be to decrease the flow of the plaintiff's well. People's Gas Co. v. Tyner, 131 Ind 277, 31 N. E. 59, 31 Am. St. Rep. 433, 16 L. R. A. 433; Tyner v People's Gas Co., 131 Ind. 408, 31 N. E. 61.

And where a city obtained a part of its water supply from wells upon its own land, to which a powerful suction was applied by means of pumps and machinery, and the effect was to destroy a stream and spring on the plaintiff's land half a mile away, the city was held liable.[93] So where the plaintiff's land was made valueless for agricultural purposes by withdrawal of the underground water in the same manner and for the same purpose.[94] In the case last referred to the court says: "In the absence of contract or enactment, whatever it is reasonable for the owner to do with his sub-surface water, regard being had to the definite rights of others, he may do. * * * But to fit up his land with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired." The subterranean supply of water is essential to the use of land for agricultural purposes and to the growth of trees and vegetation, and this supply exists in common and under equalized pressure in areas of greater or less extent and the doctrine of reasonable use applies to the proprietors in such a territory and one proprietor may not wantonly or maliciously waste it or divert it elsewhere to the detriment of other proprietors in the reasonable use of their land.[95] The right of each proprietor is lim-

[93] Smith v. Brooklyn, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664.

[94] Forbell v. New York, 164 N. Y. 522, 58 N. E. 644, 79 Am. St. Rep. 666, 51 L. R. A. 695.

[95] Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 99 Am. St. Rep. 35, 64 L. R. A. 236; Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. 849; Barclay v. Abraham, 121 Ia. 619, 96 N. W. 108, 100 Am. St. Rep, 365, 64 L. R. A. 255; Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N. W. 907, 99 Am. St. Rep. 541, 60 L. R. A. 875; Springfield W. W. Co. v. Jenkins, 62 Mo., App. 74; Miller v. Black Rock, etc., Co., 99 Va. 747, 40 S. E. 27; and cases in last two notes. See Phelps v. Nowlen, 72 N. Y. 39; Chatfield v. Wilson, 28 Vt. 49; Chesley v. King, 74 Me.

useful purpose in connection with the land from which it is taken."[96]

In Pennsylvania it is held that the reason of the rule of non-liability for drawing off or interfering with subterranean waters, is that the damage could not be foreseen or avoided.[97] The case referred to arose out of the following facts: A natural gas company in boring a well encountered salt water in one of the lower strata, which rose in the well, found its way through the upper rock formation and destroyed the neighboring wells. The existence of the salt water in the lower stratum, the geological formation in the vicinity and the probable consequences were all well known and the damage could have been prevented by a small outlay. The company was held liable.

Probably if the subterraneous water were a stream flowing in a well-known course, one through whose land it flowed would be protected against its being drawn away from him.[98] But one claiming rights in such a stream would be under the

164; Pence v. Carney, 58 W. Va. 296. A statute to prevent the waste of natural gas and imposing a penalty for its violation held valid. Townsend v. State, 147 Ind. 624, 47 N. E. 19; State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809; Ohio Oil Co. v. Indiana, 177 U. S. 190, 22 S. C. Rep. 576. But a similar statute as to artesian wells was held void in Wisconsin. Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589.

[96] Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 99 Am. St. Rep. 35, 64 L. R. A. 236.

[97] Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143, 18 Atl. 1012, 17 Am. St. Rep. 791, 6 L. R. A. 280; Collins v. Chartiers Valley Gas Co., 139 Pa. St. 111, 21 Atl. 147.

[98] See Dickinson v. Grand Junction Canal Co., 7 Exch. 282, 300; Dudden v. Guardians, etc., 1 H. & N. 627; Chasemore v. Richards, 7 H. L. Cas. 349, 373; Smith v. Adams, 6 Paige, 435; Wheatly v. Baugh, 25 Pa. St. 528; Whetstone v. Bowser, 29 Pa. St. 59; Cole Silver Mining Co. v. Virginia, etc., Water Co., 1 Sawyer, 470; Burroughs v. Saterlee, 67 Ia. 396, 56 Am. Rep. 350; Hale v. McLea, 53 Cal. 578; Lybe's Appeal, 106 Pa. St. 626; Roath v. Driscoll, 20 Conn. 532; Brown v. Illius, 25 Conn. 583; Haldeman v. Bruckhardt, 45 Pa. St. 512; Angell on Watercourses, 150–159; Washburn on Easements, 441–448; Gould on Waters, § 281. But in Pennsylvania it is denied that this rule applies where the course of the stream cannot be discovered from the surface. Lybe's App., 106 Pa. St. 626.

tions of a stream flowing in a well-defined channel, the owner of the land through which it flows will not be authorized to divert it, pollute it, or improperly use it, any more than if the stream ran upon the surface in a well defined course."[1] And the same rule has been held in Iowa and Maryland.[2]

§ 301. Nuisances in the use of water courses—General rules. Certain principles control the utilization of water in the running streams of the country, the violation of which may constitute a nuisance. These principles apply equally to navigable and non-navigable waters, and in general they are not affected by the fact that one riparian proprietor has first appropriated the waters to his own use. It is well settled that at the common law no superior rights can be acquired by one over the other by such prior appropriation.[3] The rule is modified in the mining states where the use of water upon the public domain is allowed to be appropriated to private use, independently of any ownership in the soil; and there the right of the first appropriator is recognized as the superior right.[4] It

[99] See Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Moiser v. Caldwell, 7 Nev. 363.

[1] Tampa W. W. Co. v. Cline, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376.

[2] Willis v. Perry, 92 Ia. 297, 60 N. W. 727, 26 L. R. A. 124; Washington County Water Co. v. Garver, 91 Md. 398, 46 Atl. 979.

[3] Wright v. Howard, 1 Sim. & Stu. 190; Mason v. Hill, 3 B. & Ad. 304; Martin v. Bigelow, 2 Aik. 184, 16 Am. Dec. 696; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Platt v. Johnson, 15 Johns. 213, 8 Am. Dec. 233; Gilman v. Tilton, 5 N. H. 231; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; Hoy v. Sterrett, 2 Watts, 327, 27 Am. Dec. 313; Hartzall v. Sill, 12 Pa. St. 24; Kenney & Wood Mfg. Co. v. Union Mfg. Co., 39 Conn. 576; Parker v. Hotchkiss, 25 Conn. 321; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723; Bliss v. Kennedy, 43 Ill. 67; Wood v. Edes, 2 Allen, 578; Thurber v. Martin, 2 Gray, 394, 41 Am. Dec. 468; Gould v. Boston Duck Co., 13 Gray, 442.

[4] Atchison v. Peterson, 20 Wall. 507; Kelly v. Natoma Water Co., 6 Cal. 105; Butte Canal, etc., Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769; Nevada Water Co. v. Powell, 34 Cal. 109; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec 537; Ophir S. M. Co. v. Carpenter, 4 Nev. 534; Barnes v. Sabron, 10 Nev. 217 Strait v. Brown, 16

a riparian proprietor to flow the lands of those above [illegible], manufacturing purposes, on making compensation. "The priority of first possession necessarily arises from the nature of the appropriation; where two or more have an equal right to appropriate, and where the actual appropriation by one necessarily excludes all others, the first in time is the first in right."[5]

The general principle is that every proprietor of land on a water course is entitled to the enjoyment and use of the stream substantially according to its natural flow, subject only to such interruption as is necessary and unavoidable in its reasonable and proper use by other proprietors.[6] The proprietors above have no right to divert, or unreasonably to retard the natural flow of the water to the proprietors below, and the proprietors below have no right to retard it or turn it back upon the proprietors above to their prejudice.[7] The use may be for mills, for irrigation or other agricultural purposes; in short for any purpose whatsoever, within the limits of what is reasonable.

Nev. 317; Jerrett v. Mahan, 20 Nev. 89, 17 Pac. 12. See an elaborate discussion of appropriation in Lux v. Haggin, 69 Cal. 255.

[5] Gould v. Boston Duck Co., 13 Gray, 442, 451; Fuller v. Chicopee Mfg. Co., 16 Gray, 43; Lincoln v. Chadbourne, 56 Me. 197.

[6] Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572; Tampa W. W. Co. v. Cline, 37 Fla. 586, 20 So. 780; Ferguson v. Formenich Mfg. Co., 77 Ia. 576, 42 N. W. 448; Shamleffer v. Peerless Mill Co., 18 Kan. 24; Anderson v. Cincinnati So. R. R. Co., 86 Ky. 44, 5 S. W. 49; Heath v. Williams, 25 Me. 209; Clark v. Cambridge, etc., Co., 45 Neb. 799, 64 N. W. 239; East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. 631; New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841; Clark v. Pennsylvania R. R. Co., 145 Pa. St. 432, 22 Atl. 989; Silver Spring, etc., Co. v. Wanskuck Co., 13 R. I. 611; Carpenter v. Gold, 88 Va. 551, 14 S. E. 329; United States v. Rio Grande, D. & I. Co., 174 U. S. 690.

[7] Wright v. Howard, 1 Sim. & Stu. 190; Webb v. Portland Mfg Co., 3 Sum. 189; Blanchard v Baker, 8 Me. 253, 23 Am. Dec. 504, Thurber v. Martin, 2 Gray, 394 41 Am. Dec. 468; Chandler v. Howland, 7 Gray, 348, 66 Am. Dec 487; Gould v. Boston Duck Co. 13 Gray, 442; Miller v. Miller, 9 Pa. St. 74; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526; Arnold v. Foot, 12 Wend, 330; Clark v.

and allows it to pass as it naturally would to those entitled to its use below him.[8] But he has no right to divert it without thus returning it; and to turn any portion of it into a new channel would be an actionable injury.[9] He may not divert the water even for the purposes of repair of machinery; though a mere detention of the water for that purpose would be lawful, if not under the circumstances unreasonable.[10]

A town or city cannot by purchase of an upper proprietor, or even by legislation, acquire the right to appropriate a water course for municipal purposes, without the consent of the pro-

Pennsylvania R. R. Co., 145 Pa. St. 438, 22 Atl. 989, 27 Am. St. Rep. 710.

[8] Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Gould v. Boston Duck Co., 13 Gray, 442; Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; Van Hoesen v. Coventry, 10 Barb, 518; Sackrider v. Beers, 10 Johns. 241; Merritt v. Brinkerhoff, 17 Johns. 306, 8 Am. Dec. 404; Oregon Iron Co. v. Trullinger, 3 Ore. 1; Porter v. Durham, 74 N. C. 767; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504.

[9] Webb v. Portland Mfg. Co., 3 Sum. 189; Parker v. Griswold, 17 Conn. 287, 42 Am. Dec. 739; Harding v. Stamford Water Co., 41 Conn. 87; Newhall v. Ireson, 8 Cush. 595, 54 Am. Dec. 790; Pratt v. Lamson, 2 Allen, 275; Anthony v. Lapham, 5 Pick. 175; Blanchard v. Baker, 8 Me. 253; Vandenburgh v. Van Bergen, 13 Johns. 212; Shively v. Hume, 10 Ore. 76; Weiss v. Oreg., etc., Co., 13 Ore. 496; Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572; East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. 631; Hogg v. Connellsville Water Co., 168 Pa. St. 456, 31 Atl. 1010; Carpenter v. Gold, 88 Va. 551, 14 S. E. 329; Hinkle v. Avery, 88 Ia. 47, 55 N. W. 77; Standard Plate Glass Co. v. Butler Water Co., 5 Pa. Super. Ct., 563; Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425. The owner of land upon which a spring is situated that is the source of a stream flowing through the lands of others, is only a riparian proprietor and may not appropriate the spring for his own exclusive use and it makes no difference that the owner is a water company. Lord v. Meadville Water Co., 135 Pa. St. 122, 19 Atl. 1007, 20 Am. St. Rep, 864, 8 L. R. A. 202.

[10] Davis v. Getchell, 50 Me. 602; Van Hosen v. Coventry, 10 Barb. 518. See Angell on Watercourses, § 99a. Peter v. Caswell, 38 Ohio St. 518, where water long diverted was turned into original channel causing harm.

The right of the lower proprietor to have the stream flow to him in undiminished volume is qualified to this extent, that the upper proprietor may lawfully withdraw from it whatever may be necessary to supply the wants of his family and of his domestic animals, and also for irrigation, manufacturing and other useful purposes, provided what he withdraws does not essentially diminish the volume to the prejudice of those below him.[12]

§ 303. **Detention of the water.** The general rule is that each riparian proprietor is entitled to the steady flow of the stream, according to its natural course. But to apply this rule strictly would be to preclude the best use of flowing waters in most cases; and where power is desired, the rule must yield to the necessity of gathering the water into reservoirs. It is lawful to do this where it is done in good faith,[13] for a useful purpose, and with as little interference with the rights of other proprietors as is reasonably practicable under the circumstances.[14] It is an unreasonable detention of the water to

[11] Wilts, etc., Canal Co. v. Swindon Water Works Co., L. R. 9 Ch. App. 451; S. C. L. R. 7 H. L. 697; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; 1 Lewis, Em. Dom, § 62; Osborn v. Norwalk, 77 Conn. 663; Smith v Rochester, 92 N. Y. 463, 44 Am. Dec. 391.

[12] Evans v. Merriweather, 4 Ill. 492, 38 Am. Dec. 106; Bliss v. Kennedy, 43 Ill. 68; Fleming v. Davis, 37 Tex. 173; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504; Lapham v. Anthony, 5 Pick. 175; Lakin v. Ames, 10 Cush. 198; Colburn v. Richards, 13 Mass. 420, 7 Am. Dec. 160; Arnold v. Foot, 12 Wend. 330; Randall v. Silverthorn, 4 Pa. St. 173; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Gillett v. Johnson, 30 Conn. 180; Embrey v. Owen, 6 Exch. 353; Sampson v. Hoddinott, 1 C. B. (N. S.) 590; Wood v. Waud, 3 Exch. 748, 780; Chasemore v. Richards, 2 H. & N. 168; Messinger's Appeal, 109 Pa. St. 285; Baker v. Brown, 55 Tex. 377; Shook v. Colohan, 12 Ore. 239. Water for locomotives may not be taken if flow is sensibly diminished. Garwood v. New York, etc., R. R. Co., 83 N. Y. 400, 38 Am. Rep. 452; Penn. R. R. Co v. Miller, 112 Pa. St. 34; Anderson v. Cincinnati, etc., R. R. Co., 86 Ky. 44, 5 S. W. 49. See 1 Lewis, Em. Dom. § 62.

[13] Hoy v. Sterrett, 2 Watts, 327, 27 Am. Dec. 313.

[14] Pitts v. Lancaster Mills, 13 Met. 156; Gould v. Boston Duck

by letting it off occasionally a flood may be obtained for the purpose of floating logs;[16] but it is not unreasonable, and therefore not unlawful to detain the surplus water not used in a wet season and discharge it in proper quantities for use in a dry season.[17] It has been held not to be an unreasonable use of a stream for the defendant to detain the flow for two days and a night for the purpose of filling a reservoir for a supply of ice.[18]

Co., 13 Gray, 442; Wood v. Edes, 2 Allen, 578; City of Springfield v. Harris, 4 Allen, 494; Hetrich v. Deachler, 6 Pa. St. 32; Hartzall v. Sill, 12 Pa. St. 248; Hoy v. Sterrett, 2 Watts, 327; Platt v. Johnson, 15 Johns. 213; Clinton v. Meyers, 46 N. Y. 511, 7 Am. Rep. 373; Mabie v. Mattieson, 17 Wis. 1; Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636; Parker v. Hotchkiss, 25 Conn. 321; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526; Oregon Iron Co. v. Trullinger, 3 Ore. 1.

[15] Clinton v. Meyers, 46 N. Y. 511, 7 Am. Rep. 373; Brace v. Yale, 10 Allen, 441; Timm v. Bear, 29 Wis. 254.

[16] Thunder Bay, etc., Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046. To same effect, McKee v. Delaware, etc., Co., 125 N. Y. 353, 26 N. E. 305, 21 Am. St. Rep. 740.

[17] Oregon Iron Co. v. Trullinger, 3 Ore. 1, 7. The discharge, however, must not be made in such unusual and unnatural quantities as to preclude the lower proprietors from making use of it as it flows past them. Pollitt v. Long, 58 Barb. 20; Merritt v. Brinkerhoff, 17 Johns. 306, 8 Am. Dec. 404; Thunder Bay Co. v. Speechly, 31 Mich. 336; Thurber v. Martin, 2 Gray, 394, 41 Am. Dec. 468; Oregon Iron Co. v. Trullinger, 3 Ore. 1. See also Mason v. Hoyle, 56 Conn. 265, 14 Atl. 786.

[18] Gehler v. Knorr, 101 Ia. 700, 70 N. W. 757, 63 Am. St. Rep. 416, 36 L. R. A. 697. See Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799, 102 Am. St. Rep. 499. Riparian owners upon a lake or pond are entitled to have the water stand at its natural level and it is an actionable injury to raise, or lower or divert the water. Hebron Gravel Road Co. v. Harvey, 90 Ind. 192; Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233; Troe v. Larson, 84 Ia. 649, 51 N. W. 179; Clark v. Rockland Water Co., 52 Me. 68; Fernold v. Knox Woolen Co., 82 Me. 48, 19 Atl. 93; Hyatt v. Albro, 121 Mich. 638, 80 N. W. 641; Concord Mfg. Co. v. Robertson, 66 N H. 1, 25 Atl. 718; Peay v. Salt Lake City, 11 Utah, 341, 40 Pac. 206; Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co., 79 Wis. 297, 48 N. W. 371.

or otherwise, to cause the water of a stream passing through his lands to set back upon the lands of a proprietor above. He must allow the water to enter upon his premises in the accustomed way, and the upper proprietor, if necessary, may cross his line to keep the channel open.[19] Any act of his which raises the water in the stream above his estate is presumptively damaging and therefore actionable.[20] It is actionable, also, because, if persisted in, without objection, it might, in the lapse of time, establish permanent rights by prescription.[21] Any showing of actual damage is therefore unnecessary to the maintenance of the action.[22] It has been already stated, that in aid of manufactures, this common law has been so far changed by statute in some states as to allow parties to flow the lands of others for the purpose of obtaining power on making compensation.[23]

All the foregoing principles are as much applicable to muni-

[19] Prescott v. Williams, 5 Met. 429.

[20] Bell v. McClintock, 9 Watts, 119, 34 Am. Dec. 107; Martin v. Riddle, 26 Pa. St. 415; Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Bellinger v. N. Y. Cent. R. R. Co., 23 N. Y. 42; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; Williams v. Nelson 23 Pick 141, 34 Am. Dec. 45; Staple v. Spring, 10 Mass. 72; Smith v. Agawam Canal, 2 Allen, 355; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Strout v. Milbridge Co., 45 Me. 76; Merritt v. Parker, 1 N. J. L. 460; Phinzy v. Augusta, 47 Ga. 260; Whitcomb v. Vt. Cent. R. R. Co., 25 Vt. 49; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53; Miss. Cent. R. R. Co. v. Caruth, 51 Miss. 77; Arimond v. Green Bay, etc., Co., 31 Wis. 316; Lull v. Davis, 1 Mich. 77; Eaton v. Railroad Co., 51 N. H. 504; Sullens v. Chicago, etc., Ry. Co., 74 Ia. 659, 38 N. W. 545; Athens Mfg. Co. v. Rucker, 80 Ga. 291, 4 S. E. 885; Southern Ry. Co. v. Cook, 117 Ga. 286, 43 S. E. 697; Kankakee, etc., R. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Ohio, etc., Ry. Co. v. Ramey, 139 Ill. 9, 28 N. E. 1087, 32 Am. St. Rep. 176; Centralia v. Wright, 156 Ill. 561, 41 N. E. 217; Mississippi, etc., R. R. Co. v. Archibald, 67 Miss. 38, 7 So. 212; Goodrich v. Dorset Marble Co., 60 Vt. 280, 13 Atl. 636; 1 Lewis, Em. Dom. § 67.

[21] Mississippi Cent. R. R. Co v Mason, 51 Miss. 234.

[22] *Ante*, § 12.

[23] See 1 Lewis, Em. Dom. §§ 178—182.

water on the lands above, by the partial obstruction interposed to its flow, the town will be liable, as an individual would for a like obstruction.[24]

§ 305. **Pollution of stream.** In the leading case of *Wood v. Waud*, the ground of complaint was that the defendant fouled the water of a stream, to the prejudice of lower riparian proprietors, by pouring into it soapsuds, wool comber's suds, etc. In defense, it was urged that the act of defendant did no actual damage to the plaintiffs because the stream was already so polluted by similar acts of mill owners above the defendant's mills, etc., that the wrongful act complained of made no practical difference. It was held, notwithstanding, that the plaintiffs had received damage in point of law: "they had a right to the natural stream flowing through the land in its natural state, as an incident to the right to the land on which the water course flowed."[25] The general rule is that every riparian owner has a right to have the stream come to him in its natural state and purity.[26] This right is subject to the right

[24] Haynes v. Burlington, 38 Vt. 350; Lawrence v. Fairhaven, 5 Gray, 110; Parker v. Lowell, 11 Gray, 353; Sprague v. Worcester, 13 Gray, 193; Helena v. Thompson, 29 Ark. 559; I Lewis, Em. Dom. § 67.

[25] Wood v. Waud, 3 Exch. 748, 772. See Stonehewer v. Farrar, 6 Q. B. 730. An injunction will lie against one of several who pollute a stream, through his act causes but an inconsiderable part of the damage. Woodyear v. Schaefer, 57 Md. 1; Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687. It is no defense that the plaintiff has himself to some extent polluted the stream. Jackman v. Arlington Mills, 137 Mass. 277; West Arlington Imp. Co. v. Mount Hope Retreat, 97 Md. 191, 54 Atl. 982.

[26] Merrifield v. Lombard, 13 Allen, 16; Gladfelter v. Walker, 40 Md. 1; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192; Drake v. Lady Ensley Coal, etc., Co., 102 Ala. 501, 14 So. 749; Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; Ferguson v. Formenich Mfg. Co., 77 Ia. 576, 42 N. W. 448; Jessup & M. Paper Co. v. Ford, 6 Del. Ch. 52; Richmond Mfg. Co. v. Atlantic DeLaine Co., 10 R. I. 106; Silver Spring, etc., Co. v. Wanskuck Co., 13 R. I. 611; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Randolph v. Penn. S. V. R. R. Co., 186 Pa. St. 541; Van Egmond v. Seaforth, 6 Ontario,

rupted otherwise than by such reasonable use an action lies.[28] Polluting a stream with the sewage of a city is a nuisance for which an action lies.[29] So it is a nuisance if a riparian proprietor shall cast into the stream earth, sand, the refuse of his business, or other things, which by the flowing water are carried and deposited upon the land of a proprietor below.[30]

§ 306. Reasonable use of stream. The reasonableness of the use depends upon the nature and size of the stream, the busi-

599; Attorney General v. Lunatic Asylum, 4 L. R. Ch. App. 146.

[27] Snow v. Parsons, 28 Vt. 459, 462, 67 Am. Dec. 723; Canfield v. Andrew, 54 Vt. 1, 41 Am. Rep. 828; Lockwood, etc., Co. v. Lawrence, 77 Me. 297, 52 Am. Rep. 763; Hayes v. Waldron, 44 N. H. 580, 585, 84 Am. Rep. 105; Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592.

[28] Drake v. Lady Ensley, etc., Co., 102 Ala. 501, 14 So. 749, 48 Am. St. Rep. 77, 24 L. R. A. 64; Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149; Satterfield v. Rowan, 83 Ga. 187, 9 S. E. 677; West Arlington Imp. Co. v. Mount Hope Retreat, 97 Md. 191, 54 Atl. 982; Beach v. Sterling Iron Co., 54 N. J Eq. 65, 32 Atl. 286; Townsend v. Bell, 70 Hun, 557, 24 N. Y. S. 193; West Muncie Strawboard Co. v. Slack, 164 Ind. 21; Bowman v. Humphrey, 124 Ia. 744, 100 N. W. 854; Watson v. Colusa-Parrot M. & S. Co., 31 Mont. 513; Gallagher v. Kemmerer, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673; Robb v. Carnegie Bros., 145 Pa. St. 324, 22 Atl. 649, 27 Am. St. Rep. 694, 14 L. R. A. 329; Lentz v. Carnegie Bros., 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717.

[29] Birmingham v. Land, 137 Ala. 538, 34 So. 613; Lind v. San Louis Obispo, 109 Cal. 340, 42 Pac. 437; Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703; Dudley v. New Britain, 77 Conn. 322; Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878; Dwight v. Hayes, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; Chapman v. Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296; Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628; Good v. Altoona, 162 Pa. St. 493, 29 Atl. 741, 42 Am. St. Rep. 840; Trevitt v. Prison Ass'n. 98 Va. 332, 36 S. E. 373, 81 Am. St. Rep. 727, 50 L. R. A. 564. But not for pollution caused by the surface drainage from the streets. Bainard v. Newton, 154 Mass. 255, 27 N. E. 995.

[30] Lind v. San Louis Obispo, 109 Cal. 340, 42 Pac. 437; Dierks v. Commissioners of Highways, 142 Ill. 197, 31 N. E. 496; Gallagher v. Kemmerer, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673.

in other cases only as it may illustrate the application of general principles.[31] In a recent New York case, the court of appeals, speaking on this subject, says: "A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has a right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of others to have the stream substantially preserved in its natural rise, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others, and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law is still in force; *aqua currit et debet currere, ut currere solebat.* Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation where not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners.

[31] Hetrich v. Deachler, 6 Pa. St. 32; Davis v. Winslow, 51 Me. 264, 81 Am. Dec. 573; Tyler v. Wilkinson, 4 Mason, 397; Davis v. Getchell, 50 Me. 602; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Holden v. Lake Co., 53 N. H. 552; Parker v. Hotchkiss, 25 Conn. 321; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526; Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; Clark v. Allaman, 71 Kan. 206, 80 Pac. 571; Gould v. Boston Duck Co., 13 Gray, 442; Timm v. Bear, 29 Wis. 254; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Embrey v. Owen, 6 Exch. 352; Chasemore v. Richards, 2 H. & N. 168. What constitutes a reasonable use of a stream held a question of fact. Hazzard Powder Co. v. Sommerville Mfg. Co., 78 Conn. 171.

ers must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the rise and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which, under certain circumstances, is held reasonable, under different circumstances would be held unreasonable."[32]

The question of what is a reasonable use of one's land, though such use results in the pollution of a stream to the damage of those below, has been much considered in Pennsylvania in connection with coal mines and oil wells. It has there been determined that the right to mine coal is "a right incident to the ownership of coal property and when exercised in the ordinary manner, and with due care the owner cannot be held for permitting the natural flow of mine water over his own land, into the water course, by means of which the natural drainage of the country is affected."[33] In regard to the rights of the lower proprietor the court says: "The plaintiff's grievance is for a mere personal inconvenience, and we are of opin-

[32] Strobel v. Kerr Salt Co., 164 N. Y. 303, 320, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687. The following are leading cases on the subject of reasonable use: Drake v. Lady Ensley Coal. etc., Co., 102 Ala. 501, 14 So. 749; Heilbron v. Land & Water Co., 80 Cal. 189, 22 Pac. 62; Keeney, etc., Mfg. Co., v. Union Mfg. Co., 39 Conn. 576; White v. East Lake Land Co., 96 Ga. 415, 23 S. E. 393; Dwight v. Hays, 150 Ill. 273, 37 N. E. 218; Barnard v. Shirley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117; Willis v. Perry, 92 Iowa, 297, 60 N. W. 727, 26 L. R. A. 124; Helfrich v. Catonsville Water Co., 74 Md. 269, 22 Atl. 72; Smith v. Agawam Canal Co., 2 Allen, 355; Merrifield v. Lombard,, 13 Allen, 16, 90 Am. Dec. 172; Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592; Doorman v. Ames, 12 Minn. 451; Creek v. Bozeman W. W. Co., 15 Mont. 121, 38 Pac. 459; Jones v. Adams, 19 Nev. 78, 6 Pac. 442; Hayes v. Waldron, 44 N. H. 380, 84 Am. Dec. 105; Garwood v. New York Central, etc., R. R. Co. 83 N. Y. 400; Mumpower v. Bristol, 90 Va. 151, 17 S. E. 853 Green Bay, etc., Canal Co. Kaukauna Water Power Co., 9 Wis. 370, 61 N. W. 1121; Indianapolis Water Co. v. Am. Strawboard Co., 53 Fed. 970, 57 Fed. 1000.

[33] Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. 453;

of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."

In a New York case the plaintiffs were mill owners on a stream and the defendant had large salt works above, and used large quantities of water from the stream in the manufacture of salt. The water was let down to the salt beds and then forced up and evaporated. The consequence was that the volume of the stream was materially diminished and that considerable salt escaped into the stream so that it was unfit for stock or domestic use, and fish were destroyed, vegetation killed and machinery rusted. The court held that the use was unreasonable as a matter of law. There were fourteen other salt works upon the same stream, operated in a similar manner, and having a large capital invested. In answer to the plea that the law should be modified in favor of so important an industry the court said: "While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long established business, for the purpose of enabling a great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule every man must so use his own property as not to injure that of his neighbor, and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land, does not change the rule, nor permit to prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use."[84]

S. C. 86 Pa. St. 401, 94 Pa. St. 302, 102 Pa. St. 370. To the same effect; Barnard v. Shirley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 41 Am. St. Rep. 454, 24 L. R. A. 568; Barnard v. Shirley, 151 Ind. 160, 47 N. E. 671, 41 L. R. A. 737.

[84] Strobel v. Kerr Salt Co., 164

tion. Of course whatever injury is incidental to a reasonable use of the water of a running stream is *damnum absque injuria*.[35]

§ 307. **Pollution of atmosphere—Smoke, dust, gases, offensive odors, etc.** Dust and smoke result from many kinds of business. It is what is commonly complained of in brick making, but sometimes also in the grinding of grain, and in the case of manufacturing establishments.[36] If the smoke or dust, or both, that rises from one man's premises and passes over and upon those of another causes perceptible injury to the property, or so pollutes the air as sensibly to impair the enjoyment thereof, it is a nuisance.[37] But the inconvenience

N. Y. 303, 322, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687. The suit was for an injunction and while holding that the plaintiffs were entitled to relief, the court also held that it did not follow that the defendants must make such terms as they could with the plaintiffs or submit to an injunction, as the court could, as a condition of withholding the injunction, require the defendants to construct reservoirs upon the upper sources of the stream to accumulate water when plentiful for use in times of scarcity and so make good the loss by use and to take such measures as were necessary to prevent the escape of salt into the stream.

[35] Tyler v. Wilkinson, 4 Mason, 397, 401; Chandler v. Howland, 7 Gray, 348, 66 Am. Dec. 487; Pitts v. Lancaster Mills, 13 Met. 156; Hetrich v. Deachler, 6 Pa. St. 32.

[36] Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Hutchens v. Smith, 63 Barb. 251; Wesson v. Iron Co., 13 Allen, 95, 90 Am. Dec. 181; Cooper v. Randall, 53 Ill. 24; Norcross v. Thoms, 51 Me. 503, 81 Am. Dec. 588; Gilbert v. Showerman, 23 Mich. 448; Crump v. Lambert, L. R. 3 Eq. Cas. 409; Hyatt v. Myers, 71 N. C. 271; Jeffersonville, etc., R. R. Co. v. Esterle, 13 Bush, 667; Daniels v. Keokuk Water Works, 61 Ia. 549; Louisville Coffin Co. v. Warren, 78 Ky. 400; Ponder v. Quitman Ginnery, 122 Ga. 29, 49 S. E. 746; Harley v. Merrill Brick Co., 83 Ia. 73, 48 N. W. 1000; McMorran v. Fitzgerald, 106 Mich. 649, 64 N. W. 569, 58 Am. St. Rep. 511; Kirchgraber v. Lloyd, 59 Mo. App. 59; Davis v. Whitney, 68 N. H. 66, 44 Atl. 78; Ladd v. Granite State Brick Co., 68 N. H. 185, 37 Atl. 1041; Rosenheimer v. Standard Gas Lt. Co., 39 App. Div. 482, 57 N. Y. S. 330; Herbert v. Rainey, 162 Pa. St. 525, 25 Atl. 725.

[37] Ross v. Butler, 19 N. J. Eq. 294; Rhodes v. Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Beier v. Cooke, 37 Hun, 38; Skelton v.

fensive odors.[39] These may proceed from a business carried on in an inconvenient place, or managed improperly, or from something simply permitted on one's premises from which the odors arise. It has repeatedly been held that the burning of brick was a nuisance;[40] but this can be no general rule: indeed the contrary has been sometimes held.[40a] So the business of tanning leather is often found to be a nuisance;[41] in part because of offensive smells proceeding from it, and in part from the fouling of streams on which the business is usually carried on. A livery stable is often a nuisance; and it is said in one case that situated within sixty-five feet of a hotel it is *prima facie* a nuisance.[42] But no such general rule can be applied. It is peculiarly a business which may or may not be

Fenton Elec. Lt. & P. Co., 100 Mich. 87, 58 N. W. 609; Dunsbach v. Hollister, 49 Hun, 352, 2 N. Y. S. 94; Wilmot v. Bell, 76 App. Div. 252, 78 N. Y. S. 591; Madison v. Copper Co., 113 Tenn. 331, 83 N. W. 658; Sterrett v. Northport M. & S Co., 30 Wash. 164, 70 Pac. 266.

[38] Walter v. Selfe, 4 De G. & S. 315; S. C. 4 Eng. L. & Eq. 15; Soltau v. De Held, 2 Sim. (N. S.) 133, 159; Columbus Gas Co. v. Freeland, 12 Ohio St. 392; Price v. Grantz, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 601; Coggswell v. New York, etc., R. R. Co., 103 N. Y. 10, 57 Am. Rep. 707; Baltimore, etc., R. R. Co. v. Fifth Bapt. Church, 108 U. S. 317.

[39] Hundley v. Harrison, 123 Ala. 292, 26 So. 294; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Norcross v. Thoms, 51 Me. 403, 504, 81 Am. Dec. 588. To constitute it a nuisance, it is not necessary the offensive smell should be unwholesome. Davidson v. Isham, 9 N. J. Eq. 186.

[40] Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Duke of Grafton v. Hilliard, referred to in 18 Ves. 210, and in note to 4 Eng. L. &. Eq. 18; Earl of Ripon v. Hobart, 3 M. & K. 169; Walter v. Selfe, 4 De G. & S. 315; S. C. 4 Eng. L. & Eq. 15; State v. Board of Health, 16 Mo. App. 8, and cases cited *ante*, note 36.

[40a] Phillips v. Lawrence, etc., Co., 72 Kan. 643, 82 Pac. 787.

[41] Rex v. Pappineau, 1 Stra. 686; Howard v. Lee, 3 Sandf. 281; Moore v. Webb, 1 C. B. (N. S.) 673; Howell v. McCoy, 3 Rawle, 256; Francis v. Schoelkopf, 53 N. Y. 152.

[42] Coker v. Birge, 9 Ga. 425, 54 Am. Dec. 347; S. C. 10 Ga. 336. See Aldrich v. Howard, 8 R. I. 246; Dargan v. Waddill, 9 Ired. 244. But see Shivery v. Streeper, 3 South Rep. 865.

tillery is more likely to be one,[45] and a soap manufactory still more.[46] A gas manufactory may be under some circumstances,[47] and so may a tobacco mill.[48] For a slaughter house or a fat rendering establishment the only "convenient" place would seem to be at some considerable distance;[49] and the same may be said of some manufactories of manure.[50]

Dead animals left unburied are likely to be a nuisance;[51]

[43] Kirkman v. Handy, 11 Humph. 406, 54 Am. Dec. 45; Dargan v. Waddill, 9 Ired. 244, 49 Am. Dec. 421; Brooder v. Salliard, 2 Ch. Div. 692; S. C. 17 Moak, 693; Phillips v. Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; Kaspar v. Dawson, 71 Conn. 405, 42 Atl. 78; Roth v. District of Columbia, 16 App. D. C. 323; Metropolitan Sav. Bank v. Marrien, 87 Md. 68, 39 Atl. 90; King v. Hamill, 97 Md. 103, 54 Atl. 625; Gallagher v. Flury, 99 Md. 181, 57 Atl. 672; Harvey v. Ice Co., 104 Tenn. 583, 58 S. W. 316. A private stable is not a nuisance *per se*. Keiser v. Lovett, 85 Ind. 240; Rounsaville v. Kohlheim, 68 Ga. 668, 45 Am. Rep. 505.

[44] Jones v. Williams, 11 M. & W. 176.

[45] Smiths v. McConathy, 11 Mo. 517.

[46] Brady v. Weeks, 3 Barb. 157.

[47] Cleveland v. Gas Light Co., 20 N. J. Eq. 201; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Bohan v. Port Jervis Gas Lt. Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Farley v. Gate City Gas Lt. Co., 105 Ga. 323, 31 S. E. 193.

[48] Hundley v. Harrison, 123 Ala. 292, 26 So. 294; Jones v. Howell, Hutt. 136.

[49] Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567; Morley v. Pragnal, Cro. Car. 510; Bishop v. Banks, 33 Conn. 118, 87 Am. Dec. 197; Meigs v. Lister, 23 N. J. Eq. 199; Pruner v. Pendleton, 75 Va. 516, 40 Am. Rep. 738; Moses v. State, 58 Ind. 185; Reichert v. Geers, 98 Ind. 73, 49 Am. Rep. 736; Millhiser v. Willard, 96 Ia. 327, 65 N. W. 325; Wilcox v. Henry, 35 Wash. 591, 77 Pac. 1055. See Dennis v. State, 91 Ind. 291; Seifried v. Hays, 81, Ky. 377, 50 Am. Rep. 167. Bone boiling in a populous neighborhood is a nuisance. Czarniecki's App., 11 Atl. Rep. 660 (Penn.).

[50] Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533; Evans v. Reading Fertilizing Co., 160 Pa. St. 209, 28 Atl. 702. See Duffy v. Meadows, 131 N. C. 31, 42 S. E. 460.

[51] Ellis v. Kansas City, etc., R. R. Co., 63 Mo. 131, 21 Am. Rep. 436; Gulf, etc., Ry. Co. v. Cherrault, 31 Tex. Civ. App. 558, 72 S. W. 868.

is a nuisance.[53] So is a mill-dam from which pestilential vapors arise and spread to adjoining property.[54] And so generally is any business which endangers the neighborhood by the noxious vapors and offensive smells which come from the place where it is carried on.[55]

§ 308. Noise, jarring, vibrations. A dog which disturbs the rest of the community at night by loud and continuous barking about or in the neighborhood of their residences may be a nuisance.[56] So the noises of billiard rooms, or places which are frequented by persons for drinking and carousing, and disorderly houses of all sorts, while they constitute public nuisances, may also, from their noises and other reasons, be nuisances to the neighborhood.[57] No doubt the blowing of a

[52] Barnes v. Hathorn, 54 Me. 124; Whale v. Reinback, 76 Ill. 322; Radican v. Buckley, 138 Ind. 582, 38 N. E. 53; Briegel v. Philadelphia, 135 Pa. St. 451, 19 Atl. 1038, 20 Am. St. Rep. 885.

[53] Commonwealth v. Perry, 139 Mass. 198.

[54] State v. Rankin, 3 Sou. Car. 438, 16 Am. Rep. 737; Adams v. Popham, 76 N. Y. 410; Richards v. Dougherty, 133 Ala. 569, 31 So. 934; De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433; Leonard v. Spencer, 108 N. Y. 338, 15 N. E. 397.

[55] Shaw v. Cummiskey, 7 Pick. 76; Meigs v. Lister, 23 N. J. Eq. 199; Ashbrook v. Commonwealth, 1 Bush, 139, 89 Am. Dec. 616; Illinois, etc., R. R. Co. v. Grabill, 50 Ill. 241; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Cleveland v. Gas Light Co., 20 N. J. Eq. 201; Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170; Neal v. Henry, Meigs, 17; Cooke v. Forbes, L. R. 5 Eq. Cas. 166; Hackney v. State, 8 Ind. 494; Planters W. & C. Co. v. Taylor, 64 Ark. 307, 42 S. W. 279; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Adams v. Modesto, 131 Cal. 501, 63 Pac. 1083; Swift v. Broyles, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Lippincott v. Lasher, 44 N. J. Eq. 120, 14 Atl. 103; Garigan v. Atlantic Ref. Co., 186 Pa. St. 604, 40 Atl. 834; Fort Worth v. Crawford, 75 Tex. 404, 13 S. W. 31; Penn. Lead Co.'s App., 96 Pa. St. 116, 42 Am. Rep. 534; Attorney General v. Heatley, (1897) 1 Ch. 560. But the injury must be substantial and not caused by peculiar susceptibility in the one complaining. Price v. Grantz, 118 Pa. St. 402, 11 Atl. 794.

[56] Brill v. Flagler, 23 Wend. 354.

[57] Tanner v. Albion, 5 Hill, 121; Bloomhuff v. State, 8 Blackf. 205;

trains may be prohibited in cities and places densely populated; but it may possibly, under extraordinary circumstances, become a private nuisance also.[58] And so may the keeping of a noisy livery stable,[59] or the manufacture of machinery, or any business in which the noises are great and incessant or frequent.[60]

Where manufacturing operations are carried on with heavy machinery in the part of a city mainly occupied by residences,

People v. Sergeant, 8 Cow. 139; Gaunt v. Finney, L. R. 8 Ch. App. 8; S. C. 4 Moak, 718; Inchbald v. Robinson, L. R. 4 Ch. App. 388; Marsan v. French, 61 Tex. 173, 48 Am. Rep. 272; see Givens v. Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421. Gathering in a noisy way in a pigeon shooting match may be a nuisance. King v. Moore, 3 B. & Add. 184. See Walker v. Brewster, L. R. 5 Eq. Cas. 25. The noise of a roller skating rink near a dwelling may be a nuisance. Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241. So of a baseball park. Gilbough v. West Side Amusement Co., 64 N. J. Eq. 27, 53 Atl. 289.

[58] Knight v. Goodyear, etc., Co., 38 Conn. 438, 9 Am. Rep. 406; First Baptist Church v. Schenectady, etc., R. R. Co., 5 Barb. 79. The ringing of a large bell at an early hour in a village may be a nuisance. Davis v. Sawyer, 133 Mass. 289, 43 Am. Rep. 519. But the question of nuisance in ringing a church bell depends on its effect upon ordinary persons, not on those who are ill. Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316. Blowing of a steam whistle near highway held a nuisance. Albee v. Chappaqua Shoe Mfg. Co, 62 Hun, 223, 16 N. Y. S. 687.

[59] Ball v. Ray, L. R. 8 Ch. 467; Broder v. Saillard, 2 Ch. Div. 692; S. C. 17 Moak, 693; Dargan v. Waddill, 9 Ired. 244, 49 Am. Rep. 421.

[60] Soltau v. DeHeld, 2 Sim. (N. S.) 133; Elliotson v. Feetham, 2 Bing. (N. C.) 134; Fish v. Dodge, 4 Denio, 311, 47 Am. Dec. 254; McKeon v. See, 51 N. Y. 300, 10 Am. Rep. 659; Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378; Bishop v. Banks, 33 Conn. 118, 87 Am. Dec. 197; Rhodes v. Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221; Robinson v. Baugh, 31 Mich. 290; Duncan v. Hayes, 22 N. J. Eq. 25, Davidson v. Isham, 9 N. J. Eq. 186, 190; Dennis v. Eckhardt, 3 Grant, 390; Bradley v. Gill, Lutw. 69. This applies to a plaining mill near a dwelling. Hurlburt v. McKone, 55 Conn. 31, 10 Atl. 164. To a school for training in hammered brass work. Appeal of Ladies' Art, etc., Co., 13 Atl. Rep. 537 (Penn.). But not necessarily to a blacksmith shop. Faucher v. Grass, 60 Ia. 505. See Balt., etc., R. R. Co. v. Fifth Bapt. Ch. 108 U. S. 317; Cogswell v. New York, etc., Co., 103 N. Y. 10, 57 Am. Rep. 707; Beseman v. Penn. R. Co., 50 N. J. L. 235, 13 Atl. 164.

creased, also, by noise, smoke, soot, etc. Grist mills are sometimes complained of on this ground.[62]

§ 309. **Nuisances which threaten calamity.** Many things are nuisances because they threaten calamity to the persons or property of others, and thereby cause injury, though the calamity feared may never befall. A building so negligently constructed or so greatly decayed that it is likely to fall upon an adjoining tenement, or upon persons lawfully making use of easements near it, is a nuisance of this sort,[63] and so is a

[61] Robinson v. Baugh, 31 Mich. 290; McKeon v. See, 51 N. Y. 300, 10 Am. Rep. 659; Wesson v. Washburn Iron Co., 13 Allen, 95, 90 Am. Dec. 181; Whitney v. Bartholomew, 21 Conn. 213; Crump v. Lambert, L. R. 3 Eq. Cas. 409; Demarest v. Hardham, 34 N. J. Eq. 469; English v. Progress Elec. Lt. & M. Co. 95 Ala. 259, 10 So. 134; Hurlbut v. McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; Hoadley v. Seward & Son Co., 71 Conn. 640, 42 Atl. 997; Hyde Park T.-H. Lt. Co. v. Porter, 167 Ill. 276, 47 N. E. 206; Chicago North Shore St. Ry. Co. v. Payne, 192 Ill. 239, 61 N. E. 276; Froelicher v. Oswald Iron Works, 111 La. 705, 35 So. 821, 64 L. R. A. 228; Lurssen v. Lloyd, 76 Md. 360, 25 Atl. 294; Pritchard v. Edison Elec. Ill. Co., 92 App. Div. 178, 87 N. Y S. 225; Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89; Rodenhausen v. Craven, 141 Pa. St. 546, 21 Atl. 774, 23 Am. St. Rep. 306. See McCaffrey's App. 105 Pa. St. 253. Railroad coal chutes held a nuisance on account of noise and dust. Wylie v. Elwood, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726; Wylie v. Elwood, 34 Ill. App. 244; Spring v. Delaware, etc., R. R. Co., 88 Hun, 385, 34 N. Y. S. 810. So of roundhouse near dwelling. Louisville, etc., Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188. There can be no recovery for the noise, smoke, dust, etc., arising from the operation of a railroad, unless due to negligence. Pennsylvania R. R. Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. Rep. 618.

[62] Gilbert v. Showerman, 23 Mich. 448; Cooper v. Randall, 53 Ill. 24.

[63] Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Grove v. Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262; Meyer v. Metzler, 51 Cal. 142. Defendant had an iron tower near plaintiff's hotel at Niagara Falls. The spray from the falls caused ice formations on the tower, which, in melting, fell upon the plaintiff's hotel, endangering life and damaging the property. The tower was held to be a nuisance. Davis v. Niagara Falls Tower Co., 171 N. Y. 336, 64 N. E. 4, 89 Am. Rep. 817, 57 L. R. A. 545.

imperfectly guarded in the vicinity of residences." Where nitroglycerine stored on the defendant's premises exploded and shattered the plaintiff's windows a mile away, the defendant was held liable for the damage. Nitroglycerine being highly explosive and dangerous and a menace to all property in the vicinity of the place where it is stored, the court held that one who keeps it is liable for injuries caused to surrounding property by its explosion, though he violates no provision of law regulating its storage and is guilty of no negligence, and that the right of action exists in favor of all property within the circle of danger, whether adjacent or not.[67] A building infected with disease, and rented in that condition without notifying the tenant of the fact, is a nuisance.[68]

[64] Gibson v. Denton, 4 App. Div. 198, 38 N. Y. S. 554.

[65] Schwarz v. Adsit, 91 Ill. App. 576; Mickel v. York, 175 Ill. 62, 51 N. E. 848; Beidler v. King, 209 Ill. 302, 70 N. E. 763; Factors & Traders' Ins. Co. v. Werlein, 42 La. Am. 1046, 8 So. 435, 11 L. R. A. 361; Lauer v. Palms, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67; Olsen v. Meyer, 46 Neb. 240, 64 N. W. 954; Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676; Covington, etc., Bridge Co. v. Steinbrock, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375.

[66] Myers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744; Cheatham v. Shearon, 1 Swan, 213; Emory v. Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730; Kinney v. Koopman, 116 Ala. 310, 22 So. 593, 67 Am. St. Rep. 119, 37 L. R. A. 497; Rudder v Koopman, 116 Ala. 332, 22 So. 601, 37 L. R. A. 489; Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; Flynn v. Butler, 189 Mass. 377; McAndrews v. Collerd, 42 N. J. L. 189; Cameron v. Kenyon, etc., Co., 22 Mont. 312, 56 Pac. 358, 74 Am. St. Rep. 602, 44 L. R. A. 508; Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556. Whether a magazine is a nuisance depends not on negligence, but on all the surrounding circumstances of a case. Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654. See Dilworth's App. 91 Pa. St. 247; Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718; Kleebauer v. Western Fuse, etc., Co., 138 Cal. 497, 71 Pac. 617, 94 Am. St. Rep. 62, 60 L. R. A. 377; Cosulich v. Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475.

[67] Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., 60 Ohio St. 560, 54 N. E. 528, 71 Am. St. Rep. 740, 45 L. R. A. 658.

[68] Minor v. Sharon, 112 Mass. 477, 17 Am. Rep. 122; Cesar v. Karutz, 60 N. Y. 229, 19 Am. Rep.

falling upon passing travelers, and he may be held responsible for such an accident, even if the servants have observed due care.[68a] So the blasting of rocks sufficiently near the dwellings of others to endanger them is a nuisance.[69] An unguarded

164; Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; King v. Vantandillo, 4 M. & S. 73; Long v. Chicago, etc., R. R. Co., 48 Kan. 28, 28 Pac. 977, 30 Am. St. Rep. 271, 12 L. R. A. 319. Property dangerous to health, such as infected clothing, may be destroyed as a nuisance. Savannah v. Mulligan, 95 Ga. 323, 51 Am. St. Rep. 86, 29 L. R. A. 303.

[68a] Jager v. Adams, 123 Mass. 26, 25 Am. Rep. 7. And see, Murray v. McShane, 52 Md. 217, 36 Am. Rep. 367; Khron v. Brock, 144 Mass. 516; Cork v. Blossom, 162 Mass. 330, 38 N. E. 495, 44 Am. St. Rep. 362, 26 L. R. A. 256; Ryder v. Kinsley, 62 Minn. 85, 64 N. W. 94, 54 Am. St. Rep. 623, 34 L. R. A. 557; Waterhouse v. Schlitz Brewing Co., 12 S. D. 397, 81 N. W. 725; Waterhouse v. Schlitz Brewing Co., 16 S. D. 592, 94 N. W. 587; Patterson v. Schlitz Brewing Co., 16 S. D. 33, 91 N. W. 336; Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744; Garland v. Towne, 55 N. H. 55, 20 Am. Rep. 164.

[69] Scott v. Bay, 3 Md. 431; Wilkins v. Monson Consolidated Slate Co., 96 Me. 385, 52 Atl. 755. Whether the damage is by flying rocks or concussion of the air. Colton v. Onderdonk, 65 Cal. 155, 58 Am. Rep. 556. So where one blasting on his own land projects a piece of wood upon a traveler in a highway. Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923, 76 Am. St. Rep. 274, 47 L. R. A. 715. See Gates v. Latta, 117 N. C. 189, 23 S. E. 173, 53 Am. St. Rep. 584. A contractor who uses dynamite in the construction of a tunnel is liable for all damages to property caused by the concussion of air or earth. Fitz Simons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421. In the following cases it is held that the defendant is not liable for damages by blasting unless he is negligent. Cameron v. Vandergriff, 53 Ark. 381, 13 S. W. 1092; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Booth v. Rome, etc., R. R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Benner v. Atlantic Dredge Co., 134 N. Y. 156, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L. R. A. 220; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Holland House Co. v. Baird, 169 N. Y. 136, 62 N. E. 149; Blackwell v. Lynchburg, etc., R. R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729; Fox v. Borkey, 126 Pa. St. 164, 17 Atl. 604; Baker v. Hagey, 177 Pa. St. 128, 35 Atl. 705, 55 Am. St. Rep. 712; Simmons v. McConnell, 86 Va. 494, 10 S. E. 838; Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936;

is a nuisance.[70] So of structures near or over the street which by reason of decay or otherwise endanger travel.[71]

§ 310. Private injury from public nuisance. If an individual suffers some special and peculiar injury from a public nuisance, different from that suffered by the public generally, he may have his private action therefor.[72] It is a special injury if one has a dock on navigable water, and the city, by running a sewer into it, causes it to be filled up, or the entrance materially obstructed.[73] So it is a special injury to the plaint-

Klepsch v. Donald, 8 Wash. 162, 35 Pac. 621.

[70] Hulson v. King, 95 Ga. 271, 22 S. E. 615; Gordon v. Cummings, 152 Mass. 513, 25 N. E. 978, 23 Am. St. Rep. 846, 9 L. R. A. 640; Cannon v. Lewis, 18 Mont. 402, 45 Pac. 572; South Omaha v. Cunningham, 31 Neb. 316, 47 N. W. 930; Sutphen v. Hedden, 67 N. J. L. 324, 51 Atl. 721; Healy v. Vorndran, 65 App. Div. 353, 72 N. Y. S. 877; Oklahoma City v. Meyers, 4 Okl. 686, 46 Pac. 552. See McIntire v. Roberts, 149 Mass. 450, 22 N. E. 13, 14 Am. St. Rep. 432, 4 L. R. A. 519; Gillespie v. McGowan, 100 Pa. St. 144, 45 Am. Rep. 365; Horstick v. Dunkle, 145 Pa. St. 220, 23 Atl. 378, 27 Am. St. Rep. 685.

[71] Railway Co. v. Hopkins, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189; Detzur v. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500; Village v. Kallagher, 52 Ohio 183, 39 N. E. 144; Palmore v. Morris, 182 Pa. St. 82, 37 Atl. 995, 61 Am. St. Rep. 693; Harold v. Whatney, (1898) 2 Q. B. 320. See Davis v. Rich, 180 Mass. 235, 62 N. E. 375. Barbed wire fence on line of street. Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766; Sisk v. Crump, 112 Ind. 504. Building constructed so that snow will slide into street. Smeth urst v. Barton Square Church, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 350, 2 L. R. A. 695; Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279; Shepard v. Creamer, 160 Mass. 496, 36 N. E. 475; Hannem v. Pence, 40 Minn. 127, 41 N. W. 657, 12 Am. St. Rep. 717. But see Garland v. Towne, 55 N. H. 55, 20 Am. Rep. 164.

[72] Lind v. San Luis Obispo, 109 Cal. 340, 42 Pac. 437; Holmes v. Corthell, 80 Me. 31, 12 Atl. 730; Mellick v. Pennsylvania R. R. Co., 203 Pa. St. 457, 53 Atl. 340; Rhymer v. Fritz, 206 Pa. St. 230, 55 Atl. 959, 98 Am. St. Rep. 777; Venard v. Cross, 8 Kan. 248; Green v. Nunnemacher, 36 Wis. 50; Yolo v. Sacramento, 36 Cal. 193.

[73] Clark v. Peckham, 10 R. I. 35, 14 Am. Rep, 654, S. C. 9 R. I. 455; Brayton v. Fall River, 113 Mass. 218, 18 Am. Rep. 470; French v. Conn. River, etc., Co., 145 Mass 261, 14 N. E. 113; Garritee v. Baltimore, 52 Md. 422; Langdon v. New York, 93 N. Y. 129; Butcher's Ice & C. Co. v. Philadelphia, 156 Pa. St. 54, 27 Atl. 376.

ing,[74] or a bridge which has been constructed without permission and which renders his passage inconvenient or impossible;[75] or if in passing along the highway he finds himself stopped by a fence put up without authority,[76] or kept up after the authority once given has expired.[77] When an obstruction in a street interferes with access to the plaintiff's property, there is a special damage.[78] And if a street is obstructed to one side of the plaintiff's property and thereby his business is injured or his property diminished in value, he has suffered a special damage, though immediate access to his property to and from the highway is not affected.[79] So the public nuis-

[74] Rose v. Miles, 4 M. & S. 101; Walker v. Shepardson, 2 Wis. 282. Or a boom. Dudley v. Kennedy, 63 Me. 465; Union Mill Co. v. Shores, 66 Wis. 476; Gifford v. McArthur, 55 Mich. 535. See McPheters v. Moose River, etc., Co., 78 Me. 329; Page v. Mille Lacs Lumber Co., 53 Minn. 492, 55 N. W. 608, 1119.

[75] Arundel v. McCulloch, 10 Mass. 70; Gates v. Nor. Pac. R. R. Co., 64 Wis. 64; Little Rock, etc., R. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Alabama Sipsey Riv. Nav. Co. v. Ga. Pac. Ry. Co., 87 Ala. 154, 6 So. 73; Viebahm v. Crow Wing Co., 96 Minn. 276, 104 N. W. 1089; Clark v. Chicago, etc., Ry. Co., 70 Wis. 593, 36 N. W. 326, 5 Am. St. Rep. 187.

[76] Goggans v. Myrick, 131 Ala. 286, 31 So. 22; Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341; Knowles v. Pennsylvania R. R. Co., 175 Pa. St. 623, 34 Atl. 974, 52 Am. St. Rep. 860; Gregory v. Commonwealth, 2 Dana, 417. But see Sohn v. Cambern, 106 Ind. 302; Powell v. Bunger, 91 Ind. 64; Holmes v. Corthell, 80 Me. 31, 12 Atl. 730, and note; Zettel v. West Bend, 79 Wis. 316, 48 N. W. 379, 24 Am. St. Rep. 715.

[77] Adams v. Beach, 6 Hill, 271. See Allen v. Lyon, 2 Root, 213; Columbus v. Jaques, 30 Ga. 506.

[78] Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618; Hargro v. Hodgon, 89 Cal. 623, 26 Pac. 1106; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Callahan v. Gilman, 107 N. Y. 360, 14 N. E. 264; Brakken v. Minn. etc., Ry. Co., 29 Minn. 41; Wilder v. DeCou, 26 Minn. 10. Where a street car company plowed snow up alongside its tracks so as to impede access to property it was held a nuisance Ogston v. Aberdeen Dist. Tramways Co., (1897) A. C. 111. So salting the tracks and thereby creating a slush injurious to animals. Ibid.

[79] Harvey v. Georgia Southern etc., R. R. Co., 90 Ga. 66, 15 S. E. 783; Brunswick, etc., R. R. Co., v.

whose home is destroyed thereby.[80] So any dangerous excavation made in the public way is a nuisance. It is only necessary for the plaintiff in these cases to show how he has been injured by the nuisance, and to distinguish his injury from that suffered by the public at large, and he brings himself within the rules entitling him to redress.[81] So if one's premises are situate upon public navigable water, whatever obstruction in the stream tends specially to interfere with his access to the water is an actionable injury.[82]

§ 311. Effect of legislative authority. That cannot be a public nuisance which has been authorized by the legislature,

Hardy, 112 Ga. 604, 37 S. E. 888, 52 L. R. A. 396; Stufflebaum v. Montgomery, 3 Idaho, 20, 26 Pac. 125; Rigney v. Chicago, 102 Ill. 64; Winnetka v. Clifford, 201 Ill. 475, 66 N. E. 384; O'Brien v. Central Iron & S. Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. Rep. 305, 57 L. R. A. 508; Brakken v. Minneapolis, etc., R. R. Co., 29 Minn. 41, 31 Minn. 45; Glaessner v. Anheuser-Busch Brewing Co., 100 Mo. 508, 13 S. W. 707; Republican Val. R. R. Co. v. Fellons, 16 Neb. 169; Atchison, etc., R. R. Co. v. Boener, 34 Neb. 240, 51 N. W. 842, S. C. 45 Neb. 453, 63 N. W. 787; O'Brien v. Pennsylvania, etc., R. R. Co., 119 Pa. St. 184, 13 Atl. 74; Moeller v. Philadelphia, 160 Pa. St. 614, 28 Atl. 991; Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214; Union Pac. R. R. Co. v. Benson, 19 Colo. 285, 35 Pac. 544. But see San Jose Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. 250; Jacksonville, etc., Ry. Co. v. Thompson, 34 Fla. 346, 16 So. 282, 26 L. R. A. 410; Davis v. County Comrs., 153 Mass. 218, 26 N. E. 848; Rude v. St. Louis, 93 Mo. 408, 6 S. W. 257; Fairchild v. St. Louis, 97 Mo. 85, 11 S. W. 60, Canman v. St. Louis, 97 Mo. 92, 11 S. W. 60; Gates v. Kansas City etc., R. R. Co., 111 Mo. 28, 19 S. W. 957; Chicago v. Union Bldg. Ass'n., 102 Ill. 379.

[80] Nuisances producing noxious gases and odors. Lind v. San Luis Obispo, 109 Cal. 340, 42 Pac. 437; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Harley v. Merrill Brick Co., 83 Ia. 73, 48 N. W. 1000; Milhiser v. Willard, 96 Ia. 327, 65 N. W. 325.

[81] See case of a warehouse projecting into the street and obstructing the view from the plaintiff's wharehouse. Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123. Of a bridge built so as to prevent entrance to a building. Knox v New York, 55 Barb. 404. Of a wall extended into the street. Schulte v. N. P. T. Co., 50 Cal. 592.

[82] Dobson v. Blackmore, 9 Q. B. 991; Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154; Larson v. Furlong, 63 Wis. 323; Wood v. Esson, 9 Can. S. C. R. 239; 1 Lewis, Em. Dom. §§ 65-85.

some form, provided for and created a certain easement, may at its will abandon it, or change it to some other easement, or restrict or enlarge the use of it, and generally do with the creature of its authority what it pleases. A common highway may thus be qualified by the laying of a railway track upon it;[84] a navigable stream may be bridged or dammed,[85] awnings may be permitted above a city street and covered areas below it; navigation companies may be given special privileges in the public streams of the state,[86] and so on. In these cases the state only restricts or narrows its own right, and the right of the individual, which is only a part of the public right, can be no broader than that which the state has retained.

But while the state may restrict its own right, it cannot restrict or take away the rights which are purely individual, even though they are intimately associated with the public right. Take the case of a railroad laid in a street by virtue of legislative authority, it cannot be treated as a public nuis-

[83] Commonwealth v. Reed, 34 Pa. St. 275, 75 Am. Dec. 661; Danville, etc., R. R. Co. v. Commonwealth, 73 Pa. St. 29; People v. Gaslight Co., 64 Barb. 55.

[84] Danville, etc., R. R. Co. v. Commonwealth, 73 Pa. St. 29; Commonwealth v. Erie & N. E. R. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Commonwealth v. Old Colony, etc., R. R. Co., 14 Gray, 93; Milburn v. Cedar Rapids, 12 Iowa, 246; Randle v. Pacific R. R. Co., 65 Mo. 325; Williams v. N. Y. Cent. R. R. Co., 16 N. Y. 97; Wager v. Troy Union R. R. Co., 25 N. Y. 526; Sou. Car., etc., R. R. Co. v. Steiner, 44 Ga. 546; Easton v. New York, etc., R. R. Co., 24 N. J. Eq. 49; Chicago, etc., Co. v. Loeb, 118 Ill. 203; State v. Louisville, etc., Co., 86 Ind. 114; Garnett v. Jacksonville, etc., Co., 20 Fla. 889; Cook v. Burlington, 36 Ia. 357; Moses v. Pittsburgh, etc., R. R. Co., 21 Ill. 516; Porter v. North Missouri R. R. Co., 33 Mo. 128; Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. 332; Werges v. St. Louis, etc., R. R. Co., 35 La. Ann. 641; Hepting v. New Orleans Pac. R. R. Co., 36 La. Anh. 898; Morris, etc., R. R. Co. v. Newark, 10 N. J. Eq. 352.

[85] Arimond v. Green Bay, etc., Co., 31 Wis. 316; Trenton Water Power Co. v. Raff, 36 N. J. L. 335; Lee v. Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59. See 1 Lewis, Em. Dom. chap. IV.

[86] Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462; People v. Ferry Co., 68 N. Y. 71.

who has been hindered in the enjoyment of the public right of passage. But abutting owners have private rights of access and a right to light and air from the street and if these are interfered with an action lies.[87] So no regulation of the right of navigation can lawfully take from a riparian proprietor his water front and the right to make use of it for the purposes of navigation,[88] nor can any special privilege which is conferred, to make use of public waters, empower the beneficiaries to flood the lands of individuals.[89] The state in all these cases precludes complaint for anything which, but for the license, would be a state offense, but it cannot go further.[90]

[87] Goggans v. Myrick, 131 Ala. 286, 31 So. 22; Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618; Hargor v. Hodgon, 89 Cal. 623, 26 Pac. 1106; Denver v. Bayer, 7 Colo. 113; Jacksonville, etc., Ry. Co. v. Thompson, 34 Fla. 346, 16 So. 282, 26 L. R. A. 410; Brunswick, etc., R. R. Co. v. Hardey, 112 Ga. 604, 37 S. E. 888, 52 L. R. A. 396; Harvey v Railroad Co., 90 Ga. 66, 15 S. E. 783; Stufflebaum v. Montgomery, 3 Idaho, 20, 26 Pac. 125; Haynes v. Thomas, 7 Ind. 38; Indiana, etc., Ry. Co. v. Eberle, 110 Ind. 542; O'Brien v. Central Iron & S. Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. Rep. 305, 57 L. R. A. 508; Elizabeth, etc., R. R. Co. v Combs, 10 Bush. 382, 19 Am. Rep. 671; Grand Rapids, etc., R. R. Co. v. Heisel, 38 Mich. 62; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; Lackland v. No. Mo. R. R. Co., 31 Mo. 180; Burlington, etc., R. R. Co. v. Reinhackle, 15 Neb. 279; People v. Kerr, 27 N. Y. 188; Story v. N. Y. El. R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. Met. El. R. R. Co., 104 N. Y. 268; Crawford v. Delaware, 7 Ohio St. 459; Jackson v. Jackson, 16 Ohio St. 163; Anderson v. Turbeville, 6 Coldw. 150; Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; I Lewis, Em. Dom. chap. V.

[88] Ryan v. Brown, 18 Mich. 196; Davis v. Winslow, 51 Me. 264, 81 Am. Dec. 573; Arundel v. McCulloch, 10 Mass. 70; Washburn, etc., Co. v. Worcester, 116 Mass. 458; Wood v. Esson, 9 Can. S. C. R. 239.

[89] Trenton Water Power Co. v. Raff, 36 N. J. L. 335; Grand Rapids Booming Co. v. Jarvis 30 Mich. 308; Middleton v. Booming Co., 27 Mich. 533; Thunder Bay, etc., Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462; Brown v. Dean, 123 Mass. 254; Lee v. Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59; Harold v. Jones, 86 Ala. 274, 5 So. 438, 3 L. R. A. 406.

[90] Danville etc., R. R. Co. v. Com. 73 Pa. St. 29; Williams v. N. Y. Cent. R. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Wager v. Troy Union R. R. Co., 25 N. Y. 526; People v. Kerr, 27 N. Y. 188; Starr v. Camden, etc., R. R. Co., 24 N.

same rule has been held to apply to a municipal water or light plant and, if such a plant is so located or so conducted as to become a nuisance by reason of smoke, noise, vibrations or other annoyance the municipality will be liable.[92] The same rule applies to a grant of authority to a city to erect and maintain a pest-house or hospital for contagious diseases.[92a] Railroad coal chutes and bins,[93] a railroad turntable,[94] and stock yards,[95] have been held to be nuisances. And where a railway was operated so near a church as to disturb worship therein and depreciate the value of the property, the company was held liable as for a nuisance.[96] And the general rule is that "where

J. L. 592; Trenton Water Power Co. v. Raff, 36 N. J. L. 335.

[91] Northwestern Fertilizer Co. v. Hyde Park, 70 Ill. 634; S. C. Affirmed, 97 U. S. 659; Churchill v. Burlington Water Co., 94 Ia. 89, 62 N. W. 646; Baltimore v. Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494; Bacon v. Boston, 154 Mass. 100, 28 N. E. 9; Board of Health v. Lederer, 52 N. J. L. 675, 29 Atl. 444; Matthews v. Stillwater G. & E. L. Co., 63 Minn. 493, 65 N. W. 947; Bohan v. Port Jervis Gas Lt. Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Garvey v. Long Island R. R. Co., 9 App. Div. 254, 41 N. Y. S. 397; Louisville, etc., Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188; Townsend v. Norfolk, etc., R. & L. Co., 105 Va. 22.

[92] Hyde Park T.-H. Light Co. v. Porter, 167 Ill. 276, 47 N. E. 206; Morton v. New York, 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241; Greenville v. Alland. (Tex. Civ. App.) 27 S. W. 292.

[92a] Baltimore v. Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494.

[93] Wiley v. Elwood, 134 Ill. 281, 25 N. E. 570; Spring v. Delaware, etc., R. R. Co., 88 Hun. 385, 34 N. Y. S. 810; *Contra*, Dunsmore v. Central R. R. Co., 72 Ia. 182.

[94] Garvey v. Long Island R. R. Co., 159 N. Y. 325, 54 N. E. 57.

[95] Shirely v. Cedar Rapids, etc., R. R. Co., 74 Ia. 169, 37 N. W. 133; Bielman v. Chicago, etc., R. R. Co., 50 Mo. App. 152. But see London, etc., Ry. Co. v. Truman, L. R. 11 App. Cas. 45; Dolan v. Chicago, etc., Ry. Co., 118 Wis. 362, 95 N. W. 385.

[96] First Baptist Church v. Schenectady, etc., R. R. Co., 5 Barb. 79. See Balt., etc., R. R. Co. v. Fifth Baptist Church, 108 U. S. 317; Baltimore, etc., R. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 S. C. Rep. 185; Chicago Great Western Ry. Co. v. First M. E. Church, 102 Fed. 85, 42 C. C. A. 178.

determine whether the general powers committed to them shall be put into execution or not, the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected."[96a]

Some authorities hold that legislatures may, for a public purpose, such as the operation of a railway, authorize a use of property, which would be an actionable nuisance to adjacent property, but for such authority.[97] But this seems to be a taking of private property for public use without just compensation.[98] In England, whatever act or use of property is clearly authorized by an act of parliament, cannot be an actionable nuisance, for an act of parliament is the supreme law of the land.[99] But in this country a man cannot be deprived of his property, even by the legislature, except for public use, and then only upon making just compensation.[1] To deprive a man of any *right* in property is to take his property *pro tanto*.[2] One of the rights of property is the right not to

[96a] Hill v. Managers, etc., L. R. 4 Q. B. 433.

[97] Carroll v. Wis. Cent. R. R. Co., 40 Minn. 468, 41 N. W. 661; Beseman v. Pennsylvania R. R. Co., 50 N. J. L. 235, 13 Atl. 164; S. C. Affirmed, 52 N. J. L. 221, 20 Atl. 169; Densmore v. Central Ia. R. R. Co., 72 Ia. 182; Werges v. St. Louis, etc., R. R. Co., 35 La. Ann. 641; Decker v. Evansville Suburban, etc., R. R. Co., 133 Ind. 493, 33 N. E. 349; Atchison, etc., R. R. Co., v. Armstrong, 71 Kan. 366, 80 Pac. 978.

[98] 1 Lewis, Em. Dom. §§ 151*a*–152*b*.

[99] London, etc., R. R. Co. v. Truman, L. R. 11 H. L. 45; Essex v. Local Board, L. R. 14 H. L. 153; S. C. 14 Q. B. D. 753, 17 Q. B. D. 447; Rex. v. Pease, 4 B. & A. 30, 24 E. C. L. R. 24; Attorney General v. Metropolitan R. R. Co., L. R., (1894) 1 Q. B. D. 384.

[1] 1 Lewis, Em. Dom. § 157.

[2] Eaton v. B. C. & M. R. R. Co., 51 N. H. 504, 12 Am. Rep. 147; Thompson v. Androscoggin Riv. Imp. Co., 54 N. H. 545; St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226; Foster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543; Pearsoll v. Board of Supervisors, 74 Mich. 588, 42 N. W. 77, 4 L. R. A. 193; Selden v. Jacksonville, 28 Fla. 558, 10 So. 457, 29 Am. St. Rep. 278, 14 L. R. A. 370; Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128; 1 Lewis, Em. Dom. §§ 55—59.

as already shown there are authorities to the contrary. In Massachusetts it is held "that, within constitutional limits not exactly determined, the legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by so doing it affects the use or value of property."[3a] And in that state it is held that the legislature may authorize the ringing of a factory bell which had been adjudicated to be a nuisance.[3b] Also that the legislature may license the carrying on of a business which but for the license, would be a nuisance and that the license is a bar to any action therefor.[3c] All the authorities agree that any statutory grant will be construed strongly against the right to create a private nuisance.[4]

§ 312. **Continuity of the wrong.** A nuisance continued is a fresh nuisance every day it is suffered to remain unabated. New suits for the damage caused by its continuance may therefore be brought from day to day.[5]

[3] 1 Lewis, Em. Dom. §§ 151*a*–152*b*.

[3a] Commonwealth v. Parks, 155 Mass. 531, 532.

[3b] Davis v. Sawyer, 133 Mass. 239.

[3c] Murtha v. Lovewell, 166 Mass. 391; Levin v. Goodwin, 191 Mass. 341.

[4] Baltimore v. Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494; Bohan v. Port Jervis G. L. Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711.

[5] Shadwell v. Hutchinson, 4 C. & P. 333; Holmes v. Wilson, 10 Ad. & El. 503; Howell v. Young, 5 B. & C. 259; Gillon v. Boddington, Ry. & M. 161; Bowyer v. Cook, 5 C. B. 236; Allen v. Worthy, L. R. 4 Q. B. 163; Queen v. Waterhouse, L. R. 7 Q. B. 545; Beckwith v. Griswold, 29 Barb. 291; Conhocton Stone Co. v. Buffalo, etc., R. R. Co., 52 Barb. 390; Vedder v. Vedder, 1 Denio 257; Mahon v. New York Cent. R. R. Co., 24 N. Y. 658; Slight v. Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476; Pilsbury v. Moore, 44 Me. 154; Staple v. Spring, 10 Mass. 72; Byrne v. Min., etc., Ry. Co., 38 Minn. 212, 36 N. W. 339; Crawford v. Rambo, 44 Ohio St. 279; Reid v. Atlanta, 73 Ga. 523. The mere continuance of a building wrongfully erected on the land of another is a continual wrong, for which the owner of the land may bring new suits after recovery and satisfaction for the original erec-

gently created it, or, *second*, that he continued it.[6] And here, as elsewhere in the law of torts, there may be distinct parties equally liable; one, perhaps, for the positive wrong of creating, and the other for the negative wrong of failing to abate.

In general, that party only is responsible for the continuance of a nuisance who has possession and control where it is, and upon whom, therefore, the obligation to remove seems properly to rest. It follows that, as between landlord and tenant, the party presumptively responsible is the tenant.[7] But the facts when developed, remove many cases from this presumption, for the very satisfactory reason that there are many cases in which the party out of possession is either in part or exclusively the party in fault. Thus, if the owner of lands, through which a watercourse runs, erects a dam across it which sets the water back upon the proprietor above, and then leases the lands with the nuisance upon it, he gives with

tion. Russell v. Brown, 63 Me. 203. The diversion of spring water is a continuing wrong. Colrick v. Swinburne, 105 N. Y. 503. So is flooding land. New Salem v. Eagle Mills Co., 138 Mass, 8; Van Hoozier v. Hannibal, etc., R. R. Co., 70 Mo. 145; Dickson v. Chicago, etc., R. R. Co., 71 Mo. 575; Valley Ry. Co. v. Franz, 43 Ohio St. 623, 4 N. E. 88; Omaha, etc., Ry. Co. v. Standan, 22 Neb. 343, 35 N. W. 183. See Chicago, etc., Ry. Co. v. Schaffer, 124 Ill. 112, 16 N. E. 239. So is the wrongful use of a side track in a street in front of a lot. Cain v. Chicago, etc., Co., 54 Ia. 255.

[6] Where a nuisance is not in the use alone, but also in the creation of the structure, the liability attaches to those who caused the erection. Chenango Bridge Co. v. Lewis, 63 Barb. 111.

[7] Todd v. Flight, 9 C. B. (N. S.) 377; Rich v. Basterfield, 4 C. B. 783; Russell v. Shenton, 8 Q. B. 449; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295. If a tenant before the expiration of his term puts up a fence which injures a child, his surrender does not exonerate him. Hussy v. Ryan, 64 Md. 426. A landlord is not liable for injury to tenant's guest's child injured by falling into a hole dug at the tenant's request. Moore v. Logan, etc., Co., 7 Atl. Rep. 198 (Penn.) A tenant from month to month is not liable for nuisance from decay of a privy vault. Griffith v. Lewis, 17 Mo. App. 605. But see Deutsch v. Abeles, 15 Mo. App. 398. The owner of an apartment house whose janitor opens coal hole for tenant's coal and negligently leaves it unguarded, is liable to a passer by, who falls in. Jennings v. VanSchaick, 108 N. Y. 530, 15 N. E. 424.

ant possession.[8] "He transferred it with the original wrong, and his demise affirms the continuance of it. He has also his rent as a consideration for the continuance, and therefore ought to answer the damage it occasions."[9] And as a general rule the landlord is liable for a nuisance existing on the premises at the time of the demise.[10] And so if the premises by reason of defective construction or otherwise are in a condition dangerous to the public.[11] It has been held to be otherwise, however, where the landlord requires the lessee to covenant to keep the premises in repair, and the injury is one which, though attributable to the condition of the premises when the landlord delivered possession, might have been avoided by

[8] Roswell v. Prior, 12 Mod. 635; S. C. 2 Salk, 460, and 1 Ld. Raym. 713; Fish v. Dodge, 4 Denio, 311, 47 Am. Dec. 254; Smith v. Elliott, 9 Penn. St. 345; Helwig v. Jordan, 53 Ind. 21, 21 Am. Rep. 189. See House v. Metcalf, 27 Conn. 632; People v. Irwin, 4 Denio, 129; Rex v. Pedley, 1 Ad. & El. 822; S. C. 3 N. & M. 627. If one buys leased land with a nuisance on it of which he knows, and takes rent from the tenant, he is liable for the nuisance. Pierce v. German, etc., Soc., 72 Cal. 180, 13 Pac. 478.

[9] Saffold, J., in Grady v. Wolsner, 46 Ala. 381, 382. Lessor held liable for a sink in a foot pavement left open in cleaning. Owings v. Jones, 9 Md. 108. See Clancy v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391. If premises are so constructed or in such condition that the continuance of their use must result in a nuisance the landlord is liable. Fow v. Roberts, 108 Penn. St. 489; Albert v. State, 66 Md. 325, 59 Am. Rep. 159; Jackman v. Arlington Mills, 137 Mass. 277. See Nugent v. Boston, etc., Corp., 80 Me. 62, 12 Atl. 797.

[10] Tomle v. Hampton, 129 Ill. 379, 21 N. E. 800; Mylander v. Beimschla, 102 Md. 689; Harrington v. Douglas, 181 Mass. 178, 63 N. E. 334; Hannem v. Pence, 40 Minn. 127, 41 N. W. 657, 12 Am. St. Rep. 717; Timlin v. Standard Oil Co., 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845; Wunder v. McLean, 134 Pa. St. 334, 19 Atl. 749, 19 Am. St. Rep. 702; Joyce v. Martin, 15 R. I. 558, 10 Atl. 617.

[11] Barrett v. Lake Ontario Beach Imp. Co., 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829; Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. S. 788; Waterhouse v. Schlitz Brewing Co., 12 S. D. 397, 81 N. W. 725; Waterhouse v. Schlitz Brewing Co., 16 S. D. 592, 94 N. W. 587; Patterson v. Schlitz Brewing Co., 16 S. D. 33, 91 N. W. 336.

must be some evidence that he authorized the continuance of the nuisance; for instance, that he assumed the obligation to repair the premises might be a circumstance to show that he authorized its continuance. But there is no such obligation where the landlord has required the tenant himself to assume it.[13] For similar reasons it has been held that one who floods

[12] Phelan v. Fitzpatrick, 188 Mass. 237; Cummings v. Ayer, 188 Mass. 292; Ward v. Hinkleman, 37 Wash. 375, 79 Pac. 956. In Leonard v. Storer, 115 Mass. 83, 15 Am. Rep. 76, the roof was so constructed that snow and ice, unless removed, were likely to slide from it into the street, and the injury was actually caused by its sliding off upon a passing traveler. Compare Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318. Where by the burning of a steam mill operated by a lessee other property is damaged, the landlord is liable if when delivered to the lessee the mill was in fact a nuisance, and was under the contract to be used substantially as it then was. He is not, if at that time it was not a nuisance and the repairs were to be made by the lessee. Burbank v. Bethel, etc., Co., 75 Me. 373, 46 Am. Rep. 400. If the injury is caused by the use of premises made by the lessee, as in overcrowding a gallery, sufficient so far as the owner knew, the latter is not liable. Edwards v. New York, etc., R. R. Co., 98 N. Y. 245, 50 Am. Rep. 659. The landlord is not liable for a nuisance created by the act or neglect of the tenant. Willson v. Treadwell, 81 Cal. 58, 22 Pac. 304; Rider v. Clark, 132 Cal. 382, 64 Pac. 564; Edgar v. Walker, 106 Ga. 454, 32 S. E. 582; Johnson v. McMillan, 69 Mich. 36, 36 N. W. 803; Fehlhauer v. St. Louis, 178 Mo. 635, 77 S. W. 843; Langabaugh v. Anderson, 68 Ohio St. 131, 67 N. E. 286; Fleischner v. Citizens' Invest. Co., 25 Ore. 119, 35 Pac. 174; Wunder v. McLean, 134 Pa. St. 334, 19 Atl. 749, 19 Am. St. Rep. 702; De Laney v. Georgia, etc., Ry. Co., 58 S. C. 357, 36 S. E. 699, 79 Am. St. Rep. 843; Texas Loan Agency v. Fleming, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279. See Haizlip v. Rosenberg, 63 Ark. 430, 39 S. W. 60; Kenny v. Barns, 67 Mich. 336, 34 N. W. 587; Spencer v. McManus, 82 Hun, 318, 31 N. Y. S. 185.

[13] Pretty v. Bickmore, L. R. 8 C. P. 401. See Gwinnell v. Eamer, 32 Law T. Rep. 835; Todd v. Flight, 9 C. B. (N S.) 377; Harris v. Cohen, 50 Mich. 324; Johnson v. McMillan, 69 Mich. 36, 36 N. W. 803. Nor for danger caused by structure put on by tenant, owner having delivered the premises in safe condition. Ryan v. Wilson, 87 N. Y. 471, 41 Am. Rep. 384. See Texas, etc., Ry. Co. v. Mangum, 68 Tex. 342, 4 S. W. 617. If a tenant has created a nuisance during the term, and after it, without abating the nuisance and without entry, the landlord relets to the same tenant, he is liable, though

sary for the use of the mills on the premises conveyed, the dam remaining at its present height," is liable for the continuance of the nuisance, as having expressly affirmed and encouraged it.[14] It would have been otherwise had the possession passed to others without any evidence of any conveyance or demise; for in such case the evidence that the will of the party accompanied and encouraged the continuance of the nuisance would be wanting, and the law must refer it to the will of the possessor.[15] So the mere letting of a house with a chimney in it which the owner has constructed, does not render him responsible for a nuisance caused to the occupant of an adjoining tenement by the smoke issuing from the chimney from fires built by this tenant. "It being quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance * * * the utmost that

the tenant may agree to repair. Ingwerson v. Rankin, 47 N. J. L. 18, 54 Am. Rep. 109.

[14] Waggoner v. Jermaine, 3 Denio, 306. See Lohmiller v. Indian Ford, etc., Co., 51 Wis. 683; Staple v. Spring, 10 Mass. 72; Cahill v. Eastman, 18 Minn. 324; Eastman v. Amoskeag Co., 44 N. H. 143, 82 Am. Dec. 201; Ferman v. Lombard Invest. Co., 56 Minn. 166, 57 N. W. 309; Palmore v. Morris, 182 Pa. St. 82, 37 Atl. 995, 61 Am. St. Rep. 693; Townes v. City Council, 52 S. C. 396, 29 S. E. 851. Where parts of a building are let to several tenants, the landlord is liable to them severally for a water-closet nuisance therein. Marshall v. Cohen, 44 Ga. 489. Landlord is liable to subtenant for damage from overflow caused by his servant. Pike v. Brittan, 71 Cal. 159, 60 Am. Rep. 527. But he is not liable to one tenant for overflow of properly constructed water closet caused by negligence of another tenant. Allen v. Smith, 76 Me. 335.

[15] Blunt v. Akin, 15 Wend. 522. This case examines and comments upon Roswell v. Prior, 1 Ld. Raym. 713; Beswick v. Cander, Cro. Eliz. 402, 520; Cheetham v. Hampson, 4 T. R. 318, and they in turn, as well as the principal case, are examined and distinguished in Waggoner v. Jermaine, 3 Denio, 306. In Bizer v. Ottumwa, etc., Co., 70 Ia. 145, it is held that the injury done by a dam being permanent, the builder

The fact that the party erecting the nuisance remains responsible for its continuance does not excuse the actual possessor. The continuance and every use of that which is in its erection a nuisance is a new nuisance.[17] And persons may be liable for the continuance of a nuisance who have created it on the land of another, even though they have no right to enter to abate it. "That is a consequence of their original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes by showing their inability to remove it without exposing themselves to another action."[18]

solely is liable and that his grantee is not.

[16] Rich v. Basterfield, 4 M., G. & S. 783. 801. This case examines very fully all preceding cases which might be supposed to have a bearing, and especially Bush v. Steinman, 1 B. & P. 404; Burgess v. Gray, 1 M. G. & S. 578; Randleson v. Murray, 8 Ad. & El. 109; Laugher v. Pointer, 5 B. & C. 547, and 8 D. & R. 556; Quarman v. Burnett, 6 M. & W. 499, and Leslie v. Pounds, 4 Taunt, 649, cases where the responsibility of the owner of property for injuries done or occasioned by it was in question. Compare Little Schuylkill, etc., Co. v. Richards, 57 Pa. St. 142; Moore [illegible] Mackey, 127, 47 Am. 262. To hold a landlord for the indecent conduct of his tenants, he must have let the premises for a bawdy house or have continued the lease knowing the use. Givens v. Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421.

[17] Staple v. Spring, 10 Mass. 72, 74; McDonough v. Gilman, 3 Allen, 264, 267, 80 Am. Dec. 72; Nichols v. Boston, 98 Mass. 39, 43, 93 Am. Dec. 132; Hadley v. Taylor, L. R. 1 C. P. 53; Clancy v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Morris Canal v. Ryerson, 27 N. J. L. 457; Wasmer v. Del., etc., R. R. Co., 80 N. Y. 212, 36 Am. Rep. 608. Where the lessee of premises makes use of an excavation in a sidewalk which was made for the benefit of the premises, but insufficiently covered, he is responsible either severally or jointly with the lessor for a damage to one who is injured by falling into it. Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603. But the owner is not liable for the breaking by third persons of the cover of such excavation when it has been properly dug by the tenant under city authority and he has had no knowledge of any defect. Wolf v. Kilpatrick, 101 N. Y. 146, 54 Am. Rep. 672. See Johnson v. McMillan, 69 Mich. 36, 36 N. W. 803.

[18] Thompson v. Gibson, 7 M. & W. 456, 462. If one's chimney is negligently weakened, so that it falls upon a passer-by the owner

tention has been called to it, and he has been requested to abate it. "This rule is very reasonable. The purchaser of property might be subjected to very great injustice if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. They are often such as cannot be easily known, except to the party injured. A plaintiff ought not to rest in silence, and presently surprise an unsuspecting purchaser by an action for damages; but should be presumed to acquiesce until he requests a removal of the nuisance."[19] But it seems that if one has already been notified to remove the nuisance, and the party giving the notice then sells to another, his alienee may sue without giving notice himself.[20] And notice is not necessary in any case where the alienee is chargeable with some personal duty or obligation cast upon him by law, or where the nuisance is immediately dangerous to life or health.[21]

may be liable, though the weakening was through the unauthorized act of another. But he will have a remedy over. Gray v. Boston, etc., Co., 114 Mass. 149, 19 Am. Rep. 324.

[19] Sherman, J., in Johnson v. Lewis, 13 Conn. 307, 33 Am. Dec. 405. See, also, Penruddock's Case, 5 Co. 101; Winsmore v. Greenbank, 1 Willes, 577; Woodman v. Tufts, 9 N. H. 88; Plummer v. Harper, 3 N. H. 88; Carleton v. Redington, 21 N. H. 291; Noyes v. Stillman, 24 Conn. 15; Snow v. Cowles, 26 N. H. 275; Eastman v. Amoskeag Co., 44 N. H. 143, 82 Am. Dec. 201; Pierson v. Glenn, 14 N. J. L. 36; Beavers v. Trimmer, 25 N. J. L. 97; Walter v. County Commissioners, 35 Md. 385; Bonner v. Wilborn, 7 Ga. 296; Dodge v. Stacy, 39 Vt. 548; Conhocton Stone Road v. Buffalo, etc., R. R. Co., 51 N. Y. 573, 10 Am. Rep. 646; Groff v. Ankenbrandt, 19 Ill. App. 148; Groff v. Aukenbrandt, 124 Ill. 51, 15 N. E. 40, 7 Am. St. Rep. 342; Fenter v. Toledo, etc., R. R. Co., 29 Ill. App. 250; Staples v. Dickson, 88 Me. 362, 34 Atl. 168; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; Ferman v. Lombard Invest. Co., 56 Minn. 166, 57 N. W. 309; Townes v. City Council, 52 S. C. 396, 29 S. E. 851; Philadelphia, etc., R. R. Co. v. Smith, 64 Fed. 679, 12 C. C. A. 384; but if he has notice of it, a request to abate is unnecessary. Dickson v. Chicago, etc., Co., 71 Mo. 575; Buesching v. St. Louis, etc., Co., 73 Mo. 219, 39 Am. Rep. 503, case of unguarded area near street line.

[20] Caldwell v. Gale, 11 Mich. 77. See Brown v. Cayuga, etc., R. R. Co., 12 N. Y. 486.

[21] Jones v. Williams, 11 M. & W. 176; Irvine v. Wood, 51 N. Y.

was originally constructed properly, and the condition of the structure has been changed so as to render it injurious or dangerous by *vis major*, as by fire, or by the act of a third person, which the owner had no reason to anticipate, he cannot be held liable, or bound to make the structure safe until he has had a reasonable time after it has so become dangerous, to take the necessary precaution.[22]

A mere agent or servant is not liable for the continuance of a nuisance on the land of his master or employer,[23] unless he is guilty of some distinct wrongful act, or of personal negligence, from which injury flows.[24]

§ 314. **Joint liability.** This subject has already been considered to some extent in a former chapter.[25] The general rule is that an action at law for the recovery of money damages, as distinguished from a suit in equity, cannot be maintained jointly against various tort-feasors among whom there is no concert or unity of action and no common design, but whose independent acts unite in their consequences to produce the damage in question.[26] A distinction, however, is recognized

224, 10 Am. Rep. 603. Where a nuisance consists in continuing the obstruction of a stream by a highway, an action will not lie against the country commissioners unless there has been on their part some active participation in its continuance, or some positive act evidencing its adoption. Walter v. County Commissioners, 35 Md. 385. See Bond v. Smith, 44 Hun, 219; Buesching v. St. Louis, etc., Co., 73 Mo. 219, 39 Am. Rep. 503. The rule as to notice does not apply where the nuisance is an obstruction in a highway. Matthews v. Miss., etc., Ry. Co., 26 Mo. App. 75. Where an unsecured awning over a street is forbidden, a landlord is liable if one put up by a former owner is used by his tenant. Jessen v. Sweigert, 66 Cal. 182.

[22] Mahoney v. Libbey, 123 Mass. 20, 25 Am. Rep. 6, citing L. R. 10 Exch. 255, and 1 Exch. Div. 1; Gray v. Harris, 107 Mass. 492.

[23] Brown Paper Co. v. Dean, 123 Mass. 267; Stone v. Cartwright, 6 T. R. 411.

[24] Carleton v. Reddington, 21 N. H. 291; Brown v. Lent, 20 Vt. 529. An independent contractor is liable as well as the owner if an injury is caused by a falling wall in a building put up contrary to an ordinance. Walker v. McMillan, 6 Can. S. C. R. 241.

[25] *Ante*, § 38.

[26] Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; Sellick v. Hall, 47 Conn. 260; Bowman v. Humphrey, 124 Ia. 744, 100 N. W. 854; Harley v. Merrill Brick Co., 83 Ia. 73, 48 N. W. 1000; Lockwood Co. v.

wrong-doer is chargeable with his own acts alone, in the absence of a joint purpose among the participants; in the latter, each may be answerable in a joint and several action not only for what he himself does, but likewise for the acts of those who, with him, violate public as well as private rights.[27] Of course, if two or more in any way co-operate in producing a nuisance, they are jointly and severally liable.[28] When relief is sought in equity against a nuisance, all who have contributed to it may be joined as defendants, though there has been no co-operation or common design.[29]

§ 315. **Who may complain.** The party who at the time suffers the inconvenience of a nuisance is entitled to complain of it, and it is immaterial whether it was or was not a nuisance to him in its origin. Therefore, it is of no importance to the right of action that the plaintiff has come into the neighborhood since the nuisance was created; he has the right to locate himself wherever he can do so to his satisfaction, and no one can have the authority to set limits to his choice of location by interposing something which is offensive.[30] Moreover,

Lawrence, 77 Me. 297, 52 Am. Rep. 763; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; Watson v. Colusa-P. M. S. Co., 31 Mont. 513, 79 Pac. 14; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Long v. Swindel, 77 N. C. 176; Little Schuylkill Nav., etc., Co. v. Richards, 57 Pa. St. 142, 98 Am. Dec. 249; Gallagher v. Kemmerer, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673; Swain v. Tenn. Copper Co., 111 Tenn. 430, 440–442, 73 S. W. 93; Lull v. Fox & Wis. Imp. Co., 19 Wis. 100; Draper v. Brown, 115 Wis. 361, 91 N. W. 1001; The Debris Case, 16 Fed. 25.

[27] Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676; Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603; Valparaiso v. Moffitt, 12 Ind. App. 255, 39 N. E. 909, 54 Am. St. Rep. 522; West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 24, 25.

[28] Rogers v. Stewart, 5 Vt. 215, 26 Am. Dec. 296; Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556.

[29] Kingsbury v. Flowers, 65 Ala. 479; Hillman v. Newington, 57 Cal. 62; People v. Gold Run, etc., Co., 66 Cal. 138; Woodyear v. Schaefer, 57 Md. 1; Draper v. Brown, 115 Wis. 361, 91 N. W. 966.

[30] "A man is not to be precluded from building and living on his

rights, including his right to protection in its complete enjoyment, but must, when a nuisance is created near him, either await the result of proceedings for its abatement, or dispose of his land with the nuisance practically assented to, and for a price which the nuisance has assisted in establishing. Nothing can be plainer than if the grantor could have complained when he conveyed, the grantee may complain afterwards; and to whatever use the grantor might have put the land, as being suitable and proper for the locality, the grantee is at liberty to choose and adopt.[31] Nevertheless, if one were to purchase an estate in the neighborhood of a nuisance, for the express purpose of litigation, and should demand the extraordinary process of injunction to put a stop to another's business, it may be that the court of equity, in its discretion, would refuse him this relief, while conceding his undoubted right to a remedy in damages.[32]

It is a familiar principle that no lapse of time can confer the right to maintain a nuisance as against the state.[33] On the

own land because the adjoining proprietor first erected a nuisance." Hurlbut v. McKone, 55 Conn. 31, 44, 10 Atl. 164, 3 Am. St. Rep. 17. To same effect: Laflin & R. P. Co. v. Tearney, 131 Ill. 322, 328, 21 N. E. 516, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; Kissel v. Lewis, 156 Ind. 233, 234, 59 N. E. 478; Baltimore v. Fairfield Imp. Co., 87 Md. 352, 364, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494; Lohmiller v. Indian Ford W. P. Co. 51 Wis. 683, 690, 8 N. W. 601. The plaintiff is not estopped because he did not object to the erection of the works. Harley v. Merrill Brick Co., 83 Ia. 73, 48 N. W. 1000.

[31] St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; Bliss v. Hall, 4 Bling. (N. C.) 183; King v. Morris, etc., R. R. Co., 18 N. J. Eq. 397; Gilbert v. Showerman, 23 Mich. 448; Bushnell v. Robeson, 62 Ia. 540; Angel v. Penn. R. R. Co., 38 N. J. Eq. 58; Hurlbut v. McKone, 55 Conn. 31, 44, 10 Atl. 164, 3 Am. St. Rep. 17; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722. If one's act contributes to the creation of the nuisance complained of, he cannot recover. Richards v. Waupun, 59 Wis. 45.

[32] Edwards v. Allouez Mining Co., 38 Mich. 46, 31 Am. Rep. 301.

[33] United States v. Hoar, 2 Mason, 311; State v. Rankin, 3 S. C. (N. S.) 438, 16 Am. Rep. 737;

bar any subsequent suit.[34] There still remains the case of a public nuisance not complained of by the state, but by those to whom it works a special and peculiar injury; and whether the right to maintain it as against such persons can be gained by lapse of time may possibly be open to some question. But on the whole the better doctrine would seem to be that the acquisition of rights by prescription can have nothing to do with the case of public nuisances, either when the state or when individuals complain of them.[35]

A tenant or occupant of property may maintain a suit for a nuisance by reason of noise, smoke, odors, etc.[36] And any one, though having no interest in the property but living thereon, such as a child or a visitor, who is made sick by a nuisance, wrongfully maintained or suffered by the defendant, may have an action for the physical injury.[37] But no one

People v. Cunningham, 1 Denio, 524, 43 Am. Dec. 709; Commonwealth v. Upton, 6 Gray, 473; Commonwealth v. McDonald, 16 S. & R. 390; Commonwealth v. Alburger, 1 Whart. 469; State v. Phipps, 4 Ind. 515; Elkins v. State, 2 Humph. 543; State v. Franklin Falls Company, 49 N. H. 240, 6 Am. Rep. 513; Philadelphia, etc., R. R. Co. v. State, 20 Md. 157; Driggs v. Phillips, 103 N. Y. 77.

[34] Elliotson v. Feeltham, 2 Bing. (N. C.) 134; Carlyon v. Lovering, 1 H. & N. 784; Johns v. Stevens, 3 Vt. 308; Bolivar Mfg. Co. v. Neponset Mfg. Co., 16 Pick. 241; Gladfelter v. Walker, 40 Md. 1; Crosby v. Bessey, 49 Me. 539, 77 Am. Dec. 271; Baldwin v. Calkins, 10 Wend. 167; Stiles v. Hooker, 7 Cow. 266.

[35] Kissel v. Lewis, 156 Ind. 233, 241, 50 N. E. 478; Baltimore v. Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494; Folks v. Chad, 3 Doug. 340; Weld v. Hornby, 7 East, 195; Simons v. Cornell, 1 R. I. 519; Knox v. Chaloner, 42 Me. 150; Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160; Renwick v. Morris, 3 Hill, 621; S. C. 7 Hill, 575; Kellogg v. Thompson, 66 N. Y. 88; Veazie v. Dwinel, 50 Me. 479; Lewis v. Stein, 16 Ala. 214, 1 Am. Rep. 177; Stoughton v. Baker, 4 Mass. 522; Arundel v. McCulloch, 10 Mass. 70. In New Salem v. Eagle Mills Co., 138 Mass. 8, it is held that while a private nuisance may be prescribed for, though it is a public nuisance as well, yet a public nuisance from which special injury is suffered may not be.

[36] State v. Judge, 46 La. Ann. 78, 14 So. 423; Lurssen v. Lloyd, 76 Md. 360, 25 Atl. 294.

[37] Hunt v. Gas Lt. Co., 8 Allen, 169; Holly v. Gas Lt. Co., 8 Gray,

or discomfort in the enjoyment of the property. Thus it is held that a husband residing with his family in his wife's house can not recover for the discomfort of himself and family, caused by fumes and gases from the defendant's factory.[38] Where the plaintiff leased to defendant land for the manufacture of brick, he is not estopped from recovering for a nuisance from the manner in which the business was carried on and which it was reasonably practicable to avoid.[39]

§ 316. **Remedy.** There are three remedies for nuisance: 1. Abatement by an act of the party injured. 2. A suit at law for damages. 3. A suit in equity to enjoin or abate the nuisance complained of. The first of these has already been considered.[40] An action for damages is the most common remedy.[41] The recovery is limited to the damages which have accrued up to the commencement of the suit,[42] and successive actions may be brought.[43] The remedy in equity is based upon the inadequacy of the remedy at law. When an award of damages is adequate, equity will decline jurisdiction.[44] The grounds usually assigned for the jurisdiction of equity in nuisance cases are the prevention of irreparable injury and of a multiplicity of suits.[45] To justify the interference of equity by injunction, the evidence of

123; Fort Worth, etc., Ry. Co. v. Glenn, 97 Tex. 586, 80 S. W. 992.

[38] Kavanagh v. Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689, reversing Kavanagh v. Barber, 59 Hun, 60, 12 N. Y. S. 603.

[39] Forgarty v. Junction City Pressed Brick Co., 50 Kan. 478, 31 Pac. 1052, 18 L. R. A. 756.

[40] *Ante*, § 46.

[41] Bly v. Edison Elec. Ill. Co., 172 N. Y. 1, 13, 64 N. E. 745, 58 L. R. A. 500; Robb v. Carnegie Bros. & Co., 145 Pa. St. 324, 22 Atl. 649, 14 L. R. A. 329; Hubert v. Rainey, 162 Pa. St. 525, 29 Atl. 725; Lockett v. Ft. Worth, etc., Ry. Co., 78 Tex. 211, 14 S. W. 564.

[42] Joseph Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. 693; Bowers v. Miss. & Rum Riv. Boom Co., 78 Minn. 398, 81 N. W. 208; Uline v. New York, 101 N. Y. 98, 4 N. E. 536.

[43] *Ante*, § 312; 2 Lewis, Em. Dom. § 653*b*.

[44] 1 High on Inj. §§ 739, 745; Burnham v. Kempton, 44 N. H. 78.

[45] High, Inj. §§ 739; Rouse v. Martin, 75 Ala. 510, 51 Am. Rep. 463; Thebaut v. Canova, 11 Fla. 143; Kewanee v. Almy, 204 Ill. 402, 68 N. E. 388; Owen v. Phillips, 73 Ind. 284; Burnham v. Kempton, 44 N. H. 78.

equity may restrain the defendant from conducting it in such a way as to be a nuisance, where this is possible.[48] And since equitable relief rests in the sound discretion of the chancellor,[49] he may compel the defendant to take such measures and precautions as will prevent the mischief or submit to an injunction.[50] And even though the nuisance is clearly made out and the business cannot be so carried on as to avoid it, equity may refuse an injunction and leave the plaintiff to his remedy at law, where the consequences of granting the injunction would be far more disastrous to the defendant that the consequences of refusing it would be to the plaintiff, and especially when the public and large numbers of people employed in the business would be injuriously affected by its cessation.[51] In one of the cases cited the plaintiffs, who owned several small farms of little value, brought suit to enjoin the defendants from the operation of copper works, the smoke and fumes from which injured vegetation and interfered with the comfortable enjoyment of their farms by the defendants. The copper works represented an investment of $2,000,000, employed 2,500 men, and supported a population of 12,000 people. The works were located in a remote mountain country, sparsely populated and of little value

[46] Ogletree v. McQuaggs, 67 Ala. 580; Rouse v. Martin, 75 Ala. 510, 51 Am. Rep. 463; Mirkil v. Morgan, 134 Pa. St. 144, 19 Atl. 628; Powell v. Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53.

[47] 1 High, Inj. § 740; Mirkil v. Morgan, 134 Pa. St. 144, 19 Atl. 628.

[48] McMenomy v. Band, 87 Cal. 134, 26 Pac. 795; Ballentine v. Webb, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321; Chamberlain v. Douglas, 24 App. Div. 582, 48 N. Y. S. 710.

[49] Kewanee v. Almy, 204 Ill. 402, 68 N. E. 388.

[50] Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687; Demarest v. Hardham, 34 N. J. Eq. 469; Madison v. Ducktown, etc., Co., 113 Tenn. 331, 83 S. W. 658.

[51] Clifton Iron Co. v. Dye, 87 Ala. 471, 6 So. 192; Demarest v. Hardham, 34 N. J. Eq. 469; Salem Iron Co. v. Hyland, 74 Ohio St. 160; Richard's Appeal, 57 Pa. St. 274, 9 Am. Dec. 202; Huckenstine's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669; Madison v. Ducktown, etc., Co., 113 Tenn. 331, 83 S. W. 658; Powell v. Bentley, etc.,

the plaintiffs, to be ascertained by reference. The opinion of the court is carefully considered and we quote as follows: "In order to protect by injunction several small tracts of land, aggregating in value less than $1,000, we are asked to destroy other property worth nearly $2,000,000, and wreck two great mining and manufacturing enterprises that are engaged in work of very great importance, not only to their owners, but to the state, and to the whole country as well, to depopulate a large town, and deprive thousands of working people of their homes and livelihood, and scatter them broadcast. The result would be practically a confiscation of the property of the defendants for the benefit of complainants—an appropriation without compensation. The defendants cannot reduce their ores in a manner different from that they are now employing, and there is no more remote place to which they can remove. The decree asked for would deprive them of all their rights. We appreciate the argument based on the fact that the homes of the complainants who live on the small tracts of land referred to are not so comfortable and useful to their owners as they were before they were affected by the smoke complained of, and we are deeply sensible of the truth of the proposition that no man is entitled to any more rights than another on the ground that he has or owns more property than that other. But in a case of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances. We see no escape from the conclusion in the present case that the only proper decree is to allow the complainants a reference for the ascertainment of damages, and that the injunction must be denied to them, except in the qualified manner below indicated." [52]

The works in question in the case just referred to, were situ-

Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; Mountain Copper Co. v. United States, 142 Fed. 625 (C. C. A.).

[52] Madison v. Ducktown, etc., Co., 113 Tenn. 331, 366, 367, 12 S. E. 1085, 12 L. R. A. 53.

from polluting the atmosphere within its territory. It was shown that the fumes and gases from the defendants' works spread over several counties of the plaintiff state and threatened a wholesale destruction of forests and of vegetable life, if not injury to the health of the inhabitants. The court held that a sovereign state stood on a different footing from an individual and that the court had not the same liberty of balancing advantages and disadvantages and of refusing the injunction, when that course would result in the least injury, that it would have in a suit between individuals. Accordingly, the nuisance being clearly made out, the injunction was allowed, unless the defendants took such measures as would prevent the damage.[53]

[53] Georgia v. Tenn. Copper Co., 51 L. Ed. 618.

CHAPTER XVIII.

WRONGS FROM NON-PERFORMANCE OF CONVENTIONAL AND STATUTORY DUTIES.

§ 317. **Scope of the chapter.** In this chapter will be considered certain cases in which, by virtue of some conventional relation between parties, a specific obligation is imposed upon one to observe some special course of conduct as regards the person or the property of the other. The most numerous of these are cases of bailment, but in some a special duty is undertaken or in contemplation of law promised as regards both person and property. The subject of statutory duties will also be briefly considered.

§ 318. **Bailment in general.** Bailment is a delivery of goods in trust, upon an agreement expressed or implied, that the trust shall be duly exercised, and the goods returned or delivered over when the purpose of the bailment is accomplished. There are several sorts of bailment, and for our purposes we follow the classification of Mr. Justice Story, which is as follows: 1. Those in which the trust is for the benefit of the bailor. 2. Those in which the trust is for the benefit of the bailee. 3. Those in which the trust is for the benefit of both parties.[1] The classification is important here, because the degree of care and vigilance required of the bailee is justly held to be in some degree dependent upon the circumstance that the benefit is to accrue to one rather than the other, or to both instead of one only.

§ 319. **Bailments for the benefit of the bailor.** Of the first class of bailments, or those in which one assumes a trust in goods for the benefit of the owner, it is to be said that these are usually mere matters of friendly accommodation; such as the carriage of a parcel from one town to another by one who is going on his own business, for his neighbor, who is thereby saved the necessity of a journey to carry it himself. In this case by receiving the parcel on an understanding that he will carry it, the bailee

[1] Story on Bailments, § 3.

other illustration is the case of one who, at his neighbor's request, receives some article of value to be cared for during the laater's absence from his home or place of business.[2] Here the trust is one of safe keeping only, but the law implies a promise commensurate with the trust.

If the trust to carry and deliver in the one case, or to keep safely in the other is not performed, the bailee is guilty of a breach of duty unless he has some legal excuse for the failure. It would be a good legal excuse if the goods are injured, lost or destroyed without the bailee's fault, as by inevitable accident.[3] The bailee who accepts a trust for the benefit of the bailor is of course obligated to its performance, and he is not discharged from this obligation unless he has done all that can reasonably be required of him in respect to it. But he has not done all that can reasonably be required of him if he has been guilty of negligence; for negligence implies fault, and to be in fault in discharging a legal duty to another is to place one's self under legal obligation to make good the consequent loss.[4]

Liability as gratuitous bailee only arises when the trust has once been assumed: the promise to accept such a trust is void for want of consideration, and probably after he has accepted the bailee may surrender it without performance if he restore the property uninjured, and without having put the bailor to any inconvenience or damage.[5] But any dealing with the subject of the bailment in a manner not warranted by the understanding, is in law wrongful. Therefore, if one having undertaken to carry and deliver money for another, shall hand it over to a third person to be carried, from whom it is stolen or by whom it

[2] Louisville, etc., R. R. Co v. Gerson, 102 Ala. 409, 14 So. 873; Wade v. Lutcher, etc., Lumber Co., 74 Fed. 517, 20 C. C. A. 515.

[3] *Ante*, § 10; Holmes v. Mather L. R. 10 Exch. 261; S. C. 14 Moak, 548.

[4] Burk v. Dempster, 34 Neb. 426, 51 N. W. 576. A gratuitous bailee can maintain an action for the loss or injury of the property bailed. Chamberlain v. West, 37 Minn. 54, 33 N. W. 114.

[5] Thorne v. Deas, 4 Johns. 84. Compare Shillibeer v. Glyn, 2 M. & W. 143.

The question whether the proper degree of care has been observed is one of fact, not of law.[7] A bailee is not responsible if the property is stolen from him without his fault,and this rule applies to a bank from which a special deposit is stolen by its officers.[8] But where securities are placed with a bank as a special deposit it is held liable for any loss thereof "accruing

[6] Colyer v. Taylor, 1 Cold. 372. If one who undertakes to carry money, sends it by mail, he is responsible for the loss. Stewart v. Frasier, 5 Ala. 114. See Bland v. Womack, 2 Murphey, 373; Jenkins v. Motlow, 1 Sneed, 248, 60 Am. Dec. 154; Graves v. Tichnor, 6 N. H. 537.

[7] Chase v. Mayberry, 3 Harr. 266; Jenkins v. Motlow, 1 Sneed, 248; Beatty v. Gilmore, 16 Penn. St. 463, 55 Am. Dec. 514; Storer v. Gowen, 18 Me. 174; Tracy v. Wood, 3 Mason, 132; Doorman v. Jenkins, 2 Ad. & E. 256.

[8] Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; DeHaven v. Kensington Bank, 81 Pa. St. 95; Merchants Nat. Bank v. Guilmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322; Wiley v. First Nat. Bank, 47 Vt. 546, 19 Am. Rep. 122. Bank liable when bonds specially deposited are stolen if it has been grossly negligent. Whitney v. Nat. Bank, 55 Vt. 154. See Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Nat. Bank v. Graham, 100 U. S. 699; Wylie v. Northampton Bank, 119 U. S. 361; Comp v. Carlisle, etc., Bank, 94 Pa. St. 409. So of an individual bailee of money. Bronnenburg v. Charman, 80 Ind. 475; Caldwell v. Hall, 60 Miss. 330, 45 Am. Rep. 410. Of a bailee of a ring left to be raffled for contrary to law. Woolf v. Bernero, 14 Mo. App. 518. A gratuitous bailee, it is held, is only liable for gross negligence. Patterson v. McIver, 90 N. C. 493; Carrington v. Ficklin, 32 Gratt. 670. In a case where with bailor's knowledge, the bailee had put his bonds in a locked drawer from which they were stolen it was held there was no liability and the rule was stated that a gratuitous bailee "is bound to observe such care in the custody of property committed to his keeping as persons of ordinary prudence in his situation and business usually bestow on the custody and keeping of like property belonging to themselves." Schermer v. Neurath, 54 Md. 491, 39 Am. Rep. 379. See Rea v. Simons, 141 Mass. 561, 55 Am. Rep. 492; Brant v. McMahon, 56 Mich. 498. Where the plaintiff for his own accomodation, put his money in the defendant's safe for safe keeping and the same was stolen by robbers without the defendant's fault, it was held there was no liability. Carlyon v. Fitzhenry, 2 Ariz., 266, 15 Pac. 273. So where the money was stolen from the safe by the defendant's trusted clerk. Glover v. Burbridge, 27 S. C. 305, 3 S. E. 471.

for a special deposit of bonds stolen by its cashier, stated the law to be that gratuitous bailees are bound to exercise such reasonable care as men of common prudence would usually bestow for the protection of their own property of similar value, and that gross negligence, as applied to such bailees, "is nothing more than a failure to bestow the care which the property in its situation demands."[10] And where it is known that an officer or employe having access to special deposits is engaged in speculation, and he is retained in his position and no examination is made to see if such deposits are intact, the bank will be liable if such deposits are stolen by such officer or employe.[11] A railroad company is not liable for the loss, without fault, of property which it has received to carry gratuitously.[12]

§ 320. **Bailments for the benefit of the bailee.** The case of a bailment for the exclusive benefit of the bailee is the opposite of that already considered, and requires of the bailee the exercise

[9] Gray v. Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769.

[10] Preston v. Prather, 137 U. S. 604, 11 S. C. Rep. 162, 34 L. Ed. 788.

[11] Rushin v. Tharpe, 88 Ga. 779, 15 S. E. 830; Merchants Nat. Bank v. Guilmartin, 93 Ga. 503, 21 S. E. 55, 44 Am. St. Rep. 182; Merchants Nat. Bank v, Carhart, 95 Ga. 394, 22 S. E. 628, 51 Am. St. Rep. 95, 32 L. R. A. 775; Gray v. Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769; Manhattan Bank v. Walker, 130 U. S. 267, 9 S. C. Rep. 519, 32 L. Ed. 959; Preston v. Prather, 137 U. S. 604, 11 S. C. Rep. 162, 34 L. Ed. 788. Where a special deposit of bonds is used from time to time as collateral it is held to be a bailment for the mutual advantage of the parties and the bank is bound to corresponding care, even when the bonds are not pledged as collateral. Gray v. Merriam, 46 Ill. App. 337; Onderkirk v. Central National Bank, 119 N. Y. 263, 23 N. E. 875; Preston v. Prather, 137 U. S. 604, 11 S. C. Rep. 162, 34 L. Ed 788.

[12] Van Gilder v. Chicago, etc., R R. Co., 44 Iowa, 548; Flint, etc., R Co. v. Weir, 37 Mich. 111, case o gratuitous carriage of baggage. So only liable for gross negligence of baggage gratuitously stored. Clark v. Eastern R. R. Co., 139 Mass. 423. But if one receives money to be carried gratuitously, and can give no account whatever of its disposition, a presumption of gross neglect arises against him. Boyd v. Estis, 11 La. Ann. 704. See Fairfax v. N. Y. Cent. R. R. Co., 67 N. Y. 11.

friend for a particular journey. If in such a transaction the party accommodated is guilty of even slight neglect, and the horse is lost or injured in consequence, this is such negligence as will render him responsible.[13] If the gratuitous bailor of a chattel or appliance, knows of a defect therein which renders it unsafe for the use intended and does not inform the bailee of the defect, he will be liable for any injury to the bailee by reason of such defect.[14] Otherwise if the bailor did not know of the defect.[15]

§ 321. **Bailments for mutual benefit.** The most common bailments are those from which each party expects, or is supposed to receive, some advantage. Some of these cases are simple, involving a consideration only of the particular transaction, as where the livery-keeper lets a horse, to be taken by the bailee for a journey, for a consideration paid or to be paid. Others are complicated by the consideration that the bailee receives the property in the course of a certain occupation to which the law attaches exceptional duties, imposing upon those who follow it extraordinary liabilities. Among the first may be named the case of a pledge of goods in security for a debt.[16] Here the goods are

[13] Phillips v. Coudon, 14 Ill. 84; Howard v. Babcock, 21 Ill. 259; Watkins v. Roberts, 28 Ind. 167. He is responsible for even the slightest neglect, and when a loss occurs the burden is upon him to prove that it was the result of inevitable accident or of a wrongful act which, in the exercise of due diligence, could not have been foreseen or prevented. Scranton v. Baxter, 4 Sandf. 5; Wood v. McClure, 7 Ind. 155. Such a bailee of a flag which is injured by a hail storm is not liable from the mere fact of injury. Beller v. Schultz, 44 Mich. 529, 38 Am. Rep. 280. If one furnishes a carriage gratuitously to three persons and a fourth without his knowledge gets in, he is not liable if such an one is injured by a runaway. Siegrist v. Arndt, 86 Mo. 200, 56 Am. Rep. 424.

[14] Coughlin v. Gillison, (1899) 1 Q. B. 145.

[15] Gagnon v. Dana, 69 N. H. 264, 39 Atl. 982, 26 Am. St. Rep. 170, 41 L. R. A. 389. The bailor is under no obligation to exercise care to discover such defects, in order to warn the bailee thereof. Ibid.

[16] A bank, as bailee of bonds deposited as security for a loan, is bound only to ordinary care. Jenkins v. Nat. Bank of Bowdoinham, 58 Me. 275, citing Field v. Brackett, 56 Me. 121. And see Maury v. Coyle, 34 Md. 235; First Nat. Bank v. Graham, 79 Pa. St. 106, 21 Am.

der that something may be done by him upon or in respect to it, in the line of his employment and for a compensation. As in each of these cases the bailment is for the benefit of both parties, the bailee is charged with the obligation of ordinary care, but no more.[17] Another case is that of the deposit of grain in a mill or warehouse, to be returned on demand. This case is peculiar in that it is commonly expected that the grain deposited will be stored with other grain of like kind and quality, so that the return of precisely the same grain will be impossible. This circumstance, however, does not vary the rules of legal responsibility. The bailor is entitled to receive from the aggregate an amount of grain of like kind and quality equal to the deposit, and the bailee must deliver it on demand, or he must show an excuse which does not involve a want of ordinary care on his part. It would be a valid excuse if, while he was in the exer-

Rep. 49; First Nat. Bank v. First Nat. Bank, 116 Ala. 520, 11 So. 976; Serry v. Knepper, 101 Ia. 372, 70 N. W. 601; Loomis v. Reimers, 119 Ia. 169, 93 N. W. 95; Schaaf v. Fries, 90 Mo. App. 111.

[17] Articles left to be repaired. Dale v. See. 51 N. J. L. 378, 18 Atl. 306, 14 Am. St. Rep. 688, 5 L. R. A. 583; Zell v. Dunkle, 156 Pa. St. 353, 27 Atl. 38. Goods delivered to be made up into garments. Labowitz v. Frankfort, 4 Misc. 275, 23 N. Y. S. 1038. So when cotton is left to be ginned. Kelton v. Taylor, 11 Lea, 264, 47 Am. Rep. 284; James v. Orrell, 68 Ark. 284, 57 S. W. 931, 82 Am. St. Rep. 293. Or to be compressed. Union Compress Co. v. Nunnally, 67 Ark. 284, 54 S. W. 1072. Horse left with stable keeper over night. Dennis v. Huyck, 48 Mich. 620, 42 Am. Rep. 479. Logs to be sawed left with sawyer. Gleason v. Beers, 59 Vt. 581, 59 Am. Rep. 757. Notes left for collection. Kincheloe v. Priest, 89 Mo. 240. When a horse is hired. Carrier v. Dorrance, 19 S. C. 30. An agricultural society is liable for goods, stolen through its negligence from its fair ground, which had been left for exhibition. Vigo Ag'l Soc. v. Brumfiel, 102 Ind. 146, 52 Am. Rep. 657. To same effect: Prince v. Ala. State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716. A bailee for hire of cars to be returned in as good condition as when received, ordinary wear excepted, is not liable for loss from fire occurring without its fault. St. Paul, etc., R. R. Co. v. Minn., etc., Ry. Co., 26 Minn. 243. In Mass. under a like contract the bailee of a piano was held liable where the loss occurred from the blowing down of the house. Harvey v. Murray, 136 Mass. 377.

an accidental or incendiary fire. Where, by the custom of the business, a warehouseman is expected to buy and sell, and to store what he buys with that which he receives on deposit, making his sales from the aggregate, the transaction is held in some cases to be a sale of the grain on an undertaking to pay for it on demand in grain of like kind and quality, and all risks are upon the warehouseman.[19] Other cases hold that the transaction is a bailment and that the warehouseman is liable accordingly.[20]

Every bailee is bound, in his use of the property, to keep within the terms of the bailment. If he hires a horse to go to one place, but goes with it to another, he is guilty of a conversion of the horse from the moment the departure from the journey agreed upon takes place. It is immaterial that the change is not injurious to the interests of the bailor; it is enough that it is not within the contract.[21] Contracts are matters of agree-

[18] Erwin v. Clark, 13 Mich. 10; Perkins v. Dacon, 13 Mich. 81; Norton v. Woodruff, 2 N. Y. 152; James v. Plank, 48 Ohio St. 255, 26 N. E. 1107. See Nelson v. Brown, 44 Iowa, 455; Young v. Miles, 20 Wis. 615. A warehouseman is only liable for want of ordinary care. Mobile, etc., R. R. Co. v. Prewitt, 46 Ala. 63, 7 Am. Rep. 586.

[19] Nelson v. Brown, 44 Iowa, 455; Wilson v. Cooper, 10 Iowa, 565; Smith v. Clark, 21 Wend. 83; Carlisle v. Wallace, 12 Ind. 252, 74 Am. Dec. 207; Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; Sou. Australian Ins. Co. v. Randell, L. R. 3 P. C. 101; Jones v. Kemp, 49 Mich. 9. But see Sexton v. Graham, 53 Ia. 181; Ledyard v. Hibbard, 48 Mich. 421, 42 Am. Rep. 474; Schindler v. Westover, 99 Ind. 395; Dean v. Lammers, 63 Wis. 331; Thompson v. Jordan, 164 Ind. 551. A warehouseman is liable for a loss by negligence. Motley v. Warehouse Co., 122 N. C. 347, 30 S. E. 3. And negligence is presumed from a failure to deliver on demand or to account for the property. Lichtenstein v. Jarvis, 31 App. Div. 33, 52 N. Y. S. 605.

[20] O'Dell v. Leyden, 46 Ohio St. 244, 20 N. E. 472; James v. Plank, 48 Ohio St. 255, 26 N. E. 1107; Tobin v. Portland Mills Co., 41 Ore. 269, 68 Pac. 743, 1108; Bretz v. Diehl, 117 Pa. St. 589, 11 Atl 893, 2 Am. St. Rep. 706; Lyon v. Lenon, 106 Ind. 567; Weiland v. Krejnick, 63 Minn. 314, 65 N. W. 631; Wieland v. Sunwell, 63 Minn. 320, 65 N. W. 628.

[21] Homer v. Thwing, 3 Pick. 492; Rotch v. Hawes, 12 Pick. 136, 22 Am. Dec. 414; Duncan v. Sou. Car. R. R. Co., 2 Rich. 613; Columbus v. Howard, 6 Ga. 213; Mullen v. Ensley, 8 Humph. 428; Fox v. Young, 22 Mo. App. 386; Welch v. Mohr, 93 Cal. 371, 28 Pac. 1060; Malone v. Robinson, 77 Ga. 719

ments must rest.

Where a customer in a store took off her cloak and laid it on the counter in order to try on a new one which she was proposing to purchase, and, while she was occupied with the new one the old garment disappeared, and it appeared that no place was provided for the garments of customers laid off under such circumstances, and no warning given to customers that garments so laid off would be at their own risk, and no rules made for such matters and that no care whatever was exercised in the particular case or in like cases, it was held that the proprietor was liable.[22] The safe result was reached in a case where a customer, when about to try on a suit of clothes, took off his watch and chain and, at the suggestion of the clerk who was waiting on him, put them in a drawer, whence they were stolen.[23] And the same rule has been applied in the case of the apparel of customers in a barber shop,[24] restaurant,[25] or bathing establishment.[26]

Compare Harvey v. Epes, 12 Grat. 153, in which it was decided that a departure from the terms of a hiring was not a conversion unless injury was occasioned thereby. And see Doolittle v. Shaw, 92 Ia. 348, 60 N. W. 621, 54 Am. St. Rep. 562, 26 L. R. A. 366. Defendant hired a horse to go to K. and return direct. On the way back he stopped, put the horse in a stable to be fed and while there the horse was burned without his fault. Held not liable. Evans v. Mason, 64 N. H. 98, 5 Atl. 766. Where one hired a team and driver and substituted another driver, it was held a conversion. Kellar v. Garth, 45 Mo. App. 332. See further, Line v. Mills, 12 Ind. App. 100, 39 N. E. 870; Bass v. Cantor, 123 Ind. 444, 24 N. E. 147.

[22] Bunnell v. Stern, 122 N. Y. 539, 25 N. E. 910, 19 Am. St. Rep. 519, 10 L. R. A. 481. *Contra*, Bunnell v. Stern, 14 Daly, 357.

[23] Woodruff v. Painter, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. Rep. 786, 16 L. R. A. 451. Where a customer in a store left her purse on a table, when it was unnecessary to do so, and went into another part of the store and when she returned the purse was gone, it was held that the proprietor was not liable. McAllister v. Simon, 27 Misc. 214, 57 N. Y. S. 733.

[24] Delbert v. Harris, 95 Ga. 571, 23 S. E. 112.

[25] Appleton v. Welch, 20 Misc. 343, 45 N. Y. S. 751; Ultzen v. Nicols, (1894) 1 Q. B. 92.

[26] Tombler v. Koelling, 60 Ark. 62, 28 S. W. 795, 46 Am. St. Rep. 146, 27 L. R. A. 502; Bird v. Everard, 4 Misc. 104, 23 N. Y. S. 1008; Walpert v. Bohan, 126 Ga. 532.

of the bailee, he makes out a *prima facie* case of negligence on the part of the bailee, and the burden is then on the latter to show that the loss or injury was not due to any want of ordinary care on his part.[27] If the bailee shows a loss by fire, accident or theft the burden will be on the bailor to show negligence.[28]

§ 322. **Safe deposit companies.** The keeper of a safe deposit vault is a bailee for hire as to the property of his customers kept in rented boxes.[29] Where the keeper of a vault permitted officers with a search warrant to break open the plaintiff's box and to take therefrom property not described in the warrant, and

[27] Prince v. Ala. State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716; Higman v. Carmody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33; Davis v. Hurt, 114 Ala. 146, 21 So. 468; Massillon E. & T. Co. v. Akerman, 110 Ga. 570, 35 S. E. 635; Geo. C. Bagley El. Co. v. Am. Express Co., 63 Minn. 142, 65 N. W. 264; Sulpho-Saline Bath Co. v. Allen, 66 Neb. 295, 92 N. W. 354; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Lichtenstein v. Jarvis, 31 App. Div. 33, 52 N. Y. S. 605; McKillop v. Reich, 76 App. Div. 334, 78 N. Y. S. 485; Snell v. Cornwell, 93 App. Div. 136, 87 N. Y. S. 1. A bailee who fails to "give any such explanation of his neglect to restore the property entrusted to him as will enable the bailor to test his good faith ought to be held to proof that he has exercised ordinary diligence in the care of it." Woodruff v. Painter, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. Rep. 786, 16 L. R. A. 451. But see Maloney v. Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. Rep. 135. Where provisions were damaged while in a cold storage warehouse it was held that there was no presumption of negligence. Leidy v. Quaker City, etc., Co., 180 Pa. St. 323, 36 Atl. 851.

[28] Hunter v. Recke Bros., 127 Ia. 108; Knights v. Piella, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375; Meridian Fair, etc., Ass'n v. North Birmingham St. Ry. Co., 70 Miss. 808, 12 So. 555; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Kaiser v. Latmer, 40 App. Div. 149, 57 N. Y. S. 833; Tower v. Grocers, etc., Co., 150 Pa. St. 106, 28 Atl. 229; Bradley v. Cunningham, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679.

[29] Cussen v. Southern Cal. Sav. Bank, 133 Cal. 534, 65 Pac. 1099, 85 Am. St. Rep. 221; Mayer v. Brensinger, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196; Mayer v. Brensinger, 74 Ill. App. 475; Roberts v. Stuyvesant Safe Dep. Co., 123 N. Y. 57, 25 N. E. 294, 20 Am. St. Rep. 718, 9 L. R. A. 438; Lockwood v. Manhattan Storage, etc., Co., 28 App. Div. 68, 50 N. Y. S. 974.

held that the defendant had not exercised [illegible] law and was liable for the property.[30] So where the lessee of a box was known to be sick in a hospital with brain fever and the keeper of the vault delivered the contents of the box to two men, who appeared with the key to the box and what purported to be a power of attorney from the lessee, but which was spurious, and the keeper required no identification of the man presenting the power of attorney, did not retain the power of attorney or take any precautions to verify it.[31] The loss of property from the lessee's box presumes negligence.[32]

§ 323. **Innkeepers.** Among the employments to which special obligations are attached is that of an innkeeper. An innkeeper is one who holds himself out to the public as ready to accommodate all comers with the conveniences usually supplied to travelers on their journeys.[33] One who keeps a European hotel in the usual way, except that another person runs the restaurant connected therewith, is an innkeeper.[34] One who only furnishes occasional entertainment is not an innkeeper,[35] neither is a boarding-house keeper, or one who lets lodgings and furnishes their occupants with meals.[36] One may be an innkeeper as to

[30] Roberts v. Stuyvesant Safe Dep. Co., 123 N. Y. 57, 25 N. E. 294, 20 Am. St. Rep. 718, 9 L. R. A. 438.

[31] Mayer v. Brensinger, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196.

[32] Cussen v. Southern Cal. Sav. Bank, 133 Cal. 534, 65 Pac. 1099, 85 Am. St. Rep. 221; Lockwood v. Manhattan, etc., Storage, etc, Co., 28 App. Div. 68, 50 N. Y. S. 974.

[33] See Thompson v. Lacy, 3 B. & Ald. 283. An inn is a public house of entertainment for all who choose to visit it. Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am St. Rep 198, 16 L. R. A. 188; Southwod v. Myers, 3 Bush, 681; Dickerson v. Rogers, 4 Humph. 179, 40 Am. Dec. 642.

[34] Johnson v. Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571.

[35] State v. Mathews, 2 Dev. & Bat. 424; Lyon v. Smith, 1 Morris (Iowa) 184; Carter v. Hobbs, 12 Mich. 52; Johnson v. Reynolds, 3 Kan. 257; Southwood v. Myers, 3 Bush, 681; Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218.

[36] Parkhurst v. Foster, Carth. 417; S. C. 1 Salk 387; Shoecraft v. Bailey, 25 Iowa, 553; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Chamberlain v. Masterson, 26 Ala. 371; Wintermute v. Clarke, 5 Sandf. 242; Walling v. Potter, 35 Conn. 183.

Generally one who takes a room and boards at a hotel by the week or month at special rates is a boarder and not a guest.[38]

An innkeeper is bound, as a matter of law, to furnish the entertainment called for; and while he may demand his hire in advance, if he doubts the traveler's ability to pay, yet if that be paid or tendered, he must receive the person offering himself as guest at any hour of the day or night.[39] He would be excused, however, if the inn were full, or if the traveler were infected with a contagious disease, or if he came in a disorderly manner or intoxicated. And after having received a guest he might turn him away if his conduct was disorderly, or if he refused to comply with the reasonable rules of the establishment. And a disorderly guest might be removed with force if necessary;[40] but a traveler turned away without cause, either before

[37] As to the distinction between guests and boarders, see Chamberlain v. Masterson, 26 Ala. 371; Shoecraft v. Bailey, 25 Iowa, 553; Johnson v. Reynolds, 3 Kan. 257; Hancock v. Rand, 94 N. Y. 1, 46 Am. Rep. 112. Special rate does not necessarily make one a boarder. Beale v. Posey, 72 Ala. 323. Nor duration of stay. Presumption is that one coming as a guest remains such. Ross v. Mellin, 36 Minn. 421. One who engages a room at a hotel by the week but for no definite period held a guest and not a boarder. Metzger v. Schnabel, 23 Misc. 698, 52 N. Y. S. 105. So in Polk v. Melenbacker, 136 Mich. 611, 99 N. W. 867.

[38] Moore v. Long Beach Development Co., 87 Cal. 483, 26 Pac. 92, 22 Am. St. Rep. 265; Meacham v. Galloway, 102 Tenn. 415, 52 S. W. 859, 73 Am. St. Rep. 886, 46 L. R. A. 319. Compare Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188. A conductor rented a room at a hotel at one end of his route by the month. Held not a guest and the hotel not liable as insurer for his property in the room. Horner v. Harvey, 3 N. M. 307, 5 Pac. 329. Where a club gave a banquet at a hotel the guests of the club were held not to be guests of the hotel, so as to make the latter liable for their hats stolen from the hat rack. Amey v. Winchester, 68 N. H. 447, 39 Atl. 487, 39 L. R. A. 760.

[39] Hawthorn v. Hammond, 1 C. & K. 404; Rex v. Ivens, 7 C. & P. 213. A landlord in a large village is bound to have food enough for two persons who apply. Atwater v. Sawyer, 76 Me. 539.

[40] Howell v. Jackson, 6 C. & P. 723. See Calye's Case, 8 Co. 32; Markham v. Brown, 8 N. H. 523. Mere apprehension that guests may be disorderly will not justify their exclusion. Atwater v. Sawyer, 76 Me. 539.

sick guest may only be removed with due care, having reference to his condition.[42]

As a bailee of the personal effects which the guest brings with him to the inn, it is generally held, that where the guest himself is not in fault, the innkeeper is responsible as insurer, except only as against losses by the act of God or of the public enemy.[43] This imposes upon the innkeeper not only all loses attributable to his own negligence or misconduct, or those of his servants, but also such as may result from accidental fires, and the thefts or other misconduct or negligence of third persons[44]—a degree of responsibility which is certainly very severe, and the justice and policy of which have recently been called in question, both in England and in this country.[45] In Illinois, it is held that the loss of the goods of the guest only makes out a *prima facie* case of liability against the innkeeper, and that he may exonerate himself by showing that the loss was in no manner occasioned by

[41] Whiting v. Mills, 7 Up. Can. Q. B. 450; McCarthy v. Niskern, 22 Minn. 90.

[42] McHugh v. Schlossen, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574.

[43] Mason v. Thompson, 9 Pick. 280, 20 Am. Dec. 471; Shaw v. Berry, 31 Me. 478, 52 Am. Dec. 628; Grinnell v. Cook, 3 Hill, 485, 38 Am. Dec. 663; Hulett v. Swift, 33 N. Y. 571, 88 Am. Rep. 405; Hill v. Owen, 5 Blackf. 323, 35 Am. Dec. 124; Johnson v. Richardson, 17 Ill. 302, 63 Am. Dec. 369; Sasseen v. Clark, 37 Ga. 242; Manning v. Wells, 9 Humph. 746, 51 Am. Dec. 688; Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303; Burrows v. Trieber, 21 Md. 320, 83 Am. Dec. 590; Sibley v. Aldrich, 33 N. H. 553, 66 Am. Dec. 745; Woodworth v. Morse, 18 La. Ann. 156; Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218; Packard v. Northcraft, 2 Met. (Ky.) 439; Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188; Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491, 20 Am. St. Rep. 333, 6 L. R. A. 483; Watson v. Loughran, 112 Ga. 837, 38 S. E. 82; Shultz v. Wall, 134 Pa. St. 262, 19 Atl. 742, 19 Am. St. Rep. 686, 8 L. R. A. 97; Cunningham v. Bucky, 42 W. Va. 671, 26 S. E. 442, 57 Am. St. Rep. 876, 35 L. R. A. 850. One who keeps a sea bathing house, separate from his inn, is not liable as innkeeper for clothes stolen from bathing house. Minor v. Staple, 71 Me. 316, 36 Am. Rep. 318.

[45] Walsh v. Porterfield, 87 Pa. St. 376.

[45] See Burgess v. Clements, 4 M. & S. 306; Dawson v. Chamney, 5 Q. B. 164; Merritt v. Claghorn, 23 Vt. 177.

rule has been laid down in other states.

One important difference between innkeepers and other bailees is, that the former do not necessarily come into actual possession of the thing bailed; usually they have constructive possession only. Their liability extends to the traveler's luggage, to the clothes upon his person, and to the money in his pocket.[48] It has been held that the grain in the traveler's sleigh, when brought within the enclosure, was constructively in the innkeeper's possession;[49] and in a very careful decision the landlord has been held responsible for a considerable sum of money taken from a trunk in a traveler's room, though the traveler appears to have left the room unguarded and the key in the door, the jury having acquitted him of the charge of negligence.[50] If the

[46] Metcalf v. Hess, 14 Ill. 129; Eden v. Drey, 75 Ill. App. 102. And see Laird v. Eichold, 10 Ind. 212, 71 Am. Dec. 323; Bowell v. De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240.

[47] Merritt v. Claghorn, 23 Vt. 177; Cutler v. Bonney, 30 Mich. 259, 18 Am. Rep. 127; Johnson v. Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571. See Clary v. Willey, 49 Vt. 55.

[48] Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655; Magee v. Pacific Imp. Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199; Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491, 20 Am. St. Rep. 333, 6 L. R. A. 483; Maloney v. Bacon, 33 Mo. App. 501. See the extent of this liability discussed at length in Vance v. Throckmorton, 5 Bush, 41. The liability extends only to such things as are brought in the character of guest. Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303. Cover's cattle brought by drover. Hilton v. Adams, 71 Me. 19. Jewelry in use. Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188. Does not cover what is brought to the inn for business, as a stallion to the hotel barn to stand for service. Mowers v. Fethers, 61 N. Y. 34, 19 Am. Rep. 244. See Myers v. Cottrill, 5 Biss. 465. Not liable at common law for goods stolen from a room used for business of selling by samples. Fisher v. Kelsey, 121 U. S. 383. But held liable for merchandise received and taken charge of. Eden v. Drey, 75 Ill. App. 102. And for the goods of a peddler. Cohen v. Manuel, 91 Me. 274, 39 Atl. 1030, 64 Am. St. Rep. 225, 40 L. R. A. 491.

[49] Clute v. Wiggins, 14 Johns. 175, 7 Am. Dec. 448. See Hill v. Owen, 5 Blackf. 323, 35 Am. Dec. 124; Mason v. Thompson, 9 Pick. 280, 20 Am. Dec. 471; Packard v. Northcraft, 2 Met. (Ky.) 439.

[50] Berkshire Woolen Co. v. Proctor, 7 Cush. 417. And see Burrows v. Trieber, 21 Md. 320, 27 Md. 130; Classen v. Leopold, 2 Sweeney, 705; Buddenburg v. Benner, 1 Hilt.

care that a prudent man might be reasonably expected to have taken under the circumstances, the innkeeper is, of course, excused.[51] If an innkeeper's servants take charge of the luggage of a departing guest to deliver it to a railroad company or other carrier, the responsibility of the innkeeper continues until actual delivery.[52] And probably if the guest goes away without, at the time, taking his baggage with him, the innkeeper's liability as such will continue until it is removed, if this be within

84; Spring v. Hager, 145 Mass. 186, 13 N. E. 479. So where money taken from belt on traveler's person after forcing back the bolt to the door of his room. Smith v. Wilson, 36 Minn. 334. Where the plaintiff with two friends went to the defendant's hotel for lunch and handed the waiter a five hundred dollar bill to pay his lunch check of six dollars and the waiter absconded with the money, the defendant was held liable. Grand Pacific Hotel Co. v. Rowland, 88 Ill. App. 519. A landlord is not liable for money deposited in his office by one who is not a guest, and one whose purpose is merely so to deposit is not a guest. Arcade Hotel Co. v. Wiatt, 44 Ohio St. 33, 4 N. E. 398, 58 Am. Rep. 785. Nor is one who goes to a hotel with a harlot for purposes of prostitution a guest who can hold a landlord for such deposit. Curtis v. Murphy, 63 Wis. 4, 53 Am. Rep. 242.

[51] Cashill v. Wright, 6 El. & Bl. 891; Burgess v. Clements, 1 Stark. 251; Berkshire Woolen Co. v. Proctor, 7 Cush. 417; Vance v. Throckmorton, 5 Bush, 41; Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560; Kelsey v. Berry, 42 Ill. 469; Hadley v. Upshaw, 27 Tex. 547, 86 Am. Dec. 654. The innkeeper may establish reasonable rules, which the guest must observe. Fuller v. Coats, 18 Ohio St. 343. And he is relieved from liability by noncompliance with such rules, if called to guest's attention. Burbank v. Chapin, 140 Mass. 123. But mere notice in the register is not sufficient as calling the attention of the guest to the rule. Murchison v. Sergent, 69 Ga. 206.

It is negligence in a guest to carry a large sum of money in his valise, and, without notifying the innkeeper, allow it to be treated as mere luggage. Fowler v. Dorlon, 24 Barb. 384. See also, Elcox v. Hill, 98 U. S. 218. Mere failure to lock one's door is not lack of such ordinary care. Murchison v. Sergent, 69 Ga. 206; Watson v. Loughran, 112 Ga. 837, 38 S. E. 82; Cunningham v. Burcky, 52 W. Va. 671, 26 S. E. 442, 57 Am. St. Rep. 876, 35 L. R. A. 850. *Contra*, Shultz v. Wall, 134 Pa. St. 262, 19 Atl. 742, 19 Am. St. Rep. 686, 8 L. R. A. 97. Absence of guest all night not necessarily negligence. Turner v. Whitaker, 9 Pa. Supr. Ct. 83.

[52] Maxwell v. Gerard, 84 Hun, 537, 32 N. Y. S. 849; Richards v. London, etc., R. Co., 7 C. B. 839.

the baggage is received, though before the owner actually presents himself at the inn.[54] And where a traveler delivers a check for his baggage to the porter of a hotel at the station with a view to becoming a guest of such hotel, the liability of the hotel begins upon such delivery, and if the baggage is lost between the station and the hotel the hotel keeper is liable.[55]

An innkeeper is not an insurer of the personal safety of his guests and is only bound to the exercise of reasonable care in that behalf.[56] He is not bound to protect his guest from violence as a carrier of passengers is and is not liable for an assault upon a guest by a servant, unless he has been guilty of negligence in employing or retaining the guilty servant.[57]

An innkeeper, at the common law, cannot relieve himself of his responsibility, or any part of it, by any notice posted about the inn which may or may not have been brought to the notice of the guest.[58] But by statute, in England and in many of the

[53] Adams v. Clem, 41 Ga. 65, 5 Am. Rep. 524; Murray v. Clarke, 2 Daly, 102. But see Murray v. Marshall, 9 Colo. 482, 59 Am. Rep. 152. Not liable as innkeeper if left for guest's convenience. Palin v. Reid, 10 Ont. App. 63; Miller v. Peeples, 60 Miss. 819, 45 Am. Rep. 423; O'Brien v. Vaill, 22 Fla. 627, 1 So. 137; Glenn v. Jackson, 93 Ala. 342, 9 So. 259, 12 L. R. A. 382; Wear v. Gleason, 52 Ark. 364, 12 S. W. 756, 20 Am. St. Rep. 186; Brown Hotel Co. v. Burckhart, 13 Colo. App. 59, 56 Pac. 188. As to liability for money left behind with clerk, see Whitemore v. Haroldson, 2 Lea, 312.

[54] Eden v. Drey, 75 Ill. App. 102. And see Maloney v. Bacon, 33 Mo. App. 501.

[55] Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491, 20 Am. St. Rep. 333, 6 L. R. A. 483; Carhart v. Wainman, 114 Ga. 632, 40 S. E. 781, 88 Am. St. Rep. 45. It is no defense that the porter was not authorized to receive the check. Ibid. But where a peddler left his pack at a hotel and went away for two days, during which time it disappeared, it was held that the relation of innkeeper and guest had not been created. Toub v. Schmidt, 60 Hun, 409, 15 N. Y. S. 616. In order to make an innkeeper liable as such for animals they must be delivered to him or in some way put under his care. Bradley Livery Co. v. Snook, 66 N. J. L. 654, 50 Atl. 358, 55 L. R. A. 208.

[56] Week v. McNulty, 101 Tenn. 495, 48 S. W. 809, 70 Am. St. Rep. 693, 43 L. R. A. 185.

[57] Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 100 Am. St. Rep. 154, 65 L. R. A. 88; Clancy v. Barker, 131 Fed. 161, — C. C. A. —. See Overstreet v. Moser, 88 Mo. App. 72.

[58] Bodwell v. Bragg, 29 Iowa. 232; Maltby v. Chapman, 25 Md.

rooms. These are very reasonable and proper statutes, [illegible] must be strictly complied with or they will constitute no protection.[59]

§ 324. Common carriers. Closely resembling the liability of an innkeeper is that of a common carrier. A common carrier is one who regularly undertakes, for hire, either on land or on water, to carry goods, or goods and passengers, between different places, for such as may offer.[60] The definition includes railway corporations, express companies, stage coach proprietors, the proprietors of all ships, boats and vessels employed in carriage on regular routes, wagoners and carmen, who carry as a regular employment from town to town or from place to place within the same town, street railway companies and the proprietors of omnibus routes.[61] It does not include vessel owners who employ their vessels for particular voyages as they may make contracts, nor draymen and others who take particular jobs or

310. See Epps v. Hinds, 27 Miss. 657, 61 Am. Dec. 528. An innkeeper does not relieve himself from responsibility by telling the guest, when he receives his property, that the guest must run all risks. Woodward v. Birch, 4 Bush, 510.

[59] Porter v. Gilkey, 57 Mo. 235; Woodworth v. Morse, 18 La. Ann. 156; Chamberlain v. West, 37 Minn. 54, 33 N. W. 114. See Faucett v. Nichols, 64 N. Y. 377; Batterson v. Vogel, 8 Mo. App. 24.

[60] Gisbourn v. Hurst, 1 Salk. 249; Mershon v. Hobensack, 22 N. J. L. 373; U. S. Express Co. v. Backman, 28 Ohio St. 144; Parsons on Cont. 163; Caye v. Pool's Assigner, 108 Ky. 124, 55 S. W. 887, 94 Am. St. Rep. 348, 49 L. R. A. 251. No person is a common carrier who is not a carrier for hire. Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16; Knox v. Rives, 14 Ala. 249, 48 Am. Dec. 97; Fay v. Steamer New World, 1 Cal. 348. Log driving companies are not. Mann v. White River, etc. Co., 46 Mich. 38, 41 Am. Rep. 141; Chesley v. Mississippi, etc., Boom Co., 39 Minn. 83, 38 N. W. 769. Railroad carrying a mail is not liable as a carrier to one who sends a letter which is lost. Centr. R. R. etc., Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334. A railroad company does not act as a common carrier in carrying for express companies. Louisville, etc., Ry. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 58 Am. St. Rep. 348, 38 L. R. A. 93.

[61] Merchants' Dispatch Trans. Co. v. Boch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; Adams Express Co. v. Jackson, 92 Tenn. 326, 21 S. W. 666.

A carrier may profess to limit his employment to some one species of goods, or may exclude one or more things from his general offer to carry. His employment is then limited by his offer, and he cannot be required to go beyond it. But within the limits of his accustomed business he must receive and carry for all who offer, without partiality or discrimination.[64] He may, nevertheless, make special bargains for carrying for exceptional prices, or on exceptional terms;[65] but he cannot restrict or

[62] One who holds himself out as a general truckman and especially for moving heavy machinery and keeps horses, trucks and appliances for the purpose, held a common carrier and liable accordingly. Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432.

[63] But as to tug or tow-boatmen, see White v. Tug Mary Ann, 6 Cal. 462; Smith v. Pierce, 1 La. (o. s.) 354; Davis v. Houren, 6 Rob. La. 255; Clapp v. Stanton, 20 La. Ann. 495, 96 Am. Dec. 417; Bussey v. Mississippi, etc., Co., 24 La. Ann. 165, 13 Am. Rep. 120. These Louisiana cases hold that tug-boatmen, such as ply between New Orleans and the Gulf of Mexico, are common carriers. The rule is otherwise in New York, Pennsylvania and Kentucky. Caton v. Rumney, 13 Wend. 387; Wells v. Steam Nav. Co., 2 N. Y. 204; Leonard v. Hendrickson, 18 Pa. St. 40, 55 Am. Dec. 587; Brown v. Clegg, 63 Pa. St. 51; Hays v. Millar, 77 Pa. St. 238, 18 Am. Rep. 445; Varble v. Bigley, 14 Bush, 698, 29 Am. Rep. 435. See Alkali Co. v. Johnson, L. R. 9 Exch. 338. A corporation furnishing messenger service is not a common carrier in that respect. Haskell v. Boston Dist. Messenger Co., 190 Mass. 189.

[64] Keeney v. Grand Trunk, etc., R. Co., 47 N. Y. 525; Chicago, etc., R. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599; McDuffee v. Railroad Co., 52 N. H. 430, 13 Am. Rep. 72; Mich. Cent. R. R. Co. v. Hale, 6 Mich. 243; Houston, etc., Ry. Co. v. Smith, 63 Tex. 322; Scofield v. Lake Shore, etc., Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846. For additional cases see *ante*, § 157. A railroad company is under no common-law duty to furnish equal facilities to all express companies for doing business over its line. Express Cases, 117 U. S. 1.

[65] New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Fitchburg R. R. Co. v. Gage, 12 Gray, 393; Mich. Cent. R. R. Co. v. Hale, 6 Mich. 243; Audenried v. Philadelphia, etc., R. R. Co., 68 Pa. St. 370, 8 Am. Rep. 195; Bankard v. Baltimore, etc., R. R. Co, 34 Md. 197; N. E. Express Co. v. Maine Cent. R. R. Co., 57 Me. 188, 2 Am. Rep. 31; Messenger v. Penn. R. R. Co., 37 N. J. L. 531. See Scofield v. Lake Shore, etc., Co., 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907.

assent.[66] It is thus seen that a common carrier cannot decline a bailment which is tendered to him within the line of his employment,[67] neither can he enforce upon the party proposing to employ him any terms to which the latter refuses assent. The obligation which is imposed upon him by the common law is that he shall deliver at its destination the property received by him, without damage while in his hands, unless prevented by the act of God, or of the public enemy.[68] And he must deliver, or be

[66] New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455; McMillan v. Michigan, etc., R. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Brown v. Eastern R. Co., 11 Cush. 97; Buckland v. Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68; Baltimore, etc., R. R. Co. v. Brady, 32 Md. 333; Smith v. Nor. Car. R. R. Co., 64 N. C. 235; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Sou. Exp. Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 18; Bennett v. Dutton, 10 N. H. 481; Jones v. Voorhees, 10 Ohio, 145; Fillebrown v. Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606; Baldwin v. Collins, 9 Rob. La. 468; Railroad Co. v. Manuf. Co., 16 Wall. 318.

[67] Railway Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 38 Am. St. Rep. 230, 18 L. R. A. 527; Mathis v. Southern Ry. Co., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824; Little Rock, etc., Ry. Co. v. Conatser, 61 Ark. 560, 33 S. W. 1057.

[68] Coggs v. Bernard, 2 Ld. Raym. 909; Eagle v. White, 6 Whart. 505, 37 Am. Dec. 434; Morrison v. Davis, 20 Penn. St. 171, 57 Am. Dec. 695; Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455; Fish v. Chapman, 2 Kelly, 349, 46 Am. Dec. 393; Turney v. Wilson, 7 Yerg. 340; Boyle v. McLaughlin, 4 H. & J. 291; Friend v. Woods, 6 Grat. 189, 52 Am. Dec. 119; Bohannan v. Hammond, 42 Cal. 227; Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158; Swindler v. Hilliard, 2 Rich. 286, 45 Am. Dec. 732; McMillan v. Michigan, etc., R. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Fillebrown v. Grand Trunk, etc., Co., 55 Me. 462, 92 Am. Dec. 606; Railroad Co. v. Reeves, 10 Wall. 176; Robertson v. Louisville, etc., R. R. Co., 142 Ala. 216; Railway Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 38 Am. St. Rep. 230, 18 L. R. A. 527; Clyde S. S. Co. v. Burrows, 36 Fla. 121, 18 So. 349; Cooper v. Raleigh, etc., R. R. Co., 110 Ga. 659, 36 S. E. 240; Willcock v. Pennsylvania R. R. Co., 166 Pa. St. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228; Johnstone v. Richmond, etc., R. R. Co., 39 S. C. 55, 17 S. E. 512; Gulf, etc., Ry. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 18 Am. St. Rep. 45, 8 L. R. A. 323. Proof of delivery to a common carrier for transportation and of a failure to deliver or of injury while in his posses-

to do with the time, place and manner of delivery. "An act of God means a disaster with which the agency of man has nothing to do, such as lightning, tempests and the like.[70] To exempt the carrier, the act of God must be the sole cause of the loss or injury.[71] If the negligence of the carrier combines with the act of God in causing the loss, the carrier will be liable.[72] Accidental fires, the explosion of steam boilers and the like are therefore casualties against which the carrier is an insurer.[73] The liability for live stock is the same as for other freight, except loss

sion, makes a *prima facie* case of liability. Louisville, etc., R. R Co. v. Cowherd, 120 Ala. 51, 23 So. 793; Mears v. New York, etc., R. R. Co., 75 Conn. 171, 52 Atl. 610, 96 Am. St. Rep. 193, 56 L. R. A. 884.

[69] If, by the local custom, the consignee is to furnish the conveniences for unloading and delivery, and he does so, and an injury occurs through defects in them, the carrier is not responsible for this injury. Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507, citing St. John v. Van Santvoord, 25 Wend. 660; Farmers', etc., Bank v. Transportation Co., 18 Vt. 131, and 28 Vt. 176. See Forbes v. Boston, etc., R. R. Co., 133 Mass. 154; Stimson v. Jackson, 58 N. H. 138; Turner v. Huff, 46 Ark. 222.

[70] Gordon v. Buchanan 5 Yerg. 72, 82; Friend v. Woods, 6 Gratt. 189, 52 Am. Dec. 119; Michael v. New York Cent. R. R. Co., 30 N. Y. 564, 571, 86 Am. Dec. 415; Chicago, etc., R. R. Co. v. Sawyer, 69 Ill. 285; Proprietors v. Wood, 4 Doug. 287, 290; Hayes v. Kennedy, 41 Pa. St. 378. A loss caused solely by an earthquake is by "act of God." Slater v. So. Car. Ry. Co., 29 S. C. 96, 6 S. E. 936. Snow and cold and violent storms are "act of God." Smith v. Western Ry. Co., 91 Ala. 455, 8 So. 754, 24 Am. St. Rep. 929, 11 L. R. A. 619; Blythe v. Denver, etc., R. R. Co., 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615; Jones v. Minneapolis, etc., R. R. Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. Rep. 507; Black v. Chicago, etc., R. R. Co., 30 Neb. 197, 46 N. W. 428; Herring v. Chesapeake, etc., R. R. Co., 101 Va. 778, 45 S. E. 322.

[71] Sonneborn v. Southern Ry. Co., 65 S. C. 502, 44 S. E. 77.

[72] Rodgers v. Cent. Pac., etc., Co., 67 Cal. 607; Packer v. Taylor, 35 Ark. 402. See Davis v. Wabash, etc., Co., 89 Mo. 340; Hewitt v. Chicago, etc., Ry. Co., 63 Ia. 611; New Brunswick, etc., R. R. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; McGraw v. Balt., etc., R. R. Co., 18 W. Va. 361, 41 Am. Rep. 696. The negligence, however, must be a real producing cause. Balt., etc., R. R. Co. v. Sulphur Springs Dist., 96 Pa. St. 65, 42 Am. Rep. 529.

[73] Caldwell v. N. J. Steamboat Co., 47 N. Y. 282; Merchants' Despatch Co. v. Smith, 76 Ill. 542; Bulkley v. Naumkeag, etc., Co., 24 How. 386; Cox v. Peterson, 30 Ala. 608, 68 Am. Dec. 145.

The liability of the common carrier, as such, does not attach in respect to goods in his hands awaiting the orders of the owner for shipment.[75] The liability begins as soon as goods are delivered to the carrier for shipment, and if they are lost or injured after such delivery is made and before the transportation of the goods begins, the carrier is liable as an insurer, the same as though they were lost or injured while in transit.[76] Thus when the goods are in the carrier's warehouse and the order is given to ship, the responsibility as carrier attaches at once.[77] So when a car is loaded by the shipper on a side track and the carrier is notified that it is ready.[78] So when live stock is received in the carrier's stock pens for shipment.[79] Baled hay was delivered to a railroad company for immediate shipment and placed in the

[74] Union Pac. Ry. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986; Dow v. Portland Steam Packet Co., 84 Me. 490, 24 Atl. 945; Hiller v. Chicago, etc., Ry. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541; Western Ry. Co. v. Harwell, 91 Ala. 340, 8 So. 649; Central R. R. & B. Co. v. Smithe, 85 Ala. 47, 4 So. 708; Coupland v. Housatonic R. R. Co., 61 Conn. 531, 23 Atl. 870; Cooper v. Raleigh, etc., R. R. Co., 110 Ga. 659, 36 S. E. 240; Boehl v. Chicago, etc., R. R. Co., 44 Minn. 191, 43 N. W. 333; Louisville, etc., Ry. Co. v. Bigger, 66 Miss. 319, 6 So. 234; Louisville, etc., R. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Kennick v. Chicago, etc., Co., 69 Ia. 665; Lindsley v. Chicago, etc., Co., 36 Minn. 539; Miss. Pac. Ry. Co. v. Harris, 67 Tex. 166.

[75] Michigan, etc., R. R. Co. v. Shurtz, 7 Mich. 515; St. Louis, etc., R. R. Co. v. Montgomery, 39 Ill. 335; Little Rock, etc., Ry. Co. v. Hunter, 42 Ark. 200; Basnight v. Atlantic, etc., R. R. Co., 111 N. C. 592, 16 S. E. 323; Iron Mt. Ry. Co. v. Knight, 122 U. S. 79; Miss. Pac. Ry. Co. v. Douglass, 16 A. & E. R. R. Cas. 98, and note; Montgomery, etc., Ry. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; Ill. Centr. R. R. Co. v. Tronstine, 64 Miss. 834; Grand Tower, etc., Co. v. Ullman, 89 Ill. 244.

[76] Capehart v. Granite Mills, 97 Ala. 353, 12 So. 44; Railway Co. v Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202; Berry v. Southern Ry. Co., 122 N. C. 1002, 30 S. E. 14, 65 Am. St. Rep. 743; Gulf, etc., Ry. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; Schmidt v. Chicago, etc., Ry. Co., 90 Wis. 504, 63 N. W. 1057.

[77] Schmidt v. Chicago, etc., Ry. Co., 90 Wis. 504, 63 N. W. 1057.

[78] Railway Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202.

[79] Gulf, etc., Ry. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

ready to do so, but shipment was delayed solely to enable the company to get cars for the purpose. While so delayed the hay was destroyed by fire. The company was held liable as an insurer.[80]

The time when the liability ceases depends upon circumstances. If the carrier is to transport the goods for a portion only of the whole distance, and then deliver them to another, his liability as carrier ceases when the goods arrive at the point of intersection, and he then becomes a forwarder only.[81] But a carrier having possession of the goods is not discharged of his liability as an insurer until he has delivered the goods to the succeeding carrier, or has done what, according to the course of business, is equivalent to such delivery.[82] If the contract covers the whole distance, the liability as carrier only ceases when the goods are actually delivered, unless, by the custom of the busi-

[80] London, etc., Ins. Co. v. Rome, etc., R. R. Co., 144 N. Y. 200, 206, 207, 39 N. E. 79, 43 Am. St. Rep. 752. The case is a carefully considered one and very fully states the law as to when the liability of the carrier, as an insurer, begins.

[81] Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1; Am. Ex. Co. v. Second National Bank, 69 Pa. St. 394, 8 Am. Rep. 268; Pendergast v. Adams Ex. Co., 101 Mass. 120; Baltimore, etc., R. R. Co. v. Schumacher, 29 Md. 168, 96 Am. Dec. 516; Myrick v. Mich. Centr. R. R. Co., 107 U. S. 102; Berg v. Atchison, etc., R. R. Co., 30 Kan. 561; Knight v. Prov., etc., R. R. Co., 13 R I. 572, 43 Am. Rep. 46; Detroit, ets., Ry. Co. v. McKenzie, 43 Mich. 609; Hadd v. U. S. Exp. Co., 52 Vt. 335, 36 Am. Rep. 757; Hoffman v. Cumberland Valley R. R. Co., 85 Md 391, 37 Atl. 214; Taffe v. Oregon R. R. Co., 41 Ore. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187; Hunter v. Southern Pac. Ry. Co., 76 Tex. 195, 13 S. W. 190; McConnell v. Norfolk, etc., R. R. Co., 86 Va. 248, 9 S. E. 1006. As to when contract for through shipment is implied, see Piedmont, etc., Co. v. Columbia, etc., Co., 19 S. C. 353; Ortt v. Minn., etc., R. R. Co., 36 Minn. 396; Mobile, etc., R. R. Co. v Copeland, 63 Ala. 219, 35 Am. Rep. 13; Hoffman v. Cumberland Valley R. R. Co., 85 Md. 391, 37 Atl. 214; Hunter v. Southern Pac. Ry. Co., 76 Tex. 195, 13 S. W. 190.

[82] Texas, etc., Ry. Co. v. Reiss, 183 U. S. 621, 22 S. C. Rep. 253, 46 L. Ed. 358; Texas, etc., Ry. Co. v. Callender, 183 U. S. 632, 22 S. C. Rep. 257, 46 L. Ed. 362; Texas, etc., Ry. Co. v. Clayton, 173 U. S. 348, 19 S. C. Rep 421, 43 L. Ed. 725; Texas, etc., Ry. Co. v. Clayton, 84 Fed. 305, 28 C. C. A. 142; Congdon v. Marquette, etc., R. R. Co., 55 Mich. 218, 54 Am. Rep. 367; McDonald v. Western R. R. Co., 34 N. Y. 497.

rier to that of warehouseman when the goods are received at the warehouse, and the consignee has had reasonable time and opportunity to remove them.[83]

Prima facie the consignee is the person entitled to demand and receive the goods of the carrier at the place of destination, and to sue for any breach of the carrier's contract.[84] But the presumption is not conclusive. One may have a special interest in the goods which entitles him to demand and receive possession;[85] or he may, as vendor to one who has become insolvent, be entitled to exercise his right of stoppage *in transitu*,[86] or some other right which the carrier cannot resist.

[83] Morris, etc., R. R. Co. v. Ayres, 29 N. J. L. 393; Blumenthal v. Brainerd, 38 Vt. 402; Thomas v. Boston, etc., R. R. Co., 10 Met. 472, 43 Am. Dec. 444; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 77; Moses v. Boston, etc., R. R. Co., 32 N. H. 523, 44 Am. Dec. 381; McMillan v. Michigan, etc., R. R. Co., 16 Mich. 79; Nat. Line, etc., Co. v. Smart, 107 Pa. St. 492; Western Ry. v. Little, 86 Ala. 159, 5 So. 563; Collins v. Ala. Great So. R. R. Co., 104 Ala. 390, 16 So. 140; Gulf, etc., R. R. Co. v. Horton, 84 Miss. 490, 36 So. 449; Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574; Draper v. Del. & H. Canal Co., 118 N. Y. 118, 23 N. E. 131; Railroad Co. v. Hatch, 52 Ohio St. 408, 39 N. E. 1042; Berry v. W. Va., etc., R. R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781. But the authorities are not uniform as to whether liability as insurer ceases when the goods have arrived and been placed in a warehouse, or only after a seasonable opportunity to take them away. The cases *pro* and *con* are collected in a note to Columbus, etc., Ry. Co v. Ludden, 2 Am. R. R. & Corp. Rep., p. 52.

[84] North v. Merchants, etc., Co., 146 Mass. 315, 15 N. E. 779; Pennsylvania R. R. Co. v Stein (Pa.), 12 Atl. 756; North Penn. R. R. Co. v. Commercial Bank, 123 U. S. 727; Philadelphia, etc., Co. v. Wiseman, 88 Pa. St. 264. The carrier delivers to any other person at his peril. Wernwag v. Phila., etc., Co., 117 Pa. St. 46, 11 Atl. 868; Louisville, etc., R. R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534; Hamilton v. Chicago, etc., Ry. Co., 103 Ia. 325, 72 N. W. 536; Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855; Oskamp v. Southern Express Co., 61 Ohio St. 341, 56 N. E. 13.

[85] Southern Exp. Co. v. Caperton, 44 Ala. 101.

[86] Bohtlingk v. Inglis, 3 East, 381; Newsom v. Thornton, 6 East, 17; Vertue v. Jewell, 4 Camp. 31; James v. Griffin, 1 M. & W. 20; Buckley v. Furniss, 15 Wend. 137, and 17 Wend. 504; Mottram v.

is to transport both persons and property, his obligation and his consequent liability in respect to the two are different. For the safe transportation of the property he is responsible as insurer, with the exceptions already stated; but in the case of passengers he only undertakes that he will carry them without negligence or fault. But as there are committed to his charge for the time the lives and safety of persons of all ages and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life or limb, it is reasonable to require of him the most perfect care of prudent and cautious men, and his undertaking and liability as to his passengers goes to this extent, that, as far as human foresight and care can reasonably go, he will transport them safely.[87] He is not liable if

Heyer, 5 Denio, 629; Naylor v. Dennie, 8 Pick. 198, 19 Am. Dec. 319; Atkins v. Colby, 20 N. H. 154; Reynolds v. Railroad, 43 N. H. 580; Pool v. Columbia, etc., R. R. Co., 23 S. C. 286; Dougherty v. Miss., etc., R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; Crass v. Memphis, etc., R. R. Co., 96 Ala. 447, 11 So. 480; Farrell v. Richmond, etc., R. R. Co., 102 N. C. 390, 9 S. E. 302, 11 Am. St. Rep. 760, 3 L. R. A. 647; Wheeling, etc., R. R. Co. v. Koontz, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. Rep. 435; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

[87] Railway Co. v. Sweet, 60 Ark. 550, 31 S. W. 571; Nagle v. Cal. So. R. R. Co., 88 Cal. 86, 25 Pac. 1106; Atchison, etc., R. R. Co. v. Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; Florida So. Ry. Co. v. Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631; Central of Ga. Ry. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Chicago, etc., R. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483; Louisville, etc., Ry. Co. v. Taylor, 126 Ind. 126, 25 N. E. 869; Louisville, etc., Ferry Co. v. Nolan, 135 Ind. 60, 34 N. E. 710; Larkin v. Chicago, etc., R. R. Co., 118 Ia. 652, 92 N. W. 891; Louisville, etc., R. R. Co. v. Ritter's Admr., 85 Ky. 368, 3 S. W. 591; Le Blanc v. Sweet, 107 La. 355, 31 So. 766, 90 Am. St. Rep. 303; Clerc v. Morgan's La., etc., Co., 107 La. 370, 31 So. 886, 90 Am. St. Rep. 319; Libby v. Maine Cent. R. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; Philadelphia, etc., R. R. Co. v. Anderson, 72 Md. 519, 20 Atl. 2, 20 Am. St. Rep. 483, 8 L. R. A. 673; Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432, 99 N. W. 406; Furnish v. Missouri Pac. R. R. Co., 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; Sweeney v. Kansas City Cable Ry. Co., 150 Mo. 385, 51 S. W. 682; Union Pac. Ry. Co. v. Sue, 25 Neb. 772, 41 N. W. 801; Hansen v. North Jersey St. Ry. Co., 64 N. J. L. 686, 46 Atl. 718; Palmer v. Del. & H. Canal Co., 120 N. Y. 170, 24 N. E. 302, 17 Am.

sight or judgment would prevent the injury. But he is liable for the smallest negligence in himself or his servants.[88] And this liability is applied with great strictness as well as justice, when he undertakes to transport passengers by the powerful and dangerous agency of steam.[89] But the carrier is not an insurer of the safety of his passengers and is not liable for injuries which the highest practicable care cannot avoid.[90] The carrier's duty is independent of any contract and is founded upon public policy.[91]

St. Rep. 629; Bosworth v. Union R. R. Co., 25 R. I. 202, 55 Atl. 490; Ferry Cos. v. White, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427; Illinois Cent. R. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202; Texas, etc., Ry. Co. v. Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; Connell v. Chesapeake, etc., R. R. Co., 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792; Sears v. Seattle Consol. St. Ry. Co., 6 Wash., 227, 33 Pac. 389, 1081; Chikey v. Seattle Elec. Co., 27 Wash. 70, 67 Pac. 379.

[88] Derwort v. Loomer, 21 Conn. 246, per Ellsworth, J.; Christie v. Griggs, 2 Camp. 79; Farish v. Reigle, 11 Gratt. 697, 62 Am. Dec. 666; Simmons v. New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99; Johnson v. Winona, etc., R. R. Co., 11 Minn. 296, 88 Am. Dec. 83; Taylor v. Grand Trunk R. R. Co., 48 N. H. 304, 2 Am. Rep. 229; Nagle v. Cal. So. R. R. Co, 88 Cal. 86, 25 Pac. 1106; Clark v. Chicago, etc., R. R. Co., 127 Mo. 197, 29 S. W. 1013; Taillon v. Mears, 29 Mont. 161, 74 Pac. 421; St. Louis, etc., Ry. Co. v. Finley, 79 Tex. 85, 15 S. W. 266; Mitchell v. Marker, 62 Fed. 139, 10 C. C. A. 306.

[89] Caldwell v. N. J. Steamboat Co., 47 N. Y. 282; Meier v. Pennsylvania R. R. Co., 64 Pa. St. 225; Baltimore & Ohio R. R. Co. v. Miller, 29 Md. 252. A receiver operating a railroad is subject to the same rules of liability in his official capacity as the railroad company itself. McNulta v. Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516.

[90] Nagle v. Cal. So. R. R. Co., 88 Cal. 86, 25 Pac. 1106; Tri-City Ry. Co. v. Gould, 217 Ill. 317, 75 N. E. 493; Tall v. Baltimore Steam Packet Co, 90 Md. 248, 44 Atl. 1007; Buckland v. New York, etc., R. R. Co., 181 Mass. 3, 62 N. E. 955; Bunting v. Penn. R. R. Co., 118 Pa. St. 204, 12 Atl. 448; Fredericks v. Northern Central R. R. Co., 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306. He is not bound to exercise all possible care or the greatest possible care. International, etc., Ry. Co. v. Welch, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829.

[91] Delaware, etc., R. R. Co. v.

presents himself for transportation; and this he may be said to do when he approaches the place of reception for the purpose.[92] Therefore, if the carrier is negligent in respect to the platforms and other approaches provided for the use of passengers, and in consequence of their being in an unsafe condition, the person coming to be carried is injured, he may have his action therefor.[93] The carrier of persons, like the carrier of goods, is under obligation to carry impartially; and, therefore, he cannot refuse to receive one who offers, unless he has valid excuse therefor.[94]

Trautwein, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435; McNeill v. Railroad Co., 135 N. C. 682, 47 S. E. 765.

[92] As to what is necessary to constitute one a passenger, see St. Louis, etc., R. R. Co. v. Kilpatrick, 67 Ark. 47, 54 S. W. 971; Illinois Cent. R. R. Co. v. O'Keefe, 154 Ill. 508, 39 N. E. 606; Illinois Cent. R. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 61 Am. St. Rep. 68, 39 L. R. A. 148; Illinois Cent. R. R. Co. v. Treat, 178 Ill. 576, 54 N. E. 290; Chicago, etc., R. R. Co. v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827; Lake St. El. R. R. Co. v. Burgess, 200 Ill. 628, 66 N. E. 215; Baltimore, etc., R. R. Co. v. State, 81 Md. 371, 32 Atl. 201; Wells v. New York Cent., etc., R. R. Co., 25 App. Div. 365, 49 N. Y. S. 510; Radley v. Columbia Ry. Co., 44 Ore. 332, 75 Pac. 212; Norfolk, etc., R. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935.

[93] Poucher v. N. Y. Central R. R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Tobin v. Portland, etc., R. R Co, 59 Me. 183, 8 Am. Rep. 415; McDonald v. Chicago, etc., R. R. Co., 26 Iowa, 124, 95 Am. Dec. 114; Alabama Great So. R. R. Co. v. Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354; Falls v. San Francisco, etc., R. R. Co., 97 Cal 115, 31 Pac. 901; Wilkes v. Western, etc., R. R. Co., 109 Ga. 794, 35 S. E. 165; Waterbury v. Chicago, etc., Ry. Co., 104 Ia. 32, 73 N. W. 341; Moses v. Louisville, etc., R. R. Co., 39 La. Ann. 649, 2 So. 567, 4 Am. St. Rep. 231; Collins v. Toledo, etc., Ry. Co., 80 Mich. 390, 45 N. W. 178; McCormick v. Detroit, etc., Ry. Co, 141 Mich. 17; Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; Union Pac. Ry. Co. v. Sue, 25 Neb. 772, 41 N. W. 801; Ayres v. Delaware, etc., R. R. Co., 158 N. Y. 254, 53 N. E. 22; Skottowe v. Oregon Short Line, 22 Ore. 430, 30 Pac. 222, 16 L. R. A. 593. Platforms should be lighted when necessary for the safety of passengers. St. Louis, etc., Ry. Co. v. Battle, 69 Ark. 369, 63 S. W 805; Louisville, etc., Ry. Co. v. Treadway, 143 Ind. 689, 40 N. E 807, 41 N. E. 794; Sargent v. St Louis, etc., Ry. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460.

[94] Nevin v. Pullman, etc., Co., 106 Ill. 222, 46 Am. Rep. 688; Atwater v. Delaware, etc., Co., 48 N. J. L. 55; Lake Erie, etc., Ry. Co. v. Acres, 108 Ind. 548, and cases cited.

ing his right to a passage, or that he is grossly intoxicated, or for other reason unfit to be received as a passenger with others.[95] But the color of a person is no justification for refusing to carry him as others are carried.[96] The carrier is also under obligations to use the utmost care and diligence in providing safe, suitable and sufficient vehicles for the conveyance of his passengers,[97] to carry the passenger therein to the end of his route,[98] to protect him against assaults and other ill-treatment by those employed by or under the carrier's control while on the way;[99]

[95] See Jencks v. Coleman, 2 Sumn. 221; Bennett v. Dutton, 10 N. H. 481; Elmore v. Sands, 54 N. Y. 512, 13 Am. Rep. 617; Pittsburgh, etc., R. R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 63; Johnson v. Louisville, etc., R. R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39; Hudson v. Lynn, etc., R. R. Co., 178 Mass. 64, 59 N. E. 647. And see Croom v. Chicago, etc., Ry. Co., 52 Minn. 296, 53 N. W. 1128, 38 Am. St. Rep. 557, 18 L. R. A. 602; Zackery v. Mobile, etc., R. R. Co., 75 Miss. 746, 23 So. 434, 65 Am. St. Rep. 617, 41 L. R. A. 385; Illinois Central R. R. Co. v. Smith, 85 Miss. 349, 37 So. 643, 107 Am. St. Rep. 245.

[96] *Ante*, §§ 157, 158.

[97] Readhead v. Midland R. Co., L. R. 2 Q. B. 412; S. C. 4 L. R. Q. B. 379; Ingalls v. Bills, 9 Met. 1, 43 Am. Dec. 346; Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Grand Rapids, etc., R. R. Co. v. Huntley, 38 Mich. 537; Baltimore, etc., R. R. Co. v. Miller, 29 Md. 252; Va. Cent. R. R. Co. v. Sanger, 15 Gratt. 230; Kelly v. N. Y., etc., Ry. Co., 109 N. Y. 44, 15 N. E. 879; Palmer v. Del. & H. Canal Co., 120 N. Y. 302, 17 Am. St. Rep. 629. A railroad company must also see that its track is reasonably safe for use. Curtis v. Rochester, etc., R. R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Baltimore, etc., R. R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578; State v. O'Brien, 32 N. J. 169; Carrico v. W. Va. Cent., etc., Ry. Co. 35 W. Va. 389, 14 S. E. 12; Carrico v. W. Va. Cent., etc., Ry. Co., 30 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; Gleeson v. Va. Mid. R. R. Co, 140 U. S. 435, 11 S. C. Rep. 859, 35 L. Ed. 458.

[98] Porter v. Steamboat New England, 17 Mo. 290; Gilhooly v. New York, etc., Co., 1 Daly, 197; Hamilton v. Third Av. R. Co., 53 N. Y. 25. As to liability for putting a passenger off wrongfully, see Cincinnati, etc., R. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729; Lake Shore, etc., Ry. Co. v. Rosenzwig, 113 Penn. St. 519; Mabry v. City Elec. Ry. Co., 116 Ga. 624, 42 S. E. 1025, 94 Am. St. Rep. 141, 59 L. R. A. 590; Citizens' St. R. R. Co. v. Willoeby, 134 Ind. 563, 33 N. E. 627; Southern Kansas Ry. Co. v. Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

[99] Birmingham Ry. & Elec. Co. v. Baird, 130 Ala. 334, 30 So. 456,

source arising, which might reasonably be anticipated or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board,"[1] and when the journey is completed, to afford the passenger reasonable opportunity to leave the cars with safety.[2] It is scarcely necessary

89 Am. St. Rep. 43, 54 L. R. A. 752; Savannah, etc., Ry. Co. v. Quo., 103 Ga. 125, 29 S. E. 607, 68 Am. St. Rep. 85, 40 L. R. A. 483; Louisville, etc., R. R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149; Sherley v. Billings, 8 Bush, 147, 8 Am. Rep. 451; Atchison, etc., R. R. Co. v. Henry, 55 Kan. 715, 41 Pac. 952, 29 L. R. A. 465; Hanson v. European, etc., R. R. Co., 62 Me. 84, 16 Am. Rep. 404; Ramsden v. Boston, etc., R. R. Co., 104 Mass. 117, 6 Am. Rep. 200; O'Brien v. St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592; Dwinelle v. New York Cent., etc., R. R. Co., 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224; Gillispie v. Brooklyn Heights R. R. Co., 178 N. Y. 347, 70 N. E. 857, 102 Am. St. Rep. 503, 66 L. R. A. 618; Mahoning Valley Ry. Co. v. De Pascale, 70 Ohio St. 179, 71 N. E. 633, 65 L. R. A. 860; Duggan v. Baltimore, etc., R. R. Co., 159 Pa. St. 248, 28 Atl. 182, 39 Am. St. Rep. 672; Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549; Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; Krantz v. Rio Grande W. Ry. Co., 12 Utah, 104, 41 Pac. 717, 30 L. R. A. 297; New Orleans, etc., R. R. Co. v. Jopes, 142 U. S. 18, 12 S. E. Rep. 109, 35 L. Ed. 919.

[1] Shipman, D. J., in Flint v. Norwich, etc., Co., 34 Conn. 554; Pittsburgh, etc., R. R. Co. v. Pillow, 79 Pa. St. 510, 18 Am. Rep. 424; Britton v. Atlanta, etc., Ry. Co., 88 N. C. 536, 43 Am. Rep. 749; United Rys. & Elec. Co. v. State, 93 Md. 619, 49 Atl. 923, 86 Am. St. Rep. 453, 54 L. R. A. 942; Lucy v. Chicago Gt. Western Ry. Co., 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551; Illinois Cent. R. R. Co. v. Mirror, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627; Ferry Cos. v. White, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427; Connell v. Chesapeake, etc., R. R. Co., 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792.

[2] Burrows v. Erie, etc., R. Co., 63 N. Y. 556; Southern, etc., R. R. Co. v. Kendrick, 40 Miss. 374; Hickman v. Miss., etc., Ry. Co., 91 Mo. 433; Keller v. Sioux City, etc., Co., 27 Minn. 178; Wood v. Lake Shore, etc., Co., 49 Mich. 370; Centr. R. R. Co. v. Van Horn, 38 N. J. L. 133; Hemmingway v. Chicago, etc., Co., 67 Wis. 668; Southern Ry. Co. v. Roebuck, 132 Ala. 412, 31 So. 611; Railway Co. v. Tankersley, 54 Ark. 25, 14 S. W. 1099; Atchison, etc., R. R. Co. v. Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; Brunswick, etc., R. R. Co. v. Moore, 101 Ga. 684, 28 S. E. 1000; Chicago Terminal Transfer R. R. Co. v. Schmelling, 197 Ill. 619, 64 N. E

Carriers are permitted to adopt rules for the regulation of their business; and so far as these are not opposed to law or unreasonable in themselves, the passenger must observe them.[3] These supplement the rules of law which require a passenger to conduct himself with decency, and not render himself an offense or an annoyance to others; for a failure to observe which he may and should be removed from the vehicle.[4] A common rule, and not an unreasonable one, is that the passenger shall procure a ticket as evidence of his right to a passage; that he shall show this whenever called upon by the carrier to do so, and that this ticket shall be used only for one continuous journey, unless permission be asked for and obtained to take a part of the journey at one time and part at another.[5] These are only instances of reasonable rules: many others might be named.[6] But

714; Louisville, etc., Ry. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; Cotant v. Boone Suburban Ry. Co., 125 Ia. 46, 99 N. W. 115; Leverett v. Shreveport Belt Ry. Co., 110 La. 399, 34 So. 579; Philadelphia, etc., R. R. Co. v. Anderson, 72 Md. 519, 20 Atl. 2, 20 Am. St. Rep. 483, 8 L. R. A. 673; Delaware, etc., R. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435; Texas, etc., Ry. Co. v. Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

[3] Florida Southern Ry. Co. v. Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631; Baltimore, etc., R. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052; Northern Central Ry. Co. v. O'Conner, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449; Poole v. Northern Pac. R. R. Co., 16 Ore. 261, 19 Pac. 107, 8 Am. St. Rep. 289; Phillips v. Southern Ry. Co., 124 N. C. 123, 32 S. E. 388.

[4] Vinton v. Middlesex, etc., R. R. Co., 11 Allen, 304, 87 Am. Dec. 714; Putnam v. Broadway, etc., R. R. Co., 55 N. Y. 108, 14 Am. Rep. 190; Marquette v. Chicago, etc., R. R. Co., 33 Iowa, 562; Hanson v. European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404; Keeley v. Maine Cent. R. R. Co., 67 Me. 163; Atchison, etc., Co. v. Weber, 33 Kan. 543, 52 Am. Rep. 543.

[5] Cheney v. Boston, etc., R. R Co., 11 Met. 121; Boston, etc., R. R. Co. v. Proctor, 1 Allen, 267; Elmore v. Sands, 54 N. Y. 512, 13 Am. Rep. 617; Jerome v. Smith, 48 Vt. 230, 21 Am. Rep. 125; Deitrick v. Penn. R. R. Co., 71 Pa. St. 432; Brooke v. Grand Trunk R. Co., 15 Mich. 332; Frederick v. Marquette, etc., R. R. Co., 37 Mich. 342, 26 Am. Rep. 531; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

[6] These rules held reasonable and valid: That one must purchase a ticket in advance or pay

ance with any reasonable rule, the carrier must see that this is not done with unnecessary force or injury.[7] The same rule applies here as in the case of force to remove a wrong-doer from one's premises: no more must be employed than the necessity of the case demands.[8]

§ 326. Liability for baggage. The luggage, which it is customary for carriers to permit their passengers to take with them, without charge beyond what is paid for their own conveyance, is taken under the like obligation which attends the carriage of ordinary freight.[9] Luggage or baggage includes such articles of necessity and convenience as passengers usually carry for their personal use, comfort, instruction, amusement or protection, having regard to the length and object of their journeys, including such an amount of money as it would be reasonable to take

twenty-five cents extra fare; McGowen v. Morgan's La., etc., Co., 41 La. Ann. 732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817. That a passenger having no ticket or presenting an expired or invalid ticket shall pay for the distance he has traveled as well as to destination; Manning v. Louisville, etc., R. R. Co., 95 Ala. 392, 11 So. 8, 36 Am. St. Rep. 225, 16 L. R. A. 55. That coupons detached will not be received in payment of fare. Norfolk, etc., R. R. Co. v. Wyson, 82 Va. 250.

[7] Alabama Great Southern R. R. Co. v. Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28; Boling v. St. Louis, etc., R. R. Co., 189 Mo. 219, 88 S. W. 35; Haver v. Central R. R. Co., 64 N. J. L. 312, 45 Atl. 593; Hardenbergh v. St. Paul, etc., Ry. Co., 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610; Brunswick, etc., R. R. Co. v. Bostwick, 100 Ga. 96, 27 S. E. 725; Peavy v. Ga. B. & R. R. Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334. A passenger may resist wrongful expulsion to any extent and the carrier will be liable for all injuries caused by overcoming his resistance. Pittsburgh, etc., Ry. Co. v. Russ, 67 Fed. 162, 14 C. C. A. 612.

[8] Smith v. Savannah, etc., Ry. Co., 100 Ga. 96, 27 S. E. 725; Mykleby v. Chicago, etc., Ry. Co., 39 Minn. 54, 38 N. W. 763; Morrow v. Atlanta, etc., Ry. Co., 134 N. C. 92, 46 S. E. 12.

[9] Hannibal R. R. Co. v. Swift, 12 Wall. 262; Merrill v. Grinnell, 30 N. Y. 594; Kansas City, etc., Ry. Co. v. McGahey, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; Wood v. Maine Cent. R. R. Co., 98 Me. 98, 56 Atl. 457, 99 Am. St. Rep. 339; Shaw v. Northern Pac. R. R. Co., 40 Minn. 144, 41 N. W. 548; Ringwalt v. Wabash R. R. Co., 45 Neb. 760, 64 N. W. 219; Oakes v. Northern Pac. R. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318.

merchandise is sent as baggage without the knowledge of the carrier, the latter will not be liable therefor as insurer.[11] Otherwise if it is knowingly carried as baggage.[12] For such baggage as a passenger keeps in his own possession a carrier is not liable as insurer, but only for negligence.[13] The liability as insurer for bag-

[10] Parmelee v. Fischer, 22 Ill. 212, 74 Am. Dec. 138; Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460; Jordan v. Fall River R. R. Co., 5 Cush. 69, 51 Am. Dec. 44; Noble v. Milliken, 74 Me. 225, 43 Am. Rep. 581; Ill. Centr., etc., R. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846; Hutchings v. Western, etc., R. R. Co., 25 Ga. 63, 71 Am. Dec. 156; Woods v. Devin, 13 Ill. 746, 56 Am. Dec. 483; Dexter v. Syracuse, etc., R. R. Co., 42 N. Y. 326, 1 Am. Rep. 527; Hillis v. Chicago, etc., Co., 72 Ia. 228, 33 N. W. 643; Railway Co. v. Berry, 60 Ark. 433, 30 S. W. 764, 46 Am. St. Rep. 212, 28 L. R. A. 501; Kansas City, etc., Ry. Co. v. McGahey, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; Oakes v. Northern Pac. R. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318; Charlotte Trouser Co. v. Railroad Co., 139 N. C. 382; Battle v. Columbia, etc., R. R. Co., 70 S. C. 329; Railroad Co. v. Baldwin, 113 Tenn. 205, 81 S. W. 599. Manuscript music used by a traveling company in its business and carried by them as passengers held baggage. Texas, etc., Ry. Co. v. Morrison Faust Co., 20 Tex. Civ. App. 144, 48 S. W. 1103. But the costumes and paraphernalia of a theatrical company held not to be baggage. Saunders v. Southern Ry. Co., 128 Fed. 15, 62 C. C. A. 523.

[11] Alling v. Boston, etc., Co., 126 Mass. 121, 34 Am. Rep. 376; Illinois Cent. R. R. Co. v. Matthews, 114 Ky. 973, 72 S. W. 302; Pennsylvania R. R. Co. v. Knight, 58 N. J. L. 287, 33 Atl. 845; Oakes v. Northern Pac. R. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318; Saunders v. Southern Ry. Co., 128 Fed. 15, 62 C. C. A. 523; McKibbin v. Great Northern Ry. Co., 78 Minn. 232, 80 N. W. 1052; Toledo, etc., R. R. Co. v. Bowler, etc., Co., 63 Ohio. St. 274, 58 N. E. 813; Norfolk, etc., R. R. Co. v. Irvine, 85 Va. 217, 7 S. E. 233, 1 L. R. A. 110; Humphreys v. Perry, 148 U. S. 627, 13 S. C. Rep. 711, 37 L. Ed. 587.

[12] Hoeger v. Chicago, etc., Ry. Co., 63 Wis. 100; Trimble v. New York, etc., R. R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; Railway Co. v. Bowler, etc., Co., 57 Ohio St. 38, 47 N. E. 1039, 63 Am. St. Rep. 702; Kansas City, etc., Ry. Co. v. McGahey, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; Oakes v. Northern Pac. R. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318; Saunders v. Southern Ry. Co., 128 Fed. 15, 62 C. C. A. 523.

[13] Steamship Co. v. Bryan, 83

checks baggage over a line upon which he does not go or intend to go as a passenger, the carrier is only liable for loss or damage by negligence,[15] or it may be for only willful or wanton injury.[16] The liability as insurer terminates after the arrival of the baggage and after the owner has had a reasonable opportunity to obtain it.[17]

§ 327. Street railways. Street railway companies as carriers of passengers are bound to exercise the same degree of care for their safety as other carriers.[18] One becomes a passenger as

Penn. St. 446; Whitney v. Pullman, etc., Co., 143 Mass. 243; Kinsley v. Lake Shore, etc., Co., 125 Mass. 54; Henderson v. Louisville, etc., Co., 123 U. S. 61. A steamship company held liable as insurer for property of passenger lost from state room. Adams v. N. J. Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 56 Am. St. Rep. 616, 34 L. R. A. 682.

[14] Pennsylvania R. R. Co. v. Knight, 58 N. J. L. 287, 33 Atl. 845; Talcott v. Wabash R. R. Co., 66 Hun. 456, 21 N. Y. S. 318.

[15] Wood v. Maine Cent. R. R. Co., 98 Me. 98, 56 Atl. 457, 99 Am. St. Rep. 339; Marshall v. Pontiac, etc., R. R. Co., 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650.

[16] Beers v. Boston, etc., R. R. Co., 67 Conn. 417, 34 Atl. 541, 52 Am. St. Rep. 293, 32 L. R. A. 535.

[17] Kansas City, etc., Ry. Co. v. McGahey, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; George F. Ditman B. & S. Co. v. Keokuk, etc., Ry. Co., 91 Ia. 416, 59 N. W. 257, 51 Am. St. Rep. 352; Pennsylvania Co. v. Miller, 35 Ohio St. 541; Galveston, etc., Ry. Co. v. Smith, 81 Tex. 479, 17 S. W. 133; Hoeger v. Chicago, etc., Ry. Co., 63 Wis. 100, 53 Am. Rep. 271. Where the agent of a baggage express company took the plaintiff's check on the train with order for delivery of the baggage and put the check on the trunk while on the train and marked the trunk with its label, the custom being for the railroad company to take off these checks and hold the trunk until called for by the express company, it was held that upon the attaching of the passenger's check to the trunk and the marking of it with the express company's label, the railroad became a bailee of the trunk for the express company and that the latter company became liable as carrier. Springer v. Westcott, 166 N. Y. 117, 59 N. E. 693. If baggage is held for the convenience of the carrier its liability is not changed. Shaw v. Northern Pac. R. R. Co., 40 Minn. 144, 41 N. W. 548.

[18] Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 118, 97 Am. St. Rep. 519, 60 L. R. A. 601; Magrane v. St. Louis, etc., Ry. Co., 183 Mo. 119, 81 S. W. 1158; Redman v. Met. St. Rep. Co., 185 Mo. 1, 84 S. W. 26, 105

step, the car having stopped for the purpose of receiving passengers.[19] From that instant the extreme care due a passenger must be exercised. One who has merely signaled a car and is standing waiting for it or is moving towards it is not a passenger, and only reasonable care is owed him.[20] The actual apyment of are is not necessary to constitute the relation, if one enters with the intention of becoming a passenger and of paying fare.[21] If a passenger is injured by the premature starting of the car while he in the act of getting off, the company is liable.[22] So if the place of alighting is unsafe and the danger obscured by darkness and no warning given.[23] The contract of carriage does not end until the passenger is landed in a safe place.[24] If the company receives passengers after the car is full so that some are compelled to stand on the platform or side

Am. St. Rep. 558; Marmon v. Camden Interstate Ry. Co., 56 W. Va. 554, 49 S. E. 450.

[19] Davey v. Greenfield, etc., Ry. Co., 177 Mass. 106, 58 N. E. 172; Norfolk, etc., Terminal Co. v. Morris, 101 Va. 422, 44 S. E. 719. In Dallas Rapid Transit Co. v. Payne, 98 Tex. 211, it is held that one does not become a passenger by merely getting on the side step and standing there, when there are seats inside. A newsboy who jumps on and off the cars to sell his papers is not a passenger. Podgitt v. Moll, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854.

[20] Donovan v. Hartford St. Ry. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; Duchemin v. Boston El. Ry. Co., 186 Mass. 353, 71 N. E. 780, 104 Am. St. Rep. 580.

[21] Birmingham Ry. L. & P. Co. v. Bynum, 139 Ala. 389, 36 So. 736; North Chicago St. R. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672.

[22] Wilson v. Fourteenth Street R. R. Co., 90 Cal. 319, 27 Pac. 210; Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848; Harman v. Washington, etc., R. R. Co., 7 Mackey, 255; Augusta, etc., R. R. Co. v. Randall, 79 Ga. 304, 4 S. E. 674; Smith v. Kingston City R. R. Co., 55 App. Div. 143, 67 N. Y. S. 185; Washington, etc., R. R. Co. v. Harmon, 147 U. S. 571, 13 S. E. Rep. 557, 37 L. Ed. 284.

[23] Wolf v. Third Ave. R. R. Co., 67 App. Div. 605, 74 N. Y. S. 336; Richmond City Ry. Co. v. Scott, 86 Va. 902, 11 S. E. 404. But when one was injured after having safely alighted by stepping on a rolling stone in the street the company is not liable. Conway v. Lewiston, etc., R. R. Co., 90 Me. 199, 38 Atl. 110.

[24] Senf v. St. Louis, etc., Ry Co., 112 Mo. App. 74.

fact of the passenger being in such position is not such contributory negligence as will defeat his recovery,[25] though it might be if there was room inside.[26]

§ 328. **Passenger elevators.** The prevailing rule is that those who operate passenger elevators in buildings are common carriers of passengers and bound to exercise the same degree of care as railroad companies and other common carriers.[27] The correctness of this rule is denied in New York, where it is held that the same rule applies to elevators as to real estate generally and that is that the owner or occupant must exercise ordinary care to keep his premises safe for those who come upon it

[25] Hesse v. Meriden, etc., Tramway Co., 75 Conn. 571, 54 Atl. 299; Reem v. St. Paul City Ry. Co., 77 Minn. 503, 80 N. W. 778; City Ry. Co. v. Lee, 50 N. J. L. 435, 14 Atl. 883, 7 Am. St. Rep. 798; Cuttano v. Met. St. Ry. Co, 173 N. Y. 565, 66 N. E. 563; Anderson v. City Ry. Co., 42 Ore. 505, 71 Pac. 659; McCaw v. Union Traction Co., 205 Pa. St. 271, 54 Atl. 893.

[26] Willmot v. Corrigan Consolidated St. Ry. Co., 106 Mo. 535, 17 S. W. 490. See Magrane v. St. Louis, etc., Ry. Co., 183 Mo. 119, 81 S. W. 1158.

[27] Morgan v. Saks, 143 Ala. 139; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; Colorado M. & I. Co. v. Rees, 21 Colo. 435, 42 Pac. 42; Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; Springer v. Ford, 189 Ill. 430, 59 N. E. 953, 82 Am. St. Rep. 464, 52 L. R. A. 930; Chicago Exchange Building Co. v. Nelson, 197 Ill. 334, 64 N. E. 369; Masonic Fraternity Temple Ass'n v. Collins, 210 Ill. 482, 71 N. E. 396; Kentucky Hotel Co. v. Camp, 97 Ky. 424, 30 S. W. 1010; Russo v. Improvement Ass'n, 104 La. Ann. 426, 29 So. 46; Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673; Lee v. Knapp, 155 Mo. 610, 56 S. W. 458; Becker v. Lincoln, etc., Co., 174 Mo. 246, 73 S W. 581; Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035; Goldsmith v. Holland Bldg. Co, 182 Mo. 597, 81 S. W. 1112; Fox v. Philadelphia, 208 Pa. St. 127, 57 Atl. 356, 65 L. R. A. 214; Southern B. & L. Ass'n v. Lawson, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. Rep. 804; Edwards v. Burke, 36 Wash. 107, 78 Pac. 610; Obendorfer v. Pabst, 100 Wis. 505, 76 N. W. 338. See Oberfelder v. Doran, 26 Neb. 118, 41 N. W. 1094, 18 Am. St. Rep. 771; Wise v. Ackerman, 76 Md. 375, 25 Atl. 424; McNee v. Coburn Trolley Track Co., 170 Mass. 283, 49 N. E 437. The rule applies to freight elevators when used to carry passengers. Beidler v. Branshaw, 200 Ill. 425, 65 N. E. 1086.

§ 329. **Sleeping car companies.** Sleeping car and parlor car companies are not liable as common carriers or innkeeepers for the property and effects of passengers occupying their coaches, but only for a failure to exercise reasonable care for the safety of such property.[30] In one of the cases cited, the duties and liabilities of such companies are thus stated: "A corporation engaged in running sleeping coaches with sections separated from the aisle only by curtains, is bound to have an employe charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers. These cars are used by both sexes, by persons of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by the carriers, and though such companies are not insurers they must exercise vigilance to protect their sleeping custom-

[28] Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. Rep. 630. See McGrell v. Buffalo Office Bldg. Co., 153 N. Y. 265, 47 N. E. 305. In Seaver v. Bradley, 179 Mass. 329, 60 N. E. 795, 88 Am. St. Rep. 384, the owner and operator of a passenger elevator was held not to be a common carrier of passengers within a statute giving an action for the death of a passenger by reason of the negligence of a common carrier of passengers.

[29] Burgess v. Stowe, 134 Mich. 204, 96 N. W. 29; Edwards v. Manufacturers Bldg. Co. 27 R. I. 248.

[30] Pullman Pal. C. Co. v. Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767; Pullman Pal. Car Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578; Pullman Palace Car Co. v. Martin, 92 Ga. 161, 18 S. E. 364; Pullman Pal. Car Co. v. Hall, 106 Ga. 765, 32 S. E. 923, 71 Am. St. Rep. 293, 44 L. R. A. 790; Pullman Pal. Car Co. v. Smith, 73 Ill. 360; Woodruff Sleeping, etc., Co. v. Diebel, 84 Ind. 474, 43 Am. Rep. 102; Pullman Pal. Car Co. v. Gaylord, 9 Ky. L. R. 58; Lewis v. N. Y. Sleeping Car Co., 143 Mass. 267, 58 Am. Rep. 135; Whicher v. Boston, etc., R. R. Co., 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314; Scaling v. Pullman Pal. Car Co., 24 Mo. App. 29; Efron v. Wagner Pal. Car Co., 59 Mo. App. 641; Carpenter v. New York, etc., Co., 124 N. Y. 53, 26 N. E. 227; Pullman Pal. Car Co. v. Gardner, 3 Penny. (Pa.) 78; Pullman Pal. Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 298; Pullman Pal. Car Co. v. Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31; Pullman Pal. Car Co. v. Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873. Held to the liability of innkeeper. Pullman Pal. Car Co. v. Lowe, 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809.

and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult; and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Considering the compensation received for such services, and the hazards to which unguarded and sleeping travelers are exposed, the rule of diligence above declared is not too onerous."[31] A loss without the fault of the plaintiff is held to make a *prima facie* case of negligence on the part of the company.[32] The company is liable for a theft by its servants.[33]

§ 330. **Telegraph companies.** Companies for the transmission of messages by telegraph hold relations to the public and to those doing business with them much resembling those of rail-

[31] Carpenter v. New York, etc., R. R. Co., 124 N. Y. 53, 26 N. E. 227.

[32] Pullman Pal. Car Co. v. Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767; Cooney v. Pullman Pal. Car Co., 121 Ala. 368, 25 So. 712; Pullman Pal. Car Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578; Pullman Co. v. Schaffner, 126 Ga. 609. *Contra*, Whicher v. Boston, etc., R. R. Co., 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314; Pullman Pal. Car Co. v. Hatch, 30 Tex. Civ. App. 303, 70 S. W. 771.

[33] Pullman Pal. Car Co. v. Martin, 95 Ga. 314, 22 S. E. 700; Root v. New York, etc., Co., 28 Mo. App. 199; Pullman Pal. Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 298; Pullman Pal. Car Co. v. Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873. *Contra*, Levins v. New York, etc., R. R. Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. Rep. 434. To what property the liability extends. Pullman Pal. Car Co. v. Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767; Cooney v. Pullman Pal. Car Co., 121 Ala. 368, 25 So. 712; Wilson v. Baltimore, etc., R. R. Co., 32 Mo. App. 682; Hampton v. Pullman Pal. Car Co., 42 Mo. App. 134.

As to liability for assault on passenger by porter see Campbell v. Pullman Pal. Car Co., 42 Fed. 484; Williams v. Pullman Pal. Car Co., 40 La. Ann. 87, 3 So. 631, 8 Am. St. Rep. 512; Williams v. Pullman Palace Car Co., 40 La. Ann. 417, 4 So. 85, 8 Am. St. Rep. 538.

The company is liable for a failure to awake a passenger in time to get off at the proper place Pullman Pal. Car Co. v. Smith, 73 Tex. 468, 14 S. W. 993, 23 Am. St Rep. 356, 13 L. R. A. 215. And see Pullman Pal. Car Co. v. Fielding, 62 Ill. App. 577; McKeon v. Chicago, etc., Ry. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 909, 35 L. R. A. 252.

private lands where they appropriate an easement for the purpose under the eminent domain. The legislation which permits this recognizes them as public agencies, and requires them to accommodate the public impartially, and to transmit messages in the order in which they are received. They, therefore, to some extent, in their functions and in their responsibilities, resemble common carriers, and are sometimes so designated.[34] But the resemblance does not go very far; they receive nothing to carry, and the risks of theft, robbery, fire and flood which render the undertaking of the common carrier so onerous, they are not exposed to. In reason as well as on authority, they are responsible in sending, receiving and delivering messages, on the grounds only that through their negligence errors or unnecessary delays have occurred, or that they have failed to transmit and deliver messages impartially. If a message is not sent and delivered within a reasonable time under the circumstances, or if errors occur in the transmission, which are attributable to their negligence, they are responsible for all consequent damages,[35] but they are not insurers, and if errors occur without their fault, they are not responsible.[36] A telegraph company

[34] Telephone companies stand in this respect upon the same footing with telegraph companies. Central U. Tel. Co. v. Bradbury, 106 Ind. 1; Chesapeake, etc., Co. v. Balt., etc., Co., 66 Md. 399. See State v. Tel. Co., 36 Ohio St. 296; State v. Nebraska Tel. Co., 17 Neb. 126, 22 N. W. 237.

[35] Western U. Tel. Co. v. Carew, 15 Mich. 525; Aiken v. Telegraph Co., 5 S. C. 358; Parks v. Telegraph Co., 13 Cal. 422; Grinnell v. Western U. T. Co., 113 Mass. 299, 18 Am. Rep. 485; Washington, etc., Tel. Co. v. Hobson, 15 Gratt. 122; Ferrero v. Western Union Tel. Co., 9 App. D. C. 455, 35 L. R. A. 548; Cowan v. Western Union Tel Co., 122 Ia. 379, 98 N. W. 281, 101 Am. St. Rep. 268; Western Union Tel. Co. v. Watson, 82 Miss. 101, 33 So. 76; Wertz v. Western Union Tel. Co., 7 Utah, 446, 27 Pac. 172, 13 L. R. A. 510; Wertz v. Western Union Tel. Co., 8 Utah, 499, 33 Pac. 136; Harkness v. Western Union Tel Co., 73 Ia. 190, 34 N. W. 811, 5 Am. St. Rep. 672; Western Union Tel. Co. v. Allen, 66 Miss. 549, 6 So. 461; Brooks v. Western Union Tel. Co., 26 Utah, 147, 72 Pac. 499; Western U. Tel. Co. v. Cohen, 73 Ga. 522; Western U. Tel. Co. v. Scircle. 103 Ind. 227.

[36] Sweetland v. Illinois, etc., Tel. Co., 27 Iowa, 433, 1 Am. Rep. 285; Breese v. U. S. Telegraph Co. 48 N. Y. 132, 8 Am. Rep. 526; West-

fictitious messages over its lines. The plaintiff bank at Uvalde sent a message to the W. bank at San Antonio inquiring whether a draft on the latter bank by one F. would be honored. An accomplice of F. tapped the wires, intercepted the message and sent to the plaintiff an affirmative reply, upon the strength of which it cashed the draft. The plaintiff having discovered the fraud sued the telegraph company to recover its loss and obtained judgment. It was held that the company impliedly represented that the message was genuine, and the plaintiff made a *prima facie* case by showing its action upon the message, that it was false and the consequent loss. It was further held that the company did not exculpate itself by showing that it was imposed upon in the manner stated but that it should go further and show that the imposition was not made possible through the lack of the proper care and precaution on its part.[37] It is generally held in this country that the sendee of a message may sue, when he has been damnified by the neglect or other fault of the company.[38]

Like common carriers telegraph companies are permitted to make rules for the regulation of their business; and these when brought home to those dealing with them, and assented to expressly or by implication, will be binding as contracts, provided they appear to be reasonable. A rule, for example, that any claim against the company for damages arising from delays or errors shall be presented within sixty days, has been

ern U. Tel. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1.

[37] Western Union Tel. Co. v. Uralde National Bank, 97 Tex. 219, 77 S. W. 603.

[38] Hadley v. Western Union Tel. Co., 115 Ind. 191, 15 N. E. 845; Ferrero v. Western Union Tel. Co., 9 App. D. C. 455, 35 L. R. A. 548; International Ocean Tel. Co. v. Saunders, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810; Western Union Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Webbe v. Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; Butner v. Western Union Tel. Co., 2 Okl. 234, 37 Pac. 1087; Wadsworth v. West. U. Tel. Co., 86 Tenn. 695, 8 S. W. 574; Loper v. Same, 70 Tex. 689, 3 S. W. 600. At least where he has repaid the sender the cost of sending. West v. Western U. Tel. Co., 39 Kan. 93, 17 Pac. 807. Held sendee may not sue. Western U. Tel. Co. v. Flint River L. Co., 114 Ga. 576, 40 S. E. 815; Brooke v. Western U. Tel. Co., 119 Ga. 694, 46 S. E. 826.

necting lines.[40] And if rules which are reasonable in themselves are printed conspicuously on the blanks of the company, they will be deemed assented to by those who make use of the blanks.[41]

§ 331. **Skilled workmen.** Every man who offers his services to another and is employed, assumes the duty to exercise in the employment such skill as he possesses with reasonable care and diligence. In all those employments where peculiar skill is requisite, if one offers his services, he is understood as holding

[39] Wolf v. West. U. Tel. Co., 62 Penn. St. 83, 1 Am. Rep. 387, and in Texas, West. U. Tel. Co. v. Edsall, 63 Tex. 668. See West. U. Tel. Co. v. Scircle, 103 Ind. 227; West. U. Tel. Co. v. Jones, 95 Ind. 228; Western U. Tel. Co. v. Dougherty, 54 Ark. 221, 15 S. W. 468, 26 Am. St. Rep. 33, 11 L. R. A. 102; Kirby v. West. U. Tel. Co., 7 S. D. 623, 65 N. W. 37. The last overrules Kirby v. West. U. Tel. Co., 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612. Such stipulation does not apply to action for statutory penalty. West. U. Tel. Co. v. Cobbs, 47 Ark. 344, 58 Am. Rep. 756, 1 S. W. 558. Nor where message is never sent at all. Francis v. West. U. Tel. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406. Stipulation for claim within thirty days is unreasonable where sender sues. Johnson v. West. U. Tel. Co., 33 Fed. Rep. 362, citing many cases. So may make a rule as to deposit when an answer is asked. West. U. Tel. Co. v. McGuire, 104 Ind. 130, 54 Am. Rep. 296; Hewlett v. West. U. Tel. Co., 28 Fed. Rep. 181. So reasonable rules as to keeping offices open. West. U. Tel. Co. v. Harding, 103 Ind. 505. See Given v. West. U. Tel. Co., 24 Fed. Rep. 119; West. U. Tel. Co. v. Steenberger, 107 Ky. 469, 54 S. W. 829; Western U. Tel. Co. v. Crider, 107 Ky. 600, 54 S. W. 963.

[40] West. U. Tel. Co. v. Carew, 15 Mich. 525. See, further, Redpath v. West. U. Tel. Co., 112 Mass. 71; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519. As to the liability independently of such regulation, see Leonard v. N. Y., etc., Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; Baldwin v. U. S. Telegraph Co., 45 N. Y. 744, 6 Am. St. Rep. 165.

[41] Young v. West. U. Tel. Co., 65 N. Y. 163; Passmore v. West. U. Tel. Co., 78 Pa. St. 238; West. U. Tel. Co. v. Buchanan, 35 Ind. 430, 9 Am. Rep. 744; Clement v. Western U. Tel. Co., 137 Mass. 463; Cole v. Same, 33 Minn. 227; Heiman v. Same, 57 Wis. 562; Schwartz v. Atlantic, etc., Co., 18 Hun, 157. Even if blank is torn, if sender accustomed to use them. Keiley v. West. U. Tel. Co., 109 N. Y. 231, 16 N. E. 75.

monly possessed by others in the same employment, and if his pretensions are unfounded, he commits a species of fraud upon every man who employs him in reliance on his public profession. And so wherever an employment requires peculiar care or skill, a failure to exercise it is actionable negligence.[42] But no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully, and without fault or error; he undertakes for good faith and integrity, but not for infallibility, and he is liable to his employer for negligence, bad faith or dishonesty, but not for losses consequent upon mere errors of judgment.[43]

§ 332. **Professional services in general.** The English authorities are, perhaps, somewhat more indulgent to the faults and mistakes of professional men than are those of this country. Thus Lord Campbell, with the full concurrence of his associates in the House of Lords, declared that in order to maintain an action against one's legal adviser, it was necessary, "most undoubtedly, that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be charge-

[42] The New World v. King, 16 How. 469. Rule applied to the makers of abstracts of title. Talpey v. Wright, 61 Ark. 275, 32 S. W. 1072, 54 Am. St. Rep. 206; Russell v. Polk County Abstract Co., 87 Ia. 233, 54 N. W. 212, 43 Am. St. Rep. 381; Provident Loan Trust Co. v. Wolcott, 5 Kan. App. 473, 47 Pac. 8; Symms v. Cutler, 9 Kan. App. 210, 59 Pac. 671; Schade v. Gehner, 133 Mo. 252, 34 S. W. 576; Zweigardt v. Birdseye, 57 Mo. App. 462; Renkert v. Title Guaranty Trust Co., 102 Mo. App. 267, 76 S. W. 641; Western Loan & S. Co. v. Silver Bow Abstract Co., 31 Mont. 448; Dickle v. Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616; Denton v. Nashville Title Co., 112 Tenn. 320, 79 S. W. 799. To Architects. Corey v. Eastman, 166 Mass. 279, 44 N. E. 217, 55 Am. St. Rep. 401; Badgley v. Dickson, 13 Ont. App. Rep. 494. To financial agents. Overacre v. Blake, 82 Cal. 77, 22 Pac. 979; Samonset v. Mesnager, 108 Cal. 354, 41 Pac. 337; Cross v. Kistler, 14 Colo. 571, 24 Pac. 329; Young v. Lohr, 118 Ia. 624, 92 N. W. 684; Coffing v. Dodge, 167 Mass. 231, 45 N. E. 928; Isham v. Post, 141 N. Y. 100, 35 N. E. 1084, 38 Am. St. Rep. 766, 23 L. R. A. 90.

[43] Lincoln v. Gay, 146 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Calland v. Nichols, 30 Neb 532, 46 N. W. 631; Nortwick v. Holbine, 62 Neb. 147, 86 N. W. 1057; Price v. Ga Nun, 11 Misc. 74, 32 N. Y. S. 801; Page v. Wells, 37 Mich. 415.

tain an action against the professional adviser.'"[44] The general rule in this country is that the practitioner must possess at least the average degree of learning and skill in his profession in that part of the country in which his services are offered to the public; and if he exercises that learning and skill with reasonable care and fidelity, he discharges his legal duty.[45]

§ 333. Attorneys. An attorney is bound to exercise such skill, care and diligence in any matter entrusted to him, as members of the legal profession commonly possess and exercise in such matters, and will be liable for any failure in this regard.[46] He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of

[44] Purves v. Landell, 12 C. & F. 91, 102. See also Shiells v. Blackburne, 1 H. Bl. 158; Blaikie v. Chandless, 3 Camp. 17; Godefroy v. Dalton, 6 Bing. 461; Hart v. Frame, 6 C. & F. 193; Pippin v. Sheppard, 11 Price, 400; Slater v. Baker, 2 Wils. 359; Rich v. Pierpont, 3 F. & F. 35; Seare v. Prentice, 8 East, 349; Hancke v. Hooper, 7 C. & P. 81; Lanphier v. Phipos, 8 C. &. P. 234; Lowry v. Guilford, 5 C. & P. 234; Russell v. Palmer, 2 Wils. 325; Chapman v. Chapman, L. R. 9 Eq. Cas. 276; Parker v. Rolls, 14 C. B. 691; Pitt v. Yalden, 4 Burr. 2060.

[45] Landon v. Humphrey, 9 Conn. 209, 23 Am. Dec. 233; Howard v. Grover, 28 Me. 97, 48 Am. Dec. 478; Simonds v. Henry, 39 Me. 155, 63 Am. Dec. 611; Patten v. Wiggin, 51 Me. 594, 81 Am. Dec. 593; Holmes v. Peck, 1 R. I. 243; Barnes v. Means, 82 Ill. 379, 25 Am. Rep. 328; Holtzman v. Hoy, 118 Ill. 534, 59 Am. Rep. 390; Walker v. Goodman, 21 Ala. 647; Branner v. Stormont, 9 Kan. 51; Hathorn v. Richmond. 48 Vt. 557; Craig v. Chambers, 17 Ohio St. 253; Wood v. Clapp, 4 Sneed, 65; Smothers v. Hanks, 34 Iowa, 280; Hitchcock v. Burgett, 38 Mich. 501; Reynolds v. Graves, 3 Wis. 416; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Heath v. Glisan, 3 Ore, 64; Hord v. Grimes, 13 B. Mon. 188; Small v. Howard, 128 Mass. 131, 35 Am. Rep. 363; O'Hara v. Wells, 14 Neb. 403; Vanhooser v. Berghoff, 90 Mo. 487; Gates v. Fleischer, 67 Wis. 504; Bute v. Potts, 76 Cal. 304, 18 Pac. 329; Leighton v. Sargent, 27 N. H. 460, 59 Am. Rep. 383; McCandless v. McWha, 22 Pa. St. 261; Potter v. Warner, 91 Pa. St. 362, 36 Am. Rep. 668.

[46] Kruger's Estate, 130 Cal. 621, 62 Pac. 31; Humboldt Bldg. Ass'n v. Ducker, 111 Ky. 759, 64 S. W. 671. And see Pinkston v. Aarrington, 98 Ala. 489, 13 So. 561; Moorman v. Wood, 117 Ind. 144, 19 N. E. 739; Jamison v. Weaver, 81 Ia. 212, 46 N. W. 996; Cochrane v. Little, 71 Md. 323, 18 Atl. 698; Watson v. Calvert Bldg. Ass'n., 91 Md. 25, 45 Atl. 879.

tary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession.[47] "A lawyer is without excuse who is ignorant of the ordinary settled rules of pleading and practice, and of the statutes and published decisions of his own state, but he is not to be charged with negligence where he accepts as a correct exposition of the law, a decision of the supreme court of his own state, nor can he be held liable for a mistake in reference to a matter in which members of the profession, possessed of reasonable skill and knowledge, may differ as to the law until it has been settled in the courts; nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers."[48] An attorney is liable only to his client for negligence and not to a third party who may be damnified thereby. Thus an intended legatee cannot maintain a suit against an attorney for negligence in the matter of drawing and executing a will whereby the plaintiff lost the legacy intended to be given for his benefit.[49]

§ 334. **Physicians.** The physician or surgeon, undertaking the care and treatment of a patient, contracts that he possesses ordinary skill, that he will use ordinary care, and that he will exercise his best judgment in the application of his skill to the case which he undertakes.[50] Physicians and surgeons are re-

[47] Citizens' Loan Fund & S. Ass'n v. Friedley, 123 Ind. 143, 146, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L. R. A. 669.

[48] Ibid. p. 147. Also Humboldt Bldg. Ass'n v. Ducker, 111 Ky. 759, 64 S. W. 671.

[49] Buckley v. Gray, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L. R. A. 862.

[50] Cayford v. Wilbur, 86 Me 414, 29 Atl. 117. And see the following cases in which the general rule is laid down, discussed or applied. Keller v. Lewis, 65 Ark. 578, 47 S. W. 755; Bailey v. Kreutzmann, 141 Cal. 519, 75 Pac. 104; Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577; Force v. Gregory, 63 Conn. 167, 27 Atl. 1116, 38 Am. St. Rep. 371, 22 L. R. A. 343; Akridge v. Noble, 114 Ga. 949, 41 S. E. 78; Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916; Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90; Lane v. Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; Hurley v. Eddingfield, 156 Ind. 416, 59 N. E. 1058, 83 Am. St. Rep. 198, 53 L. R. A. 135; Dege-

oughly educated only, having regard to the improvements and advanced state of the profession at the time of the treatment.[51] Locality is to be taken into account and the physician in a small and remote community is not to be judged by the standards which obtain in the great centers of population. The rule is that he must exercise that degree of care and skill ordinarily exercised by the profession in his own and in similar localities.[52] He is bound to keep abreast of the times, and a departure from approved methods, if it injures the patient, will render him liable.[53]

lass v. Wight, 114 Ia. 52, 86 N. W. 86; Decatur v. Simpson, 115 Ia. 348, 88 N. W. 839; Pettigrew v. Lewis, 46 Kan. 78, 26 Pac. 458; Manser v. Collins, 69 Kan. 290, 76 Pac. 851; Stern v. Lanng, 106 La. 738, 31 So. 303; Ramsdell v. Grady, 97 Me. 319, 54 Atl. 763; State v. Housekeeper, 70 Md. 162, 16 Atl. 380, 14 Am. St. Rep. 340, 2 L. R A. 587; Dashiell v. Griffith, 84 Md. 363, 35 Atl. 1094; Harriott v. Plimpton, 166 Mass. 585, 44 N. E 992; Mayo v. Wright, 63 Mich. 32, 29 N. W 832; Martin v. Courtney, 75 Minn. 255, 77 N. W. 813; Martin v. Courtney, 87 Minn. 197, 91 N. W. 487; Hewitt v. Eisenbart, 36 Neb. 794, 55 N. W. 252; Van Skike v. Potter. 53 Neb. 28, 73 N. W. 295; Du Bois v. Decker, 130 N. Y. 325, 29 N. E 313, 27 Am. St. Rep. 529, 14 L. R. A. 429; Pike v. Housinger, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655; Gray v. Little, 126 N. C. 385, 35 S. E. 611; Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639; Langford v. Jones, 18 Ore. 307, 22 Pac. 1064, 1152; English v. Free, 205 Pa. St. 624, 55 Atl. 777; Bigney v. Fisher, 26 R. I. 402; Mullin v. Flanders, 73 Vt. 95, 50 Am. St. Rep. 813; Lanson v. Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627; Allen v. Voje, 114 Wis. 1, 89 N. W. 924. See long note on "Degree of care and skill which a physician or surgeon must exercise," appended to Whitesell v. Hill, 101 Ia. 629, 70 N. W. 750, 37 L. R. A. 830.

[51] Peck v. Hutchinson, 88 Ia. 320, 55 N. W. 511.

[52] Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577; Thomas v. Dabblemont, 31 Ind. App. 146, 67 N. E. 463; Whitesell v. Hill, 101 Ia. 629, 70 N. W. 750, 37 L. R. A. 830; Decatur v. Simpson, 115 Ia. 348, 88 N. W. 839; Burk v. Foster, 114 Ky. 20, 69 S. W. 1096; Pelky v. Palmer, 109 Mich 561, 67 N. W. 561; Bigney v. Fisher, 26 R. I. 402; Lanson v. Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

[53] Pike v. Housinger, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep 655; Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577.

rules of the school of medicine to which he belongs and whose system he professes to practice, and he is only bound to exercise such reasonable care and skill as is usually exercised by physicians of the school in good standing.[54] But every physician, no matter to what school he belongs, is bound to keep pace with the progress of professional knowledge, ideas and discoveries, to the extent that a faithful, conscientious, and competent practitioner, of whatever school, may be reasonably expected to do.[55] Any one who holds himself out as a healer of diseases and accepts employment as such, though not belonging to any recognized school of medicine, is bound to exercise reasonable skill and diligence in his vocation and the correctness of his treatment may be tested by the same standards as prevail among physicians and surgeons generally in his own or similar localities.[56]

The liability of a physician is the same whether his service is gratuitous or compensated, volunteered or requested.[57] The same rules of liability are applied to dentists,[58] and to veterinary surgeons[59] as to other professions. If the injuries sued for in any case, were due to the plaintiff's own negligence in disregarding instructions or otherwise, he cannot recover.[60]

[54] Martin v. Courtney, 75 Minn. 255, 77 N. W. 813; Force v. Gregory, 63 Conn. 167, 27 Atl. 1116, 38 Am. St. Rep. 371, 22 L. R. A. 343. And see Nelson v. Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. 900, 1 L. R. A. 719.

[55] Force v. Gregory, 63 Conn. 167, 27 Atl. 1116, 38 Am. St. Rep. 371, 22 L. R. A. 343.

[56] Applied to magnetic healers. Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655, 103 Am. St. Rep. 573, 64 L. R. A. 969. To clairvoyant physician. Nelson v. Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719. Compare Spead v. Tomlinson, 73 N. H. 46.

[57] Peck v. Hutchinson, 88 Ia. 320, 55 N. W. 511; Edwards v. Lamb, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160; Du Bois v. Dicker, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429; Pac. Ry. Co. v. Artist, 60 Fed. 365, 9 C. C. A. 75.

[58] Mernin v. Cory, 145 Cal. 573, 79 Pac. 174; McCracken v. Smathers, 122 N. C. 799, 29 S. E. 354.

[59] Barney v. Pinkham, 29 Neb. 350, 45 N. W. 694, 26 Am. St. Rep. 340.

[60] Lower v. Franks, 115 Ind. 334, 17 N. E. 630; Young v. Mason, 8 Ind. App. 264, 35 N. E. 521; Decatur v. Simpson, 115 Ia. 348, 88 N. W. 839; Richards v. Willard, 176 Pa. St. 181, 35 Atl. 114; Lanson v. Conaway, 37 W. Va. 159, 16 S. E.

is no other physician to be had.[61]

If a physician performs an operation upon a patient without the latter's consent, it is an aggravated trespass and a consent to one operation is not a consent to another and different one.[61a] As to when consent is unnecessary or may be implied, the court, in one of the cases cited, says: "Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them." [61b]

§ 335. **Voluntary services.** Where friends and acquaintances are accustomed to give, and do give, to each other voluntary services without expectation of reward, either because other assistance cannot be procured, or because the means of parties needing help will not enable them to engage such as may be within reach, the law will not imply an undertaking for skill, even when the services are such as professional men alone are usually expected to render. And where there is no undertaking

564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

[61] Hurley v. Eddingfield, 156 Ind. 416, 59 N. E. 1058, 83 Am. St. Rep. 198, 53 L. R. A. 135. Here it was alleged that the patient died for lack of treatment, and the suit was for causing the death.

[61a] Pratt v. Davis, 224 Ill. 300; Mohr v. Williams, 95 Minn. 261.

[61b] Mohr v. Williams, 95 Minn. 261, 269.

opinion" of an attorney, given in answer to a casual inquiry by one to whom he holds no professional relation, cannot, however erroneous, render him liable.[63] But when one holds himself out to the public as having professional skill, and offers his services to those who accept them on that supposition, he is responsible for want of the skill he pretends to, even when his services are rendered gratuitously.[64]

§ 336. **Neglect or violation of statutory duty.** Where a statute or municipal ordinance imposes upon any person or corporation a duty for the protection or benefit of others, or in the performance of which others have a special interest, any person so interested in the performance of the duty, who is injured by its neglect or violation, may have a private action for the damages thereby sustained.[65] Statutes requiring railroad companies to fence their tracks may be taken for illustration. One of the chief purposes of such statutes is to protect the lives and limbs of the traveling public, who, as they pass over railroads, are exposed to great and constant hazards when cattle are not effectually excluded from the tracks.[66] But another purpose is to protect the cattle themselves, and this is commonly done by making railroad companies responsible for the cattle killed or injured by their engines or otherwise upon the unfenced tracks. Where a liability for injury to cattle is imposed in general terms, a question is certain to arise, whether, in fact, the remedy is intended to be as broad as the general terms would indicate, or whether, on the other hand, its benefits were not intended exclusively for those whose cattle were lawfully on the adjacent

[62] Shiells v. Blackburne, 1 H. Bl. 158; Beardslee v. Richardson, 11 Wend. 25, 25 Am. Dec. 596.

[63] Fish v. Kelly, 17 C. B. (N. S.) 194. But when an employment actually exists, it is immaterial whether the injured party was the employer or not; the liability is the same. Pippin v. Sheppard, 11 Price, 400; Gladwell v. Steggall, 5 Bing. (N. C.) 733.

[64] McNevins v. Lowe, 40 Ill. 209; Hord v. Grimes, 13 B. Mon. 188. See Conner v. Winton, 8 Ind. 315, 65 Am. Rep. 761; Musser's Executor v. Chase, 29 Ohio St. 577.

[65] Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698; Baxter v. Coughlin, 70 Minn. 1, 72 N. W. 797; Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536.

[66] Atchison, etc., R. R. Co. v. Elder, 149 Ill. 173, 36 N. E. 565.

has arisen, and the decisions are not uniform. In some states it has been held that if cattle stray upon the adjoining lands, and from thence pass upon the track through insufficient fences, and are injured, the owners, being themselves in fault for suffering them to stray, have no remedy whatever.[67] But in other states the conclusion is, that it was intended that all persons should have the benefit of the statutory protection.[68] Differences in the phraseology of statutes will account in part for the differences in conclusions, but not entirely.[69] Such statutes have

[67] See Bemis v. Connecticut, etc., R. R. Co., 42 Vt. 375; Eames v. Salem, etc., R R. Co., 98 Mass. 560, 96 Am. Dec. 676; McDonald v. Pittsfield, etc., R. R. Co., 115 Mass. 564; Berry v. St. Louis, etc., R. R. Co., 65 Mo. 172; Peddicord v. Miss., etc., Ry. Co., 85 Mo. 160. No liability, except for recklessness, for injuring trespassing animals running at large in violation of an ordinance. Vanhorn v. Burlington, etc., Ry. Co., 63 Ia. 67; Kansas City, etc., R. R. Co. v. McHenry, 24 Kan 501.

[68] Indianapolis, etc., R. R. Co. v. McKinney, 24 Ind. 283; Isbell v. New York, etc., R. R. Co., 27 Conn. 393, 71 Am. Dec. 78; McCall v. Chamberlain, 13 Wis. 637; Curry v. Chicago, etc., R. R. Co., 43 Wis. 665; Corwin v. New York, etc., R. R. Co., 13 N. Y. 42; Bradley v. Buffalo, etc., R. R. Co., 34 N. Y. 427; Shepard v. Buffalo, etc., R. R. Co., 35 N. Y. 641; Tracy v. Troy, etc., R. R. Co., 38 N. Y. 433; Ewing v. Chicago, etc., R. R Co., 72 Ill. 25; Cairo, etc., R. R. Co. v. Murray, 82 Ill. 76. See Fawcett v. York, etc., R. R. Co., 16 Q. B. 610.

[69] See generally Dawson v. Midland R. Co., L. R. 8 Exch. 8; Williams v. Great Western R. Co., L. R. 9 Exch. 157; Wanless v. N. E. R. Co., L. R. 6 Q B. 481; Stapley v. London, etc., R. Co., L. R. 1 Exch. 20; Nelson v. Vt. Cent. R. R. Co., 26 Vt. 717, 62 Am. Dec. 614; Thorpe v. Rutland, etc., R. R. Co., 27 Vt. 140, 7 Am. Rep. 91; White v. Concord R. R. Co., 30 N. H. 188; Horn v. Atlantic, etc., R. R. Co., 35 N. H. 169; Widner v. Maine Cent. R. R. Co., 65 Me. 332, 20 Am. Rep. 698; Schmidt v. Milwaukee, etc., R. R. Co., 23 Wis. 186, 99 Am. Dec. 158; Antisdel v. Chicago, etc., R. R. Co., 26 Wis. 145, 7 Am. Rep. 44; Bay City, etc., R. R. Co. v. Austin, 21 Mich. 390; Grand Rapids, etc., R. R. Co. v. Southwick, 30 Mich. 445; Ill. Cent. R. R. Co. v. Williams, 27 Ill. 48; Chicago, etc., R. R. Co. v. Utley, 38 Ill. 410; Peoria, etc., R. R. Co. v. Barton, 80 Ill. 72; McCoy v. California, etc., R. R. Co., 40 Cal. 532; Gabbert v. Jeffersonville R. R. Co, 11 Ind. 365, 71 Am. Dec. 358; Indianapolis, etc., R. R. Co. v. McKinney, 24 Ind. 283; Indianapolis, etc., R. R. Co. v. Lyon, 48 Ind. 119.

operating trains,[70] and for the benefit of small children who may thereby be protected from coming upon the track to their injury.[71] The following are also cases of neglect of statutory duty for which individuals injured have been allowed to recover in actions on the case for negligence: neglect of railway companies to ring bells or sound the whistle on approaching a highway crossing, or to put up a sign to warn travelers;[72] neglect to

[70] Terre Haute, etc., Ry. Co. v. Williams, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44; Dickson v. Omaha, etc., R. R. Co., 124 Mo. 140, 27 S. W. 476.

[71] Keyser v. Chicago, etc., Co., 56 Mich. 559, 33 N. W. 867, 56 Am. Rep. 403; Rosse v. St. Paul, etc., Ry. Co., 68 Minn. 216, 71 N. W. 20, 64 Am. St. Rep. 472, 37 L. R. A. 591; Chicago, etc., R. R. Co. v. Grablin, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522; Hayes v. Mich. Cent. R. R. Co., 111 U. S. 228. But not if child crosses the track and is injured by falling into a trench on land beyond. Moressey v. Prov., etc., R. R. Co., 15 R. I. 271, 3 Atl. 10. And see Lake Shore, etc., Ry. Co. v. Liidtke, 69 Ohio St. 384, 69 N. E. 653.

[72] Ernst v. Hud. Riv. R. R. Co., 35 N. Y. 9; Richardson v. N. Y. etc., R. R. Co., 45 N. Y. 846; Chicago, etc., R. R. Co. v. Triplett, 38 Ill. 482; Toledo, etc., R. R. Co. v. Jones, 76 Ill. 311; Indianapolis, etc., R R. Co. v. Smith, 78 Ill. 112; Dimick v. Chicago, etc., R. R. Co., 80 Ill. 338; Langhoff v. Milwaukee, etc., R. R. Co., 19 Wis. 489; Horn v. Chicago, etc., R. R. Co., 38 Wis. 463; Linfield v. Old Colony, etc., R. R. Co., 10 Cush. 562, 57 Am. Dec. 124; Kimball v. Western R. R. Co., 6 Gray, 542; Norton v. Eastern R. R. Co., 113 Mass. 366; State v. Vermont, etc., R. R. Co., 28 Vt. 583; Wakefield v. Connecticut, etc., R. R. Co., 37 Vt. 330, 86 Am. Dec. 711; Dodge v. Burlington, etc., R. R. Co., 34 Iowa, 276; Correll v. Burlington, etc., R. R. Co., 38 Iowa, 120, 18 Am. Rep. 22; Augusta, etc., R. R. Co. v. McElmurry, 24 Ga. 75; Nashville, etc., R. R. Co. v. Smith, 6 Heisk, 174; Chicago, etc., R. R. Co. v. Boggs, 101 Ind. 522, and cases; Johnson v. Chicago, etc., Ry. Co., 77 Mo. 546; Chicago, etc., R. R. Co. v. Crisman, 19 Colo. 30, 34 Pac. 286; Green v. Eastern Ry. Co., 52 Minn. 79, 53 N. W. 808; Petrie v. Columbia, etc., R. R. Co., 29 S. C. 303, 7 S. E. 515; Bitner v. Utah Central Ry. Co., 4 Utah, 502, 11 Pac. 620. Such a statute in Rhode Island held not to be designed for the benefit of others than those intending to cross on the highway, and therefore one who is injured in walking along the track can have no action because of the omission. O'Donnell v. Providence, etc., R. R. Co., 6 R. I. 211. But see Hill v. Portland, etc., R. R. Co., 55 Me. 438, 92 Am. Dec. 601; Norton v. Eastern R. R. Co., 113 Mass. 366; Wilson v. Rochester, etc., R. R. Co., 16 Barb. 167; Wakefield v. Connecticut, etc., R. R. Co., 37 Vt. 330, 86 Am. Dec. 711; Ransom v. Chicago, etc.,

or otherwise protect dangerous machinery,[75] or the shaft of a mine;[76] neglecting to keep a bridge in repair;[77] neglecting to provide for escapes;[78] neglecting to sink telegraph wire in crossing a stream;[79] disregarding a statute which forbids selling naphtha as a burning fluid;[80] neglect of the master of a vessel to take

Ry. Co. 62 Wis. 178, 51 Am. Rep. 718.

[73] Lunt v. London, etc., R. R. Co., L. R. 1 Q. B. 277; Bilbee v. London, etc., R. R. Co., 18 C. B. (N. S.) 583; St. Louis, etc., R. R. Co v. Dunn, 78 Ill. 197; Johnson v. St. Paul, etc., R. R. Co., 31 Minn. 283. Failure to obey a statute as to obstructing highways with cars gives an action. Patterson v. Detroit, etc., R. R. Co., 56 Mich. 172.

[74] Houston, etc., R. R. Co. v. Terry, 42 Tex. 451; Aycock v. Wilmington, etc., R. R. Co., 6 Jones (N. C.), 231; Bowman v. Chicago, etc., R. R. Co., 85 Mo. 533; Keim v. Union, etc., Co., 90 Mo. 314; Crowley v. Burlington, etc., Ry. Co., 65 Ia. 658; Phila., etc, R. R. Co. v. Stebbing, 62 Md. 504; South., etc., R. R. Co. v. Donovan, 84 Ala. 141, 4 So. 142; Little v. Southern Ry. Co., 120 Ga. 347, 47 S. E. 953, 102 Am. St. Rep. 104, 66 L. R. A. 509; Lake Shore, etc., Ry. Co. v. Parker, 131 Ill. 557, 23 N. E. 237; Chicago, etc, R. R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135; Reidel v. Philadelphia, etc., R. R. Co., 87 Md 153, 39 Atl. 507, 67 Am. St. Rep. 328; Schlereth v. Missouri Pac. R. R. Co., 96 Mo. 509, 10 S. W. 66; Beck v. Vancouver Ry. Co., 25 Ore. 32, 34 Pac. 753; Memphis St Ry. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 S. C. Rep. 679, 36 L. Ed. 485; Walsh v. Missouri Pac. R. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; Louisville, etc., R. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418.

[75] Coe v. Platt, 6 Exch. 752; Holmes v. Clarke, 6 H. & N. 348; Clarke v. Holmes, 7 H. & N. 937; Caswell v. Worth, 5 El. & Bl 849; Fawcett v. York, etc., R. R. Co., 16 Q. B. 610; Reynolds v. Hindman, 32 Iowa, 146; Hansen v. Seattle L. Co., 41 Wash. 349, 83 Pac. 102.

[76] Bartlett, etc., Co. v. Roach, 68 Ill. 174.

[77] Titcomb v. Fitchburg R. R. Co., 12 Allen, 254.

[78] Rose v. King, 49 Ohio St. 213, 30 N. E. 267, 15 L. R. A. 16; Davis v Mercer L. Co., 164 Ind. 413; Carrigan v. Stillwell, 97 Me. 247 54 Atl. 389, 61 L. R. A. 163; Willey v. Mulledy, 78 N. Y. 310; Pauley v. Steam Guage, etc., Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; Johnson v. Steam Guage, etc., Co., 146 N. Y. 152, 40 N. E. 773.

[79] Blanchard v. West. Un. Tel. Co, 60 N. Y. 510.

[80] Hourigan v. Nowell, 110 Mass. 470; Wellington v. Oil Co., 104 Mass. 64. So disregarding a statute forbidding a person to keep more than fifty pounds of dynamite or gunpowder at any place

sengers when going upon a voyage;[81] neglect of a toll-bridge company to keep the bridge in repair, as required by its charter,[82] and a failure to label poisons in compliance with law.[83] But without going further into particulars, it is sufficient to say of the authorities that they recognize the rule as a general one, that when the duty imposed by statute is manifestly intended for the protection and benefit of individuals, a person injured by a breach of the duty may have his action, and, if the statute does not give a remedy, the common law will supply it.[84] The

within the corporate limits. Kinney v. Koopman, 116 Ala. 310, 22 So. 593, 67 Am. St. Rep. 119, 37 L. R. A. 497; Rudder v. Koopman, 116 Ala. 332, 22 So. 601, 37 L. R. A. 489.

Where a statutory requirement cannot be fully complied with, whatever is possible under the circumstances to prevent injury should be done. Mobile, etc., R. R. Co. v. Malone, 46 Ala. 391, citing Gr. West. R. R. Co. v. Geddis, 33 Ill. 304; Nashville, etc., R. R. Co. v. Comans, 45 Ala 437.

[81] Couch v. Steel, 3 El. & Bl 402.

[82] Grigsby v. Chappell, 5 Rich. 443.

[83] Burk v. Creamery Package Mfg. Co., 126 Ia. 730, 102 N. W. 793, 106 Am. St. Rep 377; Sutton v. Wood, 27 Ky. L. R. 412, 85 S. W. 201.

[84] Commissioners v. Duckett, 20 Md. 468; Fawcett v. York, etc., R. Co., 16 Q. B. 610; Britton v. Gt. West. Cotton Co., L. R. 7 Exch. 130; Kitchens v. Elliott, 114 Ala. 290, 21 So. 965; Kansas City, etc., R. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457; Briscoe v. Alfrey, 61 Ark. 196, 32 S. W. 505, 54 Am. St. Rep. 203, 30 L. R A. 607; McKune v. Santa Clara, etc., Co., 110 Cal. 480, 42 Pac. 980; Platte, etc., Co. v. Dowell, 17 Colo. 376, 30 Pac. 68; Rudd v. Meriden Elec. R. R. Co., 69 Conn. 272, 37 Atl. 683; Chicago, etc., R. R. Co. v. Goyette, 133 Ill. 21, 24 N. E. 549; Landgraff v. Kuh, 188 Ill. 484, 59 N. E. 501; H. Channon Co. v. Hahn, 189 Ill. 28, 59 N. E. 522; United States Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081; Davis Coal Co. v. Polland, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; Meier v. Shrunk, 79 Ia. 17, 44 N. W. 209; Ives v. Welden, 114 Ia. 476, 87 N. W. 408, 89 Am. St. Rep. 379, 54 L. R. A. 854; Illinois Central R. R. Co. v. Laloge, 113 Ky. 896, 69 S. W. 795, 62 L. R. A. 405; Henderson v. O'Halloran, 114 Ky. 186, 70 S. W. 662; Clements v. La. Elec. Lt. Co., 44 La. Ann. 692, 11 So. 51, 32 Am. St. Rep 348, 16 L. R. A. 43; Carrigan v. Stillwell, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163; Ashman v. Flint, etc., R. R. Co., 90 Mich. 567, 51 N. W. 645; Baxter v. Coughlin, 70 Minn. 1, 72 N. W. 797; Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; Hanlon v. Missouri Pac. R. R. Co., 104 Mo. 381, 16 S W. 233; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; McRick-

ter.[85]

ard v. Flint, 114 N. Y. 222, 21 N. E. 153; Pauley v. Steam Gauge, etc., Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; Johnson v. Steam Guage & L. Co., 146 N. Y. 152, 40 N. E. 773; Harden v. N. C. R. R. Co., 129 N. C. 354, 40 S. E. 184, 85 Am. St. Rep. 747, 55 L. R. A. 784; Fleming v. Southern Ry. Co., 131 N. C. 426, 42 S. E. 905; Coal Co. v. Estievenard, 53 Ohio St. 43, 40 N. E. 725; Riden v. Grimm Bros. 97 Tenn. 220, 36 S. W. 1097, 35 L. R. A. 587; Wise v. Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548; San Antonio, etc., Ry. Co. v. Bowers, 88 Tex. 634, 32 S. W. 880; Decker v. McSorley, 111 Wis. 91, 86 N. W. 554; Horton v. Wylie, 115 Wis. 505, 92 N. W. 245, 95 Am. St. Rep. 953

[85] *Ante*, § 69.

CHAPTER XIX.

NEGLIGENCE.

§ 337. Nature and definitions. The books abound with definitions of negligence. Among the best are the following: "Negligence is the failure to exercise reasonable or ordinary care to avoid injury to others."[1] "Negligence is the absence of that measure of care which the circumstances require."[2] "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done."[3] Negligence is a relative

[1] Fiske v. Forsythe D. L. B. Co., 57 Conn. 118, 119, 17 Atl. 356.

[2] Jackson Tp. v. Wagner, 127 Pa. St. 184, 195, 17 Atl. 903, 14 Am. St. Rep. 833.

[3] Swayne, J., in Railroad Co. v. Jones, 95 U. S. 439, 441, 442. Same approved and adopted in the following: Kearney Elec. Co. v. Laughlin, 45 Neb. 390, 404, 405, 63 N. W. 941; Renneker v. So. Carolina, 20 S. C. 219, 222, 223; McDonald v. International, etc., Ry. Co., 86 Tex. 1, 22 S. W. 939. Negligence is the absence of care according to circumstances. Turnpike Co. v. Railroad Co., 51 Pa. St. 345; Philadelphia, etc., Railroad Co. v. Stinger, 78 Pa. St. 219; Texas, etc., R. R. Co. v. Murphy, 46 Texas, 356, 26 Am. Rep. 272; Blaine v. Ches. & Ohio R. R. Co., 9 W. Va. 252; Nor. Cent. R. R. Co. v. State, 29 Md. 420; Barber v. Essex, 27 Vt. 62. "The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do." Alderson, B. in Blyth v. Birmingham Waterworks, 11 Exch. 781, 784. "The absence of such care as a person is by law bound to take." Hyman v. Nye, L. R. 6 Q. B. D. 685; Lindley, L. J. "Actionable negligence consists in the neglect of the use of ordinary care or skill toward a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff without contributory negligence on his part has suffered injury to his person or property." Brett, M. R. in Heaven v. Pender, L. R. 11 Q. B. D. 503, 507. For further definitions see Stringer v. Ala. Mineral R. R. Co., 99 Ala. 397, 13 So. 75; Southern Ry. Co. v. Williams, 143 Ala. 212; Bissell v. Booker, 16 Ark. 308; Smith v Whittier, 95 Cal. 279, 30 Pac.

stances reasonably impose.[5] That degree is not the same in all cases: It may vary according to the danger involved in the want of vigilance. A few simple illustrations may make this apparent. It might not be negligence in one having charge of an infant to permit it to wander in the fields where friendly people would be continually within call and no peculiar danger was to be looked for, when to allow the same liberty in a country where the people were few and ferocious beasts abundant would be highly culpable if not criminal. The degree may vary also according to the benefit, if any, that the party assuming the duty is to derive from its performance: if he is paid a large sum for undertaking it, the evident understanding is that he shall give to it an attention and vigilance in proportion, and he is justly put to a watchfulness that is not expected of one who, on request, undertakes a mere friendly commission. The degree may also vary according to the value of the thing in respect to which the trust is assumed, not only because the loss that might result from want of care would be more severe, but also because the danger of loss generally bears some proportion to the value; a

529; Fidelity & Casualty Co. v. Cutts, 95 Me. 162, 49 Atl. 673; Merrill v. Bassett, 97 Me. 501, 54 Atl. 1102; Northern Central Ry. Co. v. State, 29 Md. 420; Brown v. Congress, etc., St. R. Co., 49 Mich. 153; Kelly v. Mich. Cent. R. R. Co., 65 Mich. 186, 31 N. W. 904, 8 Am. St. Rep. 876; Brotherton v. Manhattan Beach Imp. Co. 48 Neb. 563, 67 N. W. 479, 58 Am. St. Rep. 709, 33 L. R. A. 598; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 295, 19 Am. Rep. 181; Morris v. Brown, 111 N. Y. 318, 7 Am. St. Rep. 751; Bradley v. Railway Co., 126 N. C. 735, 741; Kerwhaker v. Cleveland, etc., R. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Carter v. Columbia, etc., R. R. Co., 19 S. C. 20, 24, 45 Am. Rep. 754; Corbin v. Grand Trunk Ry. Co., 78 Vt. 458; Hoffman v. Dickinson, 31 W. Va. 142, 152, 6 S. E. 53; Dicken v. Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582; 21 Am. & Eng. Encl. 457; 1 Whart. Neg. § 3.

[4] Fox v. Oakland Con. St. Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Northern Central Ry. Co. v. State, 29 Md. 420, 438; Kelly v. Michigan Cent. R. R. Co., 65 Mich. 186, 190, 31 N. W. 904, 8 Am. St. Rep. 876; Dicken v. Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582.

[5] Ibid.; Hauch v. Hernandez, 41 La. Ann. 992, 6 So. 783; Frankford, etc., Co. v. Phila, etc., R. R. Co., 54 Pa. St. 345, 350, 93 Am. Dec. 708.

exposed with impunity, and consequently requiring more care and vigilance for its protection. All these circumstances are to be taken into account when the question involved is one of negligence; for negligence in a legal sense is no more nor less than this: the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.[6]

§ 338. Negligence involves breach of duty. The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed. There can be no negligence unless there is a duty which has been violated.[7]

[6] Diamond State Iron Co. v. Giles, 7 Houst. 556. 564, 11 Atl. 189; Kerwhaker v. Cleveland, etc., R. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Jackson Tp. v. Wagner, 127 Pa. St. 184, 17 Atl. 903, 14 Am. St. Rep. 833; Martin v. McCrary, 115 Tenn. 316; Hoffman v. Dickinson, 31 W. V. 142, 6 S. E. 53.

[7] Southern Ry. Co. v. Williams, 143 Ala. 212; Martin v. Railway Co., 55 Ark. 510, 19 S. W. 314; Railway Co. v. Ferguson, 57 Ark. 16, 20 S. W. 545, 38 Am. St. Rep. 217, 18 L. R. A. 110; Southwestern Tel. & Tel. Co. v. Beatty, 63 Ark. 65, 37 S. W. 570; Martinovitch v. Wooley, 128 Cal. 141, 60 Pac. 760; Farmer's High Line Canal, etc., Co. v. Westlake, 23 Colo. 26, 46 Pac. 134; Messenger v. Gordon, 15 Colo. App. 429, 62 Pac. 959; Jackson v. Standard Oil Co., 98 Ga. 749, 26 S. E. 60; Smith v. Clark Hardware Co., 100 Ga. 163, 28 S. E. 73, 39 L. R. A. 607; Allen v. Hixon, 111 Ga. 460, 36 S. E. 810; Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S. E. 443; Williams v. Chicago, etc., R. R. Co., 135 Ill. 491, 26 N. E. 661, 25 Am. St. Rep. 397, 11 L. R. A. 352; Illinois Central R. R. Co. v. O'Connor, 189 Ill. 559, 59 N. E. 1098; Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; Daugherty v. Herzog, 145 Ind. 255, 44 N. E. 457, 57 Am. St. Rep. 204, 32 L. R. A. 837; Thiele v. McManus, 3 Ind. App 132; Pittsburgh, etc., Ry. Co. v. Lightheiser, 163 Ind. 247, 71 N. E 660; Eakins v. Chicago, etc., Ry. Co., 126 Ia. 224, 102 N. W. 104; Smith v. Trimble, 111 Ky. 861, 64 S. W. 915; Boardman v. Creighton, 95 Me. 154, 49 Atl. 663; State v. Consolidated Gas Co., 85 Md. 637, 37 Atl. 263; Murphy v. Greeley, 146 Mass. 196, 15 N. E. 654; Kelly v. Mich. Cent. R. R. Co., 65 Mich. 186, 31 N. W. 904, 8 Am. St. Rep. 876; Wickenburg v. Minneapolis, etc., Ry. Co., 94 Minn. 276, 102 N. W. 713; Wencker v Missouri, etc., Ry. Co., 169 Mo. 592, 70 S. W. 145; Buch v. Amory Mfg Co, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163; Morris v. Brown, 111 N. Y. 318, 7 Am. St Rep. 751; Cochran v. Sess, 168 N. Y. 372, 61 N. E. 639; Emry v. Roanoke, etc., Co., 111 N. C. 94; Ramsbottom v

the individual complaining, the observance of which duty would have averted or avoided the injury."[8] Legal duties are either implied by the common law or created by statute. By the common law every person is required so to conduct himself in the exercise of his own rights and in the use of his own property, as not to do injury by his misconduct or by the want of ordinary care to the rights or property of another.[9] This general obli-

Railroad Co., 138 N. C. 38; Baltimore, etc., Ry. Co. v. Cox, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. Rep. 583; Paolino v. McKendall, 24 R. I. 432, 53 Atl. 268, 96 Am. St. Rep. 736, 60 L. R. A. 133; Galveston City, etc., Co. v Hewitt, 67 Tex. 473; San Antonio, etc., Ry. Co. v. Morgan, 92 Tex. 98, 46 S. W. 28; St. Louis S. W. Ry. Co. v. Pope, 98 Tex. 535; Williamson v. Southern Ry. Co., 104 Va. 146; Cole v. McKey, 66 Wis. 500, 57 Am. Rep. 293; Uthermohlen v. Boggs Run Co., 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 911; Western Union Tel. Co. v. Schriver, 141 Fed. 538 (C. C. A.).

[8] West Virginia Cent., etc., R. R. Co. v. State, 96 Md. 652, 666, 54 Atl. 669, 61 L. R. A. 574. "Actionable negligence is the breach of a duty owed by the defendant to the plaintiff. Where there is no duty there is no negligence." Hughes v. Boston, etc., R. R. Co., 71 N. H. 279, 284, 51 Atl. 1070, 93 Am. St. Rep. 518. "In every case involving actionable negligence, there are necessarily three elements necessary to its existence: 1. The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; 2. A failure by the defendant to perform that duty; 3. An injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient." Faris v. Hoberg, 134 Ind. 269, 274, 275, 33 N. E. 1028, 39 Am. St. Rep. 261. To same effect, State v. Consolidated Gas Co., 85 Md. 637, 37 Atl. 263; Erie R. R. Co. v. McCormick, 69 Ohio St. 45, 68 N. E. 571. A bare allegation of duty amounts to nothing. In pleading, facts should be set forth which disclose the existence of the duty relied upon. Southern Ind. Ry. Co. v. Fine, 163 Ind. 617, 72 N. E. 589.

[9] Noyes v. Shepherd, 30 Me. 173, 178, 50 Am. Dec. 625; Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. 374; Southwestern T. & T. Co. v. Beatty, 63 Ark. 65, 37 S. W. 570; Smith v. Clarke Hardware Co., 100 Ga. 163, 165; Philadelphia, etc., R. R. Co. v. Kerr, 25 Md. 521, 531; Murray v. McShane, 57 Md. 217, 225, 36 Am. Rep. 367; Cork v. Blossom, 162 Mass. 330, 44 Am. St. Rep. 362; Durgin v. Kennett, 67 N. H. 329, 29 Atl. 414; Weller v. McCormick, 52 N. J. L. 470; Kelsey v. Barney, 12 N. Y.

stances. Statutory duties have already been referred to.[10] The disregard or violation of a statutory duty is generally held to be negligence *per se*,[11] but some cases hold it to be not necessarily negligence in itself, but simply a circumstance tending to show negligence,[12] or *prima facie* evidence thereof.[13]

A duty may be general, and owing to everybody, or it may be particular, and owing to a single person only, by reason of his peculiar position. An instance of the latter sort is the duty the owner of land owes to furnish by it lateral support to the land of the adjoining owner. But a duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him particular occasion

425; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Rachmel v. Clark, 205 Pa. St. 313, 54 Atl. 1126; Tally v. Ayres, 3 Sneed, 677; Jordan v. Wyatt, 4 Gratt. 151.

[10] *Ante*, § 336.

[11] Kansas City, etc., R. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457; Seimers v. Eisen, 54 Cal. 418; McKane v. Santa Clara, etc., Co., 110 Cal. 480, 42 Pac. 980; Platte, etc., Co. v. Dowell, 17 Colo. 376, 30 Pac. 68; Central R. R. & B. Co. v. Smith, 78 Ga. 694; Ohio, etc., Ry. Co. v. Eaves, 42 Ill. 288; Chicago, etc., R. R. Co. v. Goyette, 133 Ill. 21, 24 N. E. 549; Chicago, etc., R. R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135; Chicago, etc., R. R. Co. v. Boggs, 101 Ind. 522; Reynolds v. Hindman, 32 Ia. 146; Correll v. B. C. R. & M. R. R. Co., 38 Ia. 120, 18 Am. Rep. 22; Ives v. Welden, 114 Ia. 476, 87 N. W. 408, 89 Am. St. Rep. 379, 54 L. R. A. 854; Clement v. La Elec. Lt. Co., 44 La. Ann. 692, 11 So. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Ashman v. Flint, etc., R. R. Co., 90 Mich. 567, 51 N. W. 645; Schlereth v. Mo. Pac. Ry. Co., 96 Mo. 509, 16 S. W. 66; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Harden v. North Car. R. R. Co., 129 N. C. 354, 40 S. E. 184, 85 Am. St. Rep. 747, 55 L. R. A. 784; Rose v. King, 49 Ohio St. 213, 15 L. R. A. 16; Coal Co. v. Estievenard, 53 Ohio St. 43, 40 N. E. 725; Queen v. Dayton C. & I. Co., 95 Tenn. 458, 49 Am. St. Rep. 935; Riden v. Grimm Bros., 97 Tenn. 220, 36 S. W. 1097, 35 L. R. A. 587; Wise v. Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548; Memphis St. Ry. Co. v. Haynes, 112 Tenn. 712; Hoppe v. Chicago, etc., Ry. Co., 61 Wis. 357, 365; Decker v. McSorley, 111 Wis. 91, 86 N. W. 554.

[12] Reidel v. Phila., etc., R. R. Co., 87 Md. 153, 39 Atl. 507, 67 Am. St. Rep. 328; McGrath v. New York, etc., R. R. Co., 63 N. Y. 522; Beck v. Vancouver Ry. Co., 25 Ore. 32, 34 Pac. 753; Grand Trunk Ry. Co. v. Ives, 144 U. S. 418, 12 S. C. Rep. 679, 36 L. Ed. 485.

[13] McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153.

its trains with care becomes a particular duty to no one until he is in position to have a right to complain of the neglect; the tramp who steals a ride cannot insist that it is a duty to him;[15] neither can he when he makes a highway of the railway track and is injured by the train.[16] A man may be careless to the degree of criminality who leaves poisoned food about where others will be likely to pick it up and be injured by it; but he owes in this regard no duty to the burglar who breaks into his house to despoil it. So it may not be wise or prudent for one to have upon his premises an uncovered pit, but he is under no obligation to cover it for the protection of trespassers.[17] On the other hand if one shall make an excavation so near the line of the highway that one lawfully making use of the highway might accidentally fall into it, his duty to erect guards as a protection against such accidents is manifest, and he will be responsible for injuries occasioned by his neglect to do so.[18] These are illustra-

[14] *Ante*, § 336.

[15] Wickenburg v. Minneapolis, etc. Ry. Co., 94 Minn. 276, 102 N. W. 713.

[16] Ill. Cent. R. R. v. Hall, 72 Ill. 222; Bresnahan v. Mich. Centr. R. R. Co., 49 Mich. 410. See Mobile, etc., R. R. Co. v. Stroud, 64 Miss. 784; Railroad Co. v. Depew, 40 Ohio St. 121; Pittsburgh, etc., Ry. Co. v. Collins, 87 Pa. St. 405, 33 Am. Rep. 371; State v. Balt., etc., R. R. Co., 58 Md. 482; Chicago, etc., Ry. Co. v. Eininger, 114 Ill. 79; O'Donnell v. Providence, etc., R. R. Co., 6 R. I. 211. It makes no difference that one was at a point on the track where a highway crosses it. Kelley v. Mich. Centr. R. R. Co., 65 Mich. 186, 31 N. W. 904. In Pennsylvania it is held that the railroad company is entitled to a clear track, and whoever puts himself upon it, except as he has occasion to cross, must take upon himself the consequences. Mulherrin v. Delaware, etc., R. R. Co. 81 Pa. St. 366; Penn. R. R. Co. v. Lewis, 79 Pa. St. 33. But, if the track is laid in the street, one is not a trespasser in walking upon it. Louisville, etc., Ry. Co. v. Phillips, 112 Ind 59, 13 N. E. 132.

[17] *Post*, § 360.

[18] Barnes v. Ward, 2 C. & K. 661, S. C. 9 C. B. 392; Wettor v. Dunk, 4 F. & F. 298; Hardcastle v. South Yorkshire, etc., R. Co., 4 H. & N. 67; Vale v. Bliss, 50 Barb. 358; Davis v. Hill, 41 N. H. 329; Baltimore & Ohio R. R. Co. v. Boteler, 38 Md. 568; Stratton v. Staples, 59 Me. 94; Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; Buesching v. St. Louis, etc., Co., 73 Mo. 219, 39 Am. Rep. 503; Haughey v. Hart, 62 Ia. 96; State v. Society, 42 N. J. L. 504. See Crogan v. Schiele, 53 Conn. 186,

out how the duty arose which is supposed to have been neglected.[19]

§ 339. **Standard of care.** Negligence, as we have seen, is a failure to exercise ordinary care. Ordinary care in any case, is such care as ordinarily prudent persons are accustomed to exercise under the same or similar circumstances.[20] The requirements of ordinary care vary with the circumstances.[21] "It seems plain that the degree of vigilance, which the law will exact as implied by the requirements of ordinary care, must vary with the probable consequences of negligence, and also with the command of means to avoid injuring others possessed by the person on whom the obligation is imposed. * * * Under some circumstances a very high degree of vigilance is demanded by the requirement of ordinary care. Where the consequence of negligence will probably be serious injury to others, and where the means of avoiding the infliction of injury upon others are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight." [22]

55 Am. Rep. 88; Cross v. Lake Shore, etc., Co., 69 Mich. 363, 37 N. W. 361. Not if the excavation is so far from the street line that one falling into it, must be a trespasser. Gramlich v Wurst, 86 Pa. St. 74, 27 Am. Rep. 684; Early v. Lake Shore, etc., Co., 66 Mich. 319, 33 N. W. 813.

[19] Southern Ind. Ry. Co. v. Fine, 103 Ind. 617, 72 N. E. 589.

[20] Stanfield v. Anderson, 5 Ariz. 1, 3, 43 Pac. 221; Merrill v. Bassett, 97 Me. 501, 54 Atl. 1102; Cayzer v. Taylor, 10 Gray, 274, 69 Am. Dec. 317; Fletcher v. Boston, etc., R. R. Co., 1 Allen, 9, 15, 79 Am. Dec. 695; Kelsey v. Barney, 12 N. Y. 425; Unger v. Forty-second St. R. R. Co., 51 N. Y. 497; Cadwell v. Arnheim, 152 N. Y. 182, 46 N. E. 310; Norman v. Teel, 12 Okl. 69, 69 Pac. 791; Houston, etc., Ry. Co. v. Smith, 77 Tex. 179, 13 S. W. 972; Bertha Zinc Co. v. Martin, 93 Va. 791, 22 S. E. 869; Hoffman v. Dickinson, 31 W. Va. 142, 152, 6 S. E. 53; Yerkes v. No. Pac. Ry. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961; Schrunk v. St. Joseph, 120 Wis. 223, 97 N. W. 946; Grand Trunk Ry. Co. v. Ives, 144 U. S. 418, 12 S. C. Rep. 679; Vaughan v. Menlove, 3 Bing. N. C. 468, 32 E. C. L. R. 219. Ordinary care is such care as the great mass of mankind ordinarily exercise under the same or similar circumstances. Nass v. Schulte, 105 Wis. 146, 81 N. W. 133; Coffins v. Jefferson, 126 Wis. 578.

[21] Frankford & Co. v. Philadelphia, etc., R. R. Co., 54 Pa. St. 345, 350, 93 Am. Dec. 708, and cases cited in previous notes.

[22] Kelsey v. Barney, 12 N. Y. 425, 429, 430

or omission which would not lead an ordinarily prudent person, giving the matter thought, to apprehend danger from it.[23] "One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so."[24] But it is not necessary that the particular injury should have seemed probable in advance. It is sufficient if the act or omission is such that a man of ordinary intelligence and prudence would anticipate that *some* injury was liable to result therefrom.[25]

§ 341. **Degrees of negligence.** We have already seen that the degree of care required varies with the circumstances.[26] Degrees of care are frequently classified as slight care, ordinary care and great care.[27] Some writers make a corresponding classification of negligence, as gross negligence, ordinary negligence and slight negligence.[28] The degrees of negligence are said to be correlative to the degrees of care.[29] This means that gross negligence is the correlative of slight care and is a failure to exercise that degree of care when slight care only is required. Ordinary negligence is the failure to exercise ordinary care when ordinary care is required, and slight negligence is the failure to exercise great care when great care is required. As so understood the degrees of negligence would seem to be both

[23] Cowett v. Am. Woolen Co., 97 Me. 543; Cowett v. Am. Woolen Co., 100 Me. 65; Murphy v. New York, 89 App. Div. 93, 97, 85 N. Y. S. 445; McCauley v. Logan, 152 Pa. St. 202; Isham v. Dow, 70 Vt. 588; Smith v. Railroad Co., L. R. 6 C. P. 21.

[24] Stone v. Boston, etc., R. R. Co., 171 Mass. 536, 541, 51 N. E. 1, 41 L. R. A. 794.

[25] Clove v. McIntire, 120 Ind. 262, 22 N. E. 128; Christianson v. Chicago, etc., Ry. Co., 67 Minn. 94, 69 N. W. 640. See *ante*, §§ 15, 16.

[26] *Ante*, §§ 337, 339.

[27] Jones on Bailments, 4–10.

[28] 1 Shearman & R. Neg. § 47–49; Burdick, Torts, pp. 422–424.

[29] 1 Shearman & R. Neg. § 48.

the question of liability, and misleading, because they refer to the degree of care that ought to have been exercised, instead the degree of fault of which the party has in fact been guilty. On the other hand, if we take the degrees of negligence in their only rational sense as denoting degrees of fault or delinquency, they are still without legal significance, because they have no bearing upon the question of liability. If one has failed to exercise the degree of care required in any given case, he is guilty of negligence, and it is immaterial whether he has barely failed to come up to the standard required or whether he has failed by a long interval or, in other words, whether he has been guilty of slight negligence or of gross negligence.[30] For these and other reasons the doctrine of degrees of negligence is generally disapproved by the authorities.[31] The phrase, gross negligence, in the sense of gross delinquency is sometimes used in statutes.[32]

§ 342. **Proof of negligence—Res ipsa loquitur.** The burden of proving negligence is on the plaintiff,[33] the presumption always being, until the contrary appears, that every man performs his duty.[34] The amount of evidence required varies with the circumstances. In some cases the plaintiff must show the

[30] Diamond State Iron Co. v. Giles, 7 Houst. 556, 11 Atl. 189; Milwaukee, etc., R. R. Co. v. Arms, 91 U. S. 489, 495; Magrane v. St. Louis, etc., Ry. Co., 183 Mo. 119, 128, 81 S. W. 1158; *ante*, §§ 337, 339, and cases cited in next note.

[31] Storer v. Gowen, 18 Me. 177; McPheeters v. Hannibal, etc., R. R. Co., 45 Mo. 22; Reed v. Western Union T. Co., 135 Mo. 661, 671, 58 Am. St. Rep. 609; Magrane v. St. Louis, etc., Ry. Co., 183 Mo. 119, 128, 81 S. W. 1158; Culbertson v. Holliday, 50 Neb. 229, 235, Perkins v. New York Cent. R. R. Co., 24 N. Y. 196, 206, 207, 82 Am. Dec. 282; McAdoo v. Richmond, etc., R. R. Co. 105 N. C. 140; Railroad Co. v. Lockwood, 17 Wall. 357; Steamboat New World v. King, 16 How. 469, 474; Wilson v. Brett, 11 M. & W. 113; Wylde v. Pickford, 8 M. & W. 443; Hinton v. Dibbin, 2 Q. B. 646; Beal v. So. Devon Ry. Co., 3 H. & C. 327; Grill v. General Iron Screw Collier Co., L. R. 1 C. P. 600.

[32] Galbraith v. West End St. Ry. Co., 165 Mass. 572, 581, 43 N. E. 501.

[33] Button v. Frink, 51 Conn. 342, 350; Illinois Cent. R. R. Co. v. Cragin, 71 Ill. 177, 182; Curran v. Warren, etc., Co., 36 N. Y. 153, 156; Caldwell v. N. J. Steamboat Co., 47 N. Y. 282, 290.

[34] Huff v. Austin, 46 Ohio St. 386, 387, 21 N. E. 864, 15 Am. St. Rep. 613; Cosulich v. Standard Oil Co., 122 N. Y. 118, 123, 25 N. E. 259

circumstances surrounding it. The matter may be illustrated by reference to the railway. As a carrier of passengers a railway company is bound to exercise the highest degree of care practicable under the circumstances.[35] If such care is observed the probability that any particular passenger will be injured is very small. When, therefore, an injury occurs it seems perfectly logical and reasonable to assume that the cause must be found in the failure of the company at some point to observe the caution the business required. Accordingly there is a presumption of negligence when a passenger is injured by the derailing of his train,[36] or by a collision or other accident to the car in which he is riding,[37] or by the manner in which the train is operated. But this rule of evidence is not conclusive. The carrier may rebut the presumption and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight and diligence could not prevent.[38] The same rule is applied as against the proprietors of

[35] *Ante*, § 325.

[36] Railway Co. v. Mitchell, 57 Ark. 418, 21 S. W. 883; Mitchell v. Southern Pac. R. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; Cronk v. Wabash Ry. Co., 123 Ia. 349, 98 N. W. 884; Furnish v. Missouri Pac. R. R. Co., 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316; Chicago, etc., Ry. Co. v. Young, 58 Neb. 678, 79 N. W. 556; Bergen County Traction Co. v. Demarest, 62 N. J. L. 755, 42 Atl. 729, 72 Am. St. Rep. 683; Gulf, etc, Ry. Co. v. Smith, 74 Tex. 276, 11 S W. 1104.

[37] Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486, 29 N E. 899; Elgin, etc., Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436; Louisville, etc., Ry. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Louisville, etc., R. R. Co. v. Ritter, 85 Ky. 368, 3 S. W. 591; Western Md. R. R. Co. v. State, 95 Md. 637, 53 Atl. 969, Clark v. Chicago, etc., R. R. Co., 127 Mo. 197, 29 S. W. 1013; Reynolds v. St. Louis Traction Co., 189 Mo. 408, 88 S. W. 50, 107 Am. St. Rep. 310; Miller v. Ocean S. S. Co., 118 N. Y. 199, 23 N. E. 462; Kinney v. North Carolina R. R. Co, 122 N. C. 961, 30 S. E. 313; Chattanooga Rapid Transit Co. v. Venable, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886; Gleason v. Va. Mid. R. R. Co., 140 U. S. 435, 11 S. C. Rep. 859, 35 L. Ed. 458.

[38] Carpue v. London, etc., R. Co., 5 Q. B. 747; Laing v. Colder, 8 Pa. St. 479, 49 Am Dec. 533; Sullivan

stage coaches, and on like reasons. The presumption of negligence is raised by the injury, but it may be overcome by showing a cause consistent with due care.[39] But the mere fact of injury to a passenger does not presume negligence. Thus where a passenger sitting by a car window was injured by a missile, it was held that there was no presumption of negligence. To raise such presumption and throw the burden of proof on the carrier, the court holds that "it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business, or in the appliances of transportation."[40] And this is the general rule.[41]

In the case of an injury by a railway train to one who is not

v. Philadelphia, etc., R. R. Co., 30 Pa. St. 234; Meier v. Pennsylvania R. R. Co., 64 Pa. St. 225, 230, 3 Am. Rep. 581; Louisville, etc., Ry. Co. v. Jones, 108 Ind. 551; Lennon v. Rawitzer, 57 Conn. 583, 19 Atl. 334. But where a passenger was injured by the derailing of a street car the presumption of negligence is not overcome by showing that the track was examined the day before and the day after and found in good condition. Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270, 38 Am. St. Re. 753, 20 L. R. A. 316.

[39] Christie v. Griggs, 2 Camp, 79; Crofts v. Waterhouse, 11 Moore, 133; S. C. 3 Bing, 319; Boyce v. California Stage Co., 25 Cal. 460; Lawrence v. Green, 70 Cal. 417, 59 Am. Rep. 428; McKinney v. Neil, 1 McLean, 540; Stokes v. Saltonstoll, 13 Pet. 181; Wall v. Livezay, 6 Col. 465; Sanderson v. Frazier, 8 Id. 79, 54 Am. Rep. 544; Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125; Bush v. Barnett, 96 Cal. 202, 31 Pac. 2; Budd v. United Carriage Co., 25 Ore. 314, 35 Pac. 660, 27 L. R. A. 279; Louisville, etc., Co. v. Nolan, 135 Ind. 60, 34 N. E. 710.

[40] Thomas v. Philadelphia, etc., R. R. Co., 148 Pa. St. 180, 23 Atl. 989, 15 L. R. A. 416.

[41] Saunders v. Chicago, etc., Ry. Co., 6 S. D. 40, 60 N. W. 148. To same effect: Allen v. St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142; Breen v. New York Central, etc., R. R. Co., 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450; Hawkins v. Front St. Cable Ry. Co, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16 L. R. A. 808. See Herstine v. Lehigh Val. R. R. Co., 151 Pa. St. 244, 25 Atl. 104; Crary v. Lehigh Valley R. R. Co., 203 Pa. St. 525, 53 Atl. 363, 93 Am. St. Rep. 778, 59 L. R. A. 815 where a rock came down upon a train while passing through a cut and killed a passenger, it was held that there was no presumption of negligence. Fleming v. Pittsburgh, etc., Ry. Co., 158 Pa. St. 130, 27 Atl. 858, 38 Am. St. Rep. 835, 22 L. R. A. 351. But where a passenger was injured by the train running into a landslide it was held that negligence would

majority of cases where one is run over at a railway crossing the managers of the train are in fault. The probabilities are that with the exercise of due caution one will protect himself against injury at such places; and if he receives an injury and complains of it, he may justly be called upon for an explanation. Thoughtlessness, pre-occupation, intoxication, a reckless pushing forward to cross in advance of the train—any of these would be at least as likely to lead to such an injury as carelessness in the managers of the train; and it would be unreasonable to call upon the railway company to disprove negligence when to the common mind there could be no presumption that negligence existed.[42] Unlike the case of the passenger, who submits himself to the control of the carrier, and is not called upon to do more than to quietly remain in his place, this case is one calling for vigilance on both sides, and in which the want of care by either, would be equally liable to result in injury. Accordingly the plaintiff must make proof of specific negligence in such cases.

The presumption of negligence from injury to a passenger is an illustration of a general rule which may be thus stated: When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care.[43] The rule is commonly expressed by the maxim, *res ipsa loquitur,* the thing itself speaks.[44] Negli-

be presumed. Gleeson v. Va. Mid. R. R. Co., 140 U. S. 435, 11 S. C. Rep. 859, 35 L. Ed. 458.

[42] Skelton v. London, etc., R. Co., L. R. 2 C. P. 631; Cliff v. Midland R. Co., L. R. 5 Q. B. 258.

[43] Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718; Arkansas Tel. Co. v. Ratteree, 57 Ark. 429, 21 S. W. 1059; Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S. E. 443.

[44] "*Res ipsa loquitur* is a maxim of evidentiary potency and consequence, and serves to imply or raise a presumption of negligence as a fact, where from the physical facts attending the accident or injury there is a reasonable probability that it would not have happened if the party having control,

railroad company is hit by a derailed car or by something falling from a passing car.[45] So where a bar of iron falls from the structure of an elevated railroad upon a traveler in the street.[46] So where one crossing a street, steps on the rail of an electric railway and receives a shock.[47] Or if a horse is frightened from the same cause and, running away, injures the plaintiff.[48] When a traveler in a public street is injured by contact with a live wire broken down or incumbering the street, negligence is presumed on the part of the owner of the wire.[49] So where an

management or supervision, or with whom rests the responsibility for the sound and safe condition of the thing, property or appliance which is the immediate cause of the accident or injury, had exercised usual or proper care and precaution with reference to it." Boyd v. Portland Elec. Co., 41 Ore. 336, 342, 68 Pac. 810. And see Zahniser v. Penn. Torpedo Co., 190 Pa. St. 350, 42 Atl. 707.

[45] West Virginia Cent., etc., R. R. Co. v. State, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574; Howser v. Cumberland, etc., R. R. Co., 80 Md. 146, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L. R. A. 154. But where a person was standing by a crossing and was hit by a projecting piece of lumber there is no presumption of negligence in the company. Chicago, etc., R. R. Co. v. Reilly, 212 Ill. 506, 72 N. E. 454, 103 Am. St. Rep. 243. So where a person at work in the street was hit by the body of the conductor on the side step of a street car. United Rys. & Elec. Co. v. Fletcher, 95 Md. 533, 52 Atl. 608.

[46] Hogan v. Manhattan Ry Co., 149 N. Y. 23, 43 N. E. 403; Volkmar v. Manhattan R. R. Co., 134 N. Y. 418, 31 N. E. 870; Uggla v. West End St. Ry. Co., 160 Mass. 351, 35 N. E. 1126; Morseman v. Manhattan Ry. Co., 16 Daly, 249, 10 N. Y. S. 105. So where cinders fall upon a traveler. Lowery v. Manhattan R. R. Co., 99 N. Y. 158, 1 N. E. 608. But see Wiedmer v. N. Y. El. R. R. Co., 114 N. Y. 462, 21 N. E. 1041. Where a block of wood fell upon the defendant's structure upon its own servant working below it was held there was no presumption of negligence. Nolan v. Brooklyn Heights R. R. Co., 68 App. Div. 219, 74 N. Y. S. 120. So where some wood, shavings and sawdust fell from the structure and the dust was blown into the eyes of a traveler. Wadsworth v. Boston El. Ry. Co., 182 Mass 572, 66 N. E. 421.

[47] Braham v. Nassau Elec. R. R. Co., 72 App. Div. 456, 76 N. Y. S. 578.

[48] Trenton Pass. Ry. Co. v. Cooper, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637.

[49] Arkansas Tel. Co. v. Ratteree, 57 Ark. 429, 21 S. W. 1059; Newark Elec. Lt. Co. v. Ruddy, 62 N. J. L. 505, 41 Atl. 712, 57 L. R. A.

construction or repair upon a person in the street.[51] And where a man received an electric shock while handling an incandescent lamp in his house and it appeared that the current in the house was of higher voltage than it should have been, negligence was presumed as against the company which wired the house and furnished the lamp and the current.[52] Negli-

624; Jones v. Union Ry. Co., 18 App. Div. 267, 46 N. Y. S. 321; O'Leary v. Glens Falls Gas., etc., Co., 107 App. Div. 505; Boyd v. Portland Elec. Co., 37 Ore. 567, 62 Pac. 378, 52 L. R. A. 509; Boyd v. Portland Elec. Co., 40 Ore. 126, 66 Pac. 576, 57 L. R. A. 619; Chaperon v. Portland Elec. Co., 41 Ore. 39, 67 Pac. 929; Boyd v. Portland Elec. Co., 41 Ore. 336, 68 Pac. 810; Herbert v. Lake Charles Ice, etc., Co., 111 La. 522, 35 So. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; Geisman v. Mo.-Edison Elec. Co., 173 Mo. 654, 73 S. W. 654; Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810; Ahern v. Ore. Tel. Co., 24 Ore. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; Norfolk Ry. & Lt. Co. v. Spratley, 103 Va. 379, 49 S. E. 502; Snyder v. Wheeling Elec. Co., 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499.

[50] Excelsior Elec. Co. v. Sweet, 57 N. J. L. 224, 30 Atl. 553.

[51] Decola v. Cowan, 102 Md. 551; Khron v. Brock, 144 Mass. 516; Dixon v. Plums, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698; Byrne v. Boadle, 2 H. & C. 722. A building was in process of construction and nineteen independent contractors were at work on the building with an aggregate of two hundred and fifty men. A passer in the street was injured by a brick falling from the building. It was held that the falling of brick afforded a presumption of negligence on the part of someone but not on the part of any particular contractor and that the plaintiff could not recover without showing who was responsible for the accident. Wolf v. Am. Tract Society, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241.

[52] Alexander v. Nanticoke Lt. Co., 209 Pa. St. 571, 58 Atl. 1068, 67 L. R. A. 475; Crowe v. Nanticoke Lt. Co., 209 Pa. St. 580, 58 Atl. 1071. The accidents in these cases happened in the same neighborhood and on the same night. In the latter case the person using the lamp was killed. In the former case the court says: "To say that one injured as the appellant was cannot recover unless he affirmatively proves, in the first instance, the specific act of negligence of the company which caused the injury, would, in many cases, be a denial of a right to recover at all, no matter how negligent the company might be. * * * The user of electricity, though having knowledge of its dangerous character, has no knowledge of how that danger can be con-

was injured by the fall of a passenger elevator in which he was riding.[53] Where the plaintiff's buildings were destroyed by the explosion of the defendant's dynamite factory.[54] Where a new gas tank, on being filled with water, burst and injured the plaintiff on adjoining property.[55] Where sparks escaped from a fire pot used in repairing a roof, which set fire to the building.[56] Where a chimney fell on the plaintiff's property in an ordinary wind.[57] Where caustic soda was used in the defendant's mill and was found in a mud hole in one of the approaches to the mill and the plaintiff's horse, going through the hole, received burns from which he died.[58] While it is customary to say that negligence is presumed in such cases, the expression is not entirely accurate. As said by the Pennsylvania court:

trolled. He relies upon the company to control it, and, when this appellant took the lamp in his hand, he had a right to do so without a thought that it had not been controlled." p. 575. See a similar case, with same nolding. Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39.

[53] Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; Springer v. Ford, 189 Ill. 430, 59 N. E. 953, 82 Am. St. Rep. 464, 52 L. R. A. 930; Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. Rep. 630; Womble v. Merchants Grocery Co., 135 N. C. 474, 47 S. E. 493; Edwards v. Manufacturers' Bldg. Co., 27 R. I. 248.

[54] Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718. Plaintiff's vessel was set on fire by an explosion of oil in the defendant's refinery. Held no presumption of negligence. Consulich v. Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475. So in case of the explosion of a boiler. Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613. So in case of an explosion of gas upon the premises of a gas company whereby one lawfully on the premises of the company was injured. Washington Gas Lt. Co. v. Eckloff, 4 App. D. C. 174; Washington Gas Lt. Co. v. Eckloff, 7 App. D. C. 372.

[55] Duerr v. Consolidated Gas Co., 86 App. Div. 14, 83 N. Y. S. 714.

[56] Shafer v. Lacock, 168 Pa. St. 497, 32 Atl. 44, 29 L. R. A 254.

[57] Cork v. Blossom, 162 Mass. 330, 38 N. E. 495, 44 Am. St. Rep. 362, 26 L. R. A. 256; Travers v. Murray, 87 App. Div. 552, 84 N. Y. S. 558. So where a brick arch fell and injured the plaintiff. Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S E. 443; Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329.

[58] Atlanta Cotton Seed Oil Mills v. Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244.

defendant, to direct a verdict for the plaintiff, whereas in these cases the question is for the jury. The accurate statement of the law is not that negligence is presumed but that the circumstances amount to evidence from which it may be inferred by the jury."[59]

§ 343. When negligence is a question of law and when of fact. Negligence may consist in a failure to conform to a specific rule of law or in a failure to act as a man of ordinary prudence would act under the same circumstances. When the act or omission violates a specific rule of law, it is negligence as matter of law.[60] In the other case it may be a question of law or fact according to the circumstances as developed by the evidence.[61] The definition of negligence and the determination of a standard of duty are always matters of law for the court.[62] "Generally, negligence is a mixed question of law and fact; and it is for the consideration of the jury, when the evidence is conflicting, or only tends to prove the facts, or if different minds may reasonably draw different inferences, though the facts are uncontroverted. The court should not take the question from the jury unless the facts are undisputed, or conclusively proved, and the inferences undisputable; or, unless the rule of duty is clearly defined, and is invariable, whatever may be the circumstances; or, unless the court could properly sustain a demurrer to the evidence."[63] If the facts are undisputed and if only one inference can reasonably be drawn there-

[59] Zahniser v. Penn. Torpedo Co., 190 Pa. St. 350, 42 Atl. 707.

[60] As where a statutory duty is violated. See *ante*, § 336.

[61] Farrell v. Waterbury Horse R. R. Co., 60 Conn. 239, 21 Atl. 675. Negligence cannot be defined and measured by any precise standard. It is always relative to particular facts and circumstances upon which it is sought to be predicated. Fox v. Oakland Con. St. Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Wikberg v. Olson Co., 138 Cal. 479, 71 Pac. 511.

[62] Custer v. Baltimore, etc., R. R. Co., 206 Pa. St 529, 55 Atl. 1130; Morrissey v. Bridgeport Traction Co., 68 Conn. 215, 35 Atl. 1126; Peltier v. Bradley D. & C. Co., 67 Conn. 42, 34 Atl. 712, 32 L. R. A. 651; Highland Ave. & B. R. R. Co. v. Donovan, 94 Ala. 299, 10 So. 139.

[63] Wilson v. Louisville, etc., R. R. Co., 85 Ala. 269, 4 So. 701. And see Van Praag v. Gale, 107 Cal.

Where the evidence is so decidedly in favor of one of the parties on the question of negligence that the court would feel obliged to grant a new trial if the verdict was in favor of the other party, it should direct a verdict for the former.[65] If the facts are in dispute or in doubt, or if the facts are undisputed and fair-minded men might reasonably draw different conclusions therefrom, then the question of negligence is for the jury.[66] So

438, 40 Pac. 555; Fisher v. Monongahela Con. Ry. Co., 131 Pa. St. 292, 18 Atl. 1016.

[64] Overacre v. Blake, 82 Cal. 77, 22 Pac. 979; Cleghorn v. Thompson, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 442; Missouri Pac. Ry. Co. v. Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473; Stone v. Boston, etc., R. R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; Sadowski v. Michigan Car Co., 84 Mich 100, 47 N. W. 598; Chicago, etc., R. R. Co. v. Barnard, 32 Neb. 506, 49 N. W. 362; Seyer v. Otoe, 66 Neb. 566, 92 N. W. 756; Hinshaw v. Raleigh, etc., R. R. Co., 118 N. C. 1047, 24 S. E. 426; Sheldon v. Asheville, 119 N. C. 606, 25 S. E. 781; Ward v. Odell Mfg. Co., 123 N. C. 248, 31 S. E. 495; Massey v. Seller, 45 Ore. 267, 77 Pac. 397; Wade v. Columbia Elec. Co., 51 S. C. 296, 29 S. E. 233, 64 Am. St. Rep. 676; McKeever v. Homestake Min. Co., 10 S. D. 599, 74 N. W. 1053; Traction Co. v. Carroll, 113 Tenn. 514, 82 S. W. 313; Sanches v. San Antonio, etc., Ry. Co., 88 Tex. 117, 30 S. W. 431; Ketterman v. Dry Fork R. R. Co., 48 W. Va. 606, 37 S. E. 683; Peterson v. Sherry L Co., 90 Wis. 83, 62 N. W 948; Toledo, B. & M. [illegible] v. Bosch, 101 Fed. 530, 41 C. C. A. 482. Compare with North Carolina cases cited above, the following: Emry v. Raleigh, etc., R. R. Co., 109 N. C. 589, 19 S. E. 636, 15 L. R. A. 332; Knight v. Railroad Co., 110 N. C. 58, 14 S. E. 650; State v. Roberts, 114 N. C. 389, 19 S. E. 645; Kahn v. Atlantic, etc., R. R. Co., 115 N. C. 638, 20 S. E. 169. "When the facts are admitted, or so clearly and conclusively proved as to admit of no reasonable doubt, it is the duty of the court to declare the law applicable to them; but, where material facts are dipsuted, or even in doubt, or inferences of fact are to be drawn from the testimony, it is the exclusive province of the jury to determine what the facts are, and apply them to the law as declared by the court." Fisher v. Monongahela Con. Ry. Co., 131 Pa. St. 292, 297, 18 Atl. 1016.

[65] Davis v. Cal. St. Cable R. R. Co., 105 Cal. 131, 38 Pac. 647; Elliott v. Chicago, etc., Ry. Co., 150 U. S. 245, 14 S. C. Rep. 85, 37 L. Ed. 1068.

[66] Nugent v. Boston, etc., R. Corp., 80 Me. 62, 12 Atl. 797; Jensen v. Kyer, 101 Me. 106; Penn. R. R. Co. v. Peters, 116 Pa. St. 206, 9 Atl. 317; McDermott v. San Francisco, etc., Co., 68 Cal. 33; O'Neill v Chicago, etc., Ry. Co., 1 McCrary, 505; Lincoln v. Gillilan,

Many cases would be very clear if they were not complicated with questions of contributory negligence. Such are the cases of a disregard of a law expressly devised to prevent the like injuries. An instance is that of the failure of a railway train to come to a stop before crossing another road, as is required by statutes in some states, whereby another train is run into. Here the negligence is plain, but it might happen that some parties injured by it would, by their own negligence, be precluded from any redress. The case might be equally clear if the railway company were to send out a train without brakes, and thereby an injury should result through the impossibility of stopping it when a danger appeared; or if one were to start a bonfire in a town while a fierce wind was raging; or if one were to deliver a loaded gun as a plaything to a young child; or if he were to send a package of dynamite by express without disclosing its dangerous nature. Concerning such cases no one should be in doubt. But in the great majority of cases the question of negli-

18 Neb. 114; Ohio, etc., R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134; Davies v. Oceanic S. S. Co., 89 Cal. 280, 26 Pac. 827; Wabash Ry. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Campbell v. Eveleth, 83 Me. 50, 21 Atl. 784; Barry v. Hannibal, etc., R. R. Co., 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610; Church v. Chicago, etc., R. R. Co., 119 Mo. 203, 23 S. W. 1056; Bolden v. Southern Ry. Co., 123 N. C. 614, 31 S. E. 851; Wilson v. Pennsylvania R. R. Co., 177 Pa. St. 503, 35 Atl. 677; Evans v. Iowa City, 125 Ia. 202, 100 N. W. 1112; Wolf v. City Ry. Co., 45 Ore. 446, 72 Pac. 329, 78 Pac. 668; McDermott v. State, 202 U. S. 600. "It is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as matter of law, and, where the facts or the inferences to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury under proper instructions." Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555. Though the facts are admitted or undisputed, yet if different men might reasonably draw different conclusions therefrom, the question of negligence is for the jury. Fox v. Oakland Con. St. Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; McDougall v. Ashland, etc., Co., 97 Wis. 382, 73 N. W. 327; Jensen v. Kyer, 101 Me. 106; Sharp v. Erie R. R. Co., 184 N. Y. 100.

67 Berg v. Boston, etc., Min. Co., 12 Mont. 212, 29 Pac. 545; Buehner Chair Co. v. Feulner, 164 Ind. 368; Cohen v. Philadelphia, etc., R. R. Co., 211 Pa. St. 227.

no case where the facts are in dispute can the judge take the case from the jury and decide against negligence, as matter of law, unless there is a want of evidence fairly tending to establish the negligence which is counted on.[69] It should be

[68] Railroad Company v. Stout, 17 Wall. 657; Hawks v. Northampton, 121 Mass. 10; Chicago, etc. R. Co. v. Hutchinson, 120 Ill. 587; Schmidt v. Chicago, etc., R. R. Co., 83 Ill. 405; Chicago, etc., R. R. Co. v. Lee, 60 Ill. 501; Cramer v. The City of Burlington, 42 Iowa, 315; Artz v. Chicago, etc., R. R. Co., 44 Iowa, 284; Belair v. Chicago, etc., R. R. Co., 43 Iowa, 663; Colorado, etc., R. Co. v. Martin, 7 Col. 592; Lake Shore, etc., R. R. Co. v. Miller, 25 Mich. 274; Hassenyer v. Mich. Centr. R. R. Co., 48 Mich. 205, 42 Am. Rep. 470; Kan. Pac. R. Co. v. Brady, 17 Kan. 388; Atchison, etc., R. Co. v. Bales, 16 Kan. 252; Perry v. S. P., etc., R. R. Co., 50 Cal. 578; McNamara v. N. P., etc., R. R. Co., 50 Cal. 581; Conroy v. Vulcan Iron Works, 65 Mo. 35; Keegan v. Kavanaugh et. al., 62 Mo. 231; Georgia, etc., Co. v. Neely, 56 Ga 541; Allen v. Hancock, 16 Vt. 230; Rice v. Montpelier, 19 Vt. 470; Hill v. New Haven, 37 Vt. 501, 88 Am. Dec. 613; Gagg v. Vetter, 41 Ind. 228, 13 Am. Rep. 322; Pittsburgh, etc., R. R. Co. v. Pearson, 72 Pa. St. 169; Sheehy v. Burger, 62 N. Y. 558; Spooner v. Brooklyn, 54 N. Y. 230; Delany v. Milwaukee, etc., R. R. Co., 33 Wis. 67; Wheeler v. Westport, 30 Wis. 392; Townley v. Chicago, etc., Co., 53 Wis. 626; Noyes v. Southern Pac. R. R. Co., 92 Cal. 285, 28 Pac. 288; Redington v. Pac. Postal Tel. Cable Co., 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132; Buchel v. Gray, 115 Cal. 421, 47 Pac. 112; Wikberg v. Olson Co., 138 Cal. 479, 71 Pac. 511; Fiske v. Forsyth Dyeing Co., 57 Conn. 118, 17 Atl. 356; Bunnell v. Berlin Iron Bridge Co., 66 Conn. 24, 33 Atl. 533; Szymanski v. Blumenthal, 4 Penn. (Del.) 511; Chicago, etc., R. R. Co. v. Lane, 130 Ill. 116, 22 N. E. 513; Louisville Gas Co. v. Kaufman, 105 Ky. 131, 48 S. W. 434; Bittner v. Crosstown Ry. Co., 153 N. Y. 76, 46 N. E. 1044, 60 Am. St. Rep. 588; Ensign v. Central N. Y. Tel. Co., 79 App. Div. 244, 79 N. Y. S. 799; Corbin v. Philadelphia, 195 Pa. St. 461, 45 Atl. 1070, 78 Am. St. Rep. 825, 49 L. R. A. 715; Whaley v. Bartlett, 42 S. C. 454, 20 S. E. 745; Gulf, etc., Ry. Co. v. Greenlee, 70 Tex. 553, 8 S. W. 129; Consumers Elec., etc., Co. v. Pryor, 44 Fla. 354, 32 So. 797; Fitzgerald v. Edison Elec. Ill. Co., 200 Pa. St. 540, 50 Atl. 161, 86 Am. St. Rep. 732.

[69] Barber v. Essex, 27 Vt. 62. See Marcott v. Marquette, etc., R. R. Co., 47 Mich. 1; Longenecker v. Penn R. R. Co., 105 Pa. St. 328; Chicago, etc., Ry. Co. v. Carey, 115 Ill. 115; Dublin, etc., Ry. Co. v. Slattery, L. R. 3 App. Cas. 1155. Compare Randall v. Balt., etc., R. R. Co., 109 U. S. 478; Goodlett v. Louisville, etc., R. R. Co., 122 U. S 391, 410; Bloomfield v. Burlington, etc., Ry. Co., 74 Ia. 607, 38 N. W. 431.

plaintiff seeks to recover upon it.[70]

§ 344. **Contributory negligence.** It may happen that the injury complained of was brought about by the concurring negligence of the party injured and of the party of whose conduct he complains. This presents a case for the application of the principle that no man shall base a right of recovery upon his own fault. Between two wrong-doers, the law will leave the consequences to rest where they have chanced to fall.[71] Therefore, although the injury complained of was caused by the negligence of the defendant, yet if legal fault contributing to the injury is imputable to the plaintiff himself, he will not be heard to complain. This is the general rule.[72] In a leading English case,

[70] Donaldson v. Milwaukee, etc., R. R. Co., 21 Minn. 293; McMahon v. Nor. Cent. R. R. Co., 39 Md. 438; N. J. Central R. R. Co. v. Moore, 24 N. J. L. 824; Orange, etc., R. R. Co. v. Ward, 47 N. J. L. 560; Fassett v. Roxbury, 55 Vt. 552; Teipel v. Hilsendegen, 44 Mich. 461; Kaminitsky v. North East. R. R. Co., 25 S. C. 53; Noyer v. Southern Pac. R. R. Co., 92 Cal. 285, 28 Pac. 288; Greenwell v. Washington Market Co., 21 D. C. Rep. 298; Nugent v. Boston, etc., R. R. Co., 80 Me. 62, 12 Atl. 797; Evans v. Wabash R. R. Co., 178 Mo. 508, 77 S. W. 515; Knapp v. Jones, 50 Neb. 490, 70 N. W. 19; Chicago, etc., R. R. Co. v. Winfrey, 67 Neb. 13, 93 N. W. 526; Conkling v. Erie R. R. Co., 63 N. J. L. 338, 43 Atl. 666; Kettle v. Turl, 162 N. Y. 255, 56 N. E. 626; Baker v. Westmoreland, etc., Gas Co., 157 Pa. St. 593, 27 Atl. 789; Johnson v. Rio Grande W. Ry. Co., 19 Utah, 77, 57 Pac. 17; Worthington v. Central Vt. R. R. Co., 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326; Klinkler v. Wheeling S. & L. Co., 43 W. Va. 219, 27 S. E. 237; Dunlap v. Northeastern R. R. Co., 130 U. S. 649, 9 S. C. Rep. 647, 32 L. Ed. 1058; Pyle v. Clark, 79 Fed. 747, 25 C. C. A. 190; Louisville, etc., R. R. Co. v. Bryant, 141 Ala. 292; Maci v. Boedker, 127 Ia. 721; Peoples v. Railroad Co., 137 N. C. 96; Whisenhant v. Railroad Co., 137 N. C. 349.

[71] Gibbon v. Paynton, 4 Burr. 2298; Clay v. Willan, 1 H. Bl. 298. "There must be a wrong as well as damage, and there is no legal injury where the loss is the result of the common fault of both parties." Rathbun v. Payne, 19 Wend. 399, per Robinson, J.

[72] Mobile, etc., R. R. Co. v. Ashcroft, 48 Ala. 15; Rickets v. Birmingham St. Ry. Co., 85 Ala. 600, 5 So. 353; Railway Co. v. Cox, 60 Ark. 106, 29 S. W. 38; Taylor v. Baldwin, 78 Cal. 517, 21 Pac. 124; Sego v. Southern Pac. Co., 137 Cal. 405, 70 Pac. 279; Kennedy v. Denver, etc., Ry. Co., 10 Colo. 493, 16 Pac. 210; Jackson v. Criely, 16 Colo. 103, 26 Pac. 331; New Haven etc., Co. v. Vanderbilt, 16 Conn

that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the

420; Morissey v. Bridgeport Traction Co., 68 Conn. 215, 35 Atl. 1126; Lyman v. Phila., etc., R. R. Co., 4 Houst. 583; Washington, etc., R. R. Co. v. Wright, 7 App. D. C. 295; Greenwell v. Washington Market Co., 21 D. C. Rep. 298; Florida Southern Ry. Co. v. Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631; Brunswick, etc., R. R. Co. v. Smith, 97 Ga. 777, 25 S. E. 759; Georgia Southern, etc., Ry. Co. v. Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118; Western Union Tel. Co. v. Quinn, 56 Ill. 319; Koutz v. Toledo, etc., R. R. Co., 54 Ind. 515; Chicago, etc., R. R. Co. v. Hedges, 118 Ind. 5, 20 N. E. 530; Evans v. Adams Exp. Co., 122 Ind. 362, 23 N. E. 1039, 7 L. R. A. 678; Banning v. Chicago, etc., Ry. Co., 89 Ia. 74, 56 N. W. 277; Keefe v. Chicago, etc., Ry. Co., 92 Ia. 182, 60 N. W. 503, 54 Am. St. Rep. 542; Geesen v. Saquin, 115 Ia. 7, 87 N. W. 745; Paducah, etc., R. R. Co. v. Hoebl, 12 Bush, 41; Ramsey v. Louisville, etc., Ry. Co., 89 Ky. 99, 20 S. W. 162; Houston v. Vicksburg, etc., R. R. Co., 39 La. Ann. 796, 2 So. 562; Garman v. Bangor, 38 Me. 443; Allen v. Me. Cent. R. R. Co., 82 Me. 111, 19 Atl. 105; Whitman v. Fisher, 98 Me. 575, 57 Atl. 895; Northern Cent. R. R. Co. v. Price, 29 Md. 420; Lewis v. Baltimore, etc., R. R. Co., 38 Md. 588, 17 Am. Rep. 521; Smith v. Smith, 2 Pick. 621; Lucas v. New Bedford, etc., R. R. Co., 6 Gray, 64; William v. Mich. Cent. R. R. Co., 2 Mich. 259; Matta v. Chicago, etc., Ry. Co., 69 Mich. 109, 37 N. W. 54; Smith v. Detroit, etc., Ry. Co., 136 Mich. 282, 99 N. W. 15; Doneldson v. Milwaukee, etc., R. R. Co., 21 Minn. 293; Erd v. St. Paul, 22 Minn. 443; New Orleans, etc., R. R. Co. v. Hughes, 49 Miss. 258; Stainback v. Meridian, 79 Miss. 447, 28 So. 947, 30 So. 607; Adams v. Wiggins Ferry Co., 27 Mo. 95, 72 Am. Dec. 247; Gleeson v. Excelsior Mfg. Co., 94 Mo. 201, 7 S. W. 188; Hurst v. Kansas City, etc., R. R. Co., 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539; Chicago, etc., R. R. Co. v. Landauer, 36 Neb. 642, 54 N. W. 976; Knapp v. Jones, 50 Neb. 490, 70 N. W. 19; State v. Manchester, etc., R. R. Co., 52 N. H. 528; Moore v. Central R. R. Co., 24 N. J. L. 268; Menger v. Laur, 55 N. J. L. 205, 26 Atl. 180, 20 L. R. A. 61; Johnson v. Hudson Riv. R. R. Co., 20 N. Y. 65, 75 Am. Dec. 375; Kane v. Yonkers, 169 N. Y. 392, 62 N. E. 428; Jackson v. Commissioners, 76 N. C. 282; Meredith v. Cranberry Coal & I. Co., 99 N. C. 576, 5 S. E. 659; Timmons v. Cent. Ohio R. R. Co., 6 Ohio St. 105; Sandusky, etc., R. R. Co. v. Sloan, 27 Ohio St. 341; Severy v. Chicago, etc., Ry. Co., 6 Okl. 153, 50 Pac. 162; Dufer v. Cully, 3 Ore. 377; Reeves v. Delaware, etc., R. R. Co., 30 Pa. St. 454, 72 Am. Dec. 713; Monongahela v. Fischer, 111 Pa. St. 9, 56 Am. Rep. 241; Delaware, etc., R. R. Co. v. Cadow, 120 Pa. St. 559, 14 Atl. 450, 6 Am. St.

or common care and caution, that but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care and caution would not, however, disentitle him to recover, unless it were such that but for that negligence and want of ordinary care and caution the misfortune could not have happened; nor, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff.'' [73] The rule applies to actions founded upon statutory duties, as well as to those founded upon the common law.[74]

Rep. 730; Pollock v. Pennsylvania R. R. Co., 210 Pa. St. 634, 105 Am. St. Rep. 846; Guess v. S. C. Ry. Co., 30 S. C. 163, 9 S. E. 18; Louisville, etc., R. R. Co. v. Wilson, 88 Tenn. 316, 12 S. W. 720; Barr v. Railroad Co., 105 Tenn. 544, 58 S. W. 849; Cook v. Mining Co., 12 Utah, 51, 41 Pac. 557; Trow v. Vt. Cent. R. R. Co., 24 Vt. 487, 58 Am. Dec. 191; Hill v. New Haven, 37 Vt. 501, 88 Am. Dec. 613; Kilpatrick v. Grand Trunk Ry. Co., 72 Vt. 263, 47 Atl. 827, 82 Am. St. Rep. 939; Norfolk, etc., R. R. Co. v. Cottrell, 83 Va. 512, 3 S. E. 123; Cawley v. Winifrede R. R. Co., 31 W. Va. 116, 5 S. E. 318; Bremer v. Pleiss, 121 Wis. 61, 98 N. W. 945; Gardner v. Paine L. Co., 123 Wis. 338, 101 N. W. 700; Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291; Railroad Co. v. Jones, 95 U. S. 439.

[73] Tuff v. Warman, 5 C. B. (N. S.) 573, 585. See, also, Butterfield v. Forester, 11 East, 60; Mayor of Colchester v. Brooke, 7 Q. B. 339; Davies v. Mann, 10 M. & W. 545; Lewis v. Baltimore, etc., R. R. Co., 38 Md. 588; Balt., etc., Co. v. Kean, 65 Md. 394. Compare Murphy v. Deane, 101 Mass. 463.

[74] Currey v. Chicago, etc., R. R. Co., 43 Wis. 665; Keech v. Baltimore, etc., R. R. Co., 17 Md. 32; Little v. Brockton, 123 Mass. 511 and cases cited; Taylor v. Carew Mfg. Co., 143 Mass. 470; Western U. Tel. Co. v. McDaniel, 103 Ind. 294; Nugent v. Vanderveer, 39 Hun, 322; Victor Coal Co. v. Muir, 20 Colo. 321, 38 Pac. 378, 46 Pac. 299, 26 L. R. A. 435; Gartin v. Meredith, 153 Ind. 16, 53 N. E. 936; Patterson v. Burlington, etc., R. R. Co., 39 Iowa, 279; Murphy v. Chicago, etc., R. R. Co., 45 Ia. 661; Godfrey v. Beattyville Coal Co., 101 Ky. 339, 41 S. W. 10; Kilpatrick v. Grand Trunk Ry. Co., 72 Vt. 263, 47 Atl. 827, 82 Am. St. Rep. 939; Lopes v. Sahuque, 114 La. 1004, 38 So. 810. Compare Louisville, etc., R. R. Co. v. Com.,

gence does not defeat a recovery, but where both parties are at fault the damages are equally divided between them.[75] This rule applies to all maritime torts, when sued in admiralty.[76]

§ 346. **Burden of proof.** When negligence is the ground of an action, it devolves upon the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which it occurred. If from these circumstances it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has by showing them disproved his right to recover.[77] Whether the burden is on the plaintiff to show, in the first instance and as part of his affirmative case, that he was in the exercise of due care, or whether contributory negligence is an affirmative defense, which the defendant has the burden of establishing, is a question upon which the authorities differ. The prevailing doctrine is that there is a legal presumption against negligence upon which the plaintiff is at liberty to rely, thus casting the burden of showing contributory negligence upon the defendant.[78] But some cases hold that the burden is on the plaintiff

80 Ky. 143; McKimble v. Boston, etc., R. R. Co., 139 Mass. 542; Commonwealth v. Boston, etc., R. R. Co., 134 Mass. 211. Contributory negligence held to be no defense where the injury was due to a willful failure to comply with a statute. Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375.

[75] Atlee v. Packet Co., 21 Wall. 389, 395; The Max Morris, 137 U. S. 1.

[76] Ibid; The Max Morris, 28 Fed. 881, 886.

[77] Railroad Co. v. Gladmon, 15 Wall. 401; Frech v. Philadelphia, etc., R. R. Co., 39 Md. 574; State v. Baltimore, etc., R. R. Co., 58 Md. 482; Hoth v. Peters, 55 Wis. 405; McQuilken v. Cent. Pac. R. R. Co., 50 Cal. 7; Baltimore, etc., R. R. Co. v. Stumpf, 97 Md. 78, 54 Atl. 978; Nord v. Boston, etc. Min. Co., 30 Mont. 48, 75 Pac. 681; Bradwell v. Pittsburgh, etc., Pass. Ry. Co., 139 Pa. St. 404, 20 Atl. 1046; Bunnell v. Railway Co., 13 Utah, 314, 44 Pac. 927; Clark v. Oregon Short Line, etc., R. R. Co., 20 Utah, 401, 59 Pac. 92.

[78] Montgomery, etc., Co. v. Chambers, 79 Ala. 338; St. Louis, etc, Ry. Co. v. Philpot, 72 Ark. 23, 77 S. W. 901; McDougall v. Cent. Pac. R. R. Co., 63 Cal. 431; Smith v. Occidental, etc., S. S. Co., 99 Cal. 462, 34 Pac. 84; Anderson v. Seropion, 147 Cal. 201; Chicago, etc., R. R. Co. v. Nuney, 19 Colo. 36, 34 Pac. 288; Paducah, etc., R. R. Co. v. Hoehl, 12 Bush, 41; Bogenschutz v. Smith, 84 Ky. 330; Clerc v. Morgan's etc., Co., 107 La. 370, 31 So. 886, 90 Am. St. Rep.

imputed to himself.[79]

§ 347. Plaintiff's negligence must have been proximate to the injury. The negligence that will defeat a recovery must be

319; County Com'rs v. Burgess, 61 Md. 29; Baltimore, etc., R. R. Co. v. Stumpf, 97 Md. 78, 54 Atl. 978; St. Paul v. Kuby, 8 Minn. 154; Hickman v. Kansas City, etc., R. R. Co., 66 Miss. 154, 5 So. 225; Simms v. Forbes, 86 Miss. 412, explaining or overruling Mississippi Cent. R. R. Co. v. Mason, 51 Miss 234, and Vicksburg v. Hennessy, 54 Miss. 391, 8 Am. Rep. 354; Thompson v. Northern Mo. R. R. Co., 51 Mo. 190, 11 Am. Rep. 443; Thorpe v. Miss., etc., Ry. Co., 89 Mo. 650, 58 Am. Rep. 120; Parsons v. Missouri Pac. Ry. Co., 94

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[79] Park v. O'Brien, 23 Conn. 339; Brockett v. Fair Haven, etc., R. R. Co., 73 Conn. 428, 434, 47 Atl. 763; Hauer v. Northern Pac. Ry. Co., 7 Idaho. 305, 62 Pac. 1028; Galena, etc., R. R. Co. v. Yarwood, 15 Ill. 468; Galena, etc., R. R. Co. v. Dill, 22 Ill. 264; North Chicago Ry. Co. v. Louis, 138 Ill. 9, 27 N. E. 457; West Chicago St. R. R. Co v. Linderman, 187 Ill. 463, 58 N. E. 367, 79 Am. St. Rep. 226; Jeffersonville, etc., R. R. Co. v. Lyon, 55 Ind. 477; Indiana, etc. R. R. Co. v. Greene, 106 Ind. 279; Sale v. Aurora, etc., Co., 147 Ind. 324; Gartin v. Meredith, 153 Ind. 16, 53 N. E. 936; Murphy v. Chicago, etc., R. R. Co., 45 Ia. 661; Hawes v. Burlington, etc., Ry. Co., 64 Ia. 315; Merrill v. Hampden, 26 Me. 234; Bigelow v. Reed, 51 Me. 325; Gallagher v. Proctor, 84 Me. 41, 24 Alt. 459; McLane v. Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487; Lane v. Crombie, 12 Pick. 177; Wilson v. Charlestown, 8 Allen, 137; Wheelock v. Boston etc., R. R. Co., 105 Mass. 203; Lake Shore, etc., Ry. Co. v. Miller, 25 Mich. 274; Teipel v. Hilsendegen, 44 Mich. 461; Button v. Hudson R. R. Co., 18 N. Y. 248; Warner v. N. Y. Cent. R. R. Co, 44 N Y. 465; Wendell v. New York, etc., R. R. Co., 91 N. Y. 420; Weston v. Troy, 139 N. Y. 281, 34 N. E. 780; Whalen v Citizens' Gas Lt. Co., 151 N. Y. 70, 45 N. E. 363; Hyde v. Jamaica, 27 Vt. 443; Bovee v. Danville, 53 Vt. 183. In Indiana the allegation and proof of due care by the plaintiff have been dispensed with by statute. Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 232, 61 N. E. 197; Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936; Davis v. Mercer L. Co., 164 Ind. 413. In a suit for the death of a person by the negligence of the defendant, when there was no eye witness of the accident, due care on the part of the deceased may be presumed. Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441; Hopkinson v. Knapp, 92 Ia. 328, 60 N. W. 653; Schum v. Penn. R. R. Co., 107 Pa. St. 8. See Keim v. Union Ry. Co., 90 Mo. 314; Tolman v. Syracuse, etc., Co., 98 N. Y. 198, 50 Am. Rep 649; Wakelin v. London, etc. Co., L. R. 12 App. Cas. 41.

cause will no more be noticed as a ground of defense than as a ground of recovery. It would be quite impossible, within such limits as can here be assigned to the subject, to enter upon an

Mo. 286, 6 S. W. 464; Nord v. Boston, etc., Min. Co., 30 Mont. 48, 75 Pac. 681; Nelson v. Helena, 16 Mont. 21, 39 Pac. 905; Orient Ins. Co. v. Northern Pac. Ry. Co., 31 Mont. 502; State v. District Court, 32 Mont. 37; Anderson v. Chicago, etc. R. R. Co., 35 Neb. 95, 52 N. W. 840; Union Stock Yards Co. v. Conoyer, 41 Neb. 617, 59 N. W. 950; Durant v. Palmer, 29 N. J. L. 544, 547; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434, 438; White v. Suffolk, etc., R. R. Co., 121 N. C. 484, 489; Wood v. Bartholomew, 122 N. C. 177, 186, 29 S. E. 959 (compare Owens v. Richmond, etc., R. R. Co., 88 N. C. 502); Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Pennsylvania R. R. Co. v. Weber, 76 Pa. St. 157, 18 Am. Rep. 407; Bradwell v. Pittsburgh, etc., Pass. Ry. Co., 139 Pa. St. 404, 20 Atl. 1046; Baker v. Westmoreland Gas Co., 157 Pa. St. 593, 27 Atl. 789; Sopherstein v. Bertels, 178 Pa. St. 401, 35 Atl. 1000; Donahue v. Enterprise R. R. Co., 32 S. C. 299, 11 S. E. 95, 17 Am. St. Rep 854; Whaley v. Bartlett, 42 S. C. 454, 20 S. E. 745; Strickland v. Capital City Mills, 70 S. C. 211; Gulf, etc., Ry. Co. v. Redecker, 67 Tex. 100, 60 Am. Rep. 20; Brown v. Sullivan, 71 Tex. 470, 10 S. W. 288; San Antonio, etc., Ry. Co. v. Bennett, 76 Tex. 151, 13 S. W. 319; Hogan v. Missouri, etc., Ry. Co., 88 Tex. 679, 32 S. W. 1035; Bunnell v. Railway Co., 13 Utah, 314, 44 Pac. 927; Linden v. Anchor Min. Co., 20 Utah, 134, 58 Pac. 355; Baltimore, etc., R. R. Co. v. McKenzie, 81 Va. 71; Kimball v. Friend, 95 Va. 125, 27 S. E. 901; Northern Pac. R. R. Co. v. Hess, 2 Wash. 383, 26 Pac. 866; Johnson v. Bellingham Bay Imp. Co., 13 Wash. 455, 43 Pac 370; Gallagher v. Buckley, 31 Wash. 380, 72 Pac. 79; Hoyt v. Hudson, 10 Wis. 105; Wheeler v. Westport, 30 Wis. 892; Gill v. Homrighausen, 79 Wis. 634, 48 N. W. 862; Railroad Co. v. Gladman, 15 Wall. 401; Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291; Hough v. Railroad Co., 100 U. S. 213, 225, 226; Northern Pac. R. R. Co. v. Mares, 123 U. S. 710, 721, 722; Inland, etc, Co. v. Tolsom, 139 U. S. 551, 557, 558, 11 S. C. Rep. 653; Mobile, etc., R. R. Co. v. Wilson, 76 Fed. 178, 22 C. C. A. 101. If the plaintiff's case discloses contributory negligence, the defendant may take advantage of it, though he has not pleaded it as a defense. Nord v. Boston, etc., Min. Co., 30 Mont 48, 75 Pac. 681; Clark v. Oregon Short Line, etc., R. R. Co., 20 Utah, 401, 59 Pac. 92; Bunnell v. Railway Co., 13 Utah, 314, 44 Pac 927. Held that contributory negligence may be proved under the general issue. Canadian Pac. Ry. Co. v. Clark, 73 Fed. 76, 74 Fed. 362, 20 C. C. A. 447.

80 Kansas City, etc., R. R. Co. v. Lackey, 114 Ala 152, 21 So. 444; Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 Atl. 924, 21 Am. St. Rep. 104, 12 L. R. A 279;

own premises, it is not contributory negligence that he had not guarded his premises as perfectly against such injuries as prudence might dictate.[81] Thus, one's buildings near the line of a railway, by reason of very combustible material, may be peculiarly exposed to take fire from passing engines; but while the owner must take upon himself all such risks as may result from a careful management of trains, he has a right to redress if his buildings are negligently burned.[82] It is not contributory negligence that one allows his cattle to pasture by an unfenced railway track, on land belonging to or controlled by himself, provided it is the fault of the railway company that the track is not fenced.[83] In neither of these cases does the party neglect any duty he owes to the railway company; he merely does what he may rightfully do with his own.

§ 348. **When defendant's conduct is reckless or wilful—Doctrine of last clear chance.** Where the conduct of the defendant is wanton and wilful, or where it indicates that degree of indifference to the rights of others which may justly be char-

Middendorf v. Schulz, 105 Ill. App. 221; St. Louis, etc., Ry. Co. v. McClain, 80 Tex. 85, 15 S. W. 789.

[81] McCarty v. Boise City Canal Co., 2 Idaho, 245, 10 Pac. 623; Mansfield v. Richardson, 118 Ia. 250, 252, 45 S. E. 269; Shields v. Orr Extension Ditch Co., 22 Nev. 349, 47 Pac. 194; Box v. Kelso, 5 Wash. 360, 31 Pac. 973.

[82] Philadelphia, etc., R. R. Co., v. Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97. See, for the same principle, Underwood v. Waldron, 33 Mich. 232; King v. Morris, etc., R. R. Co., 3 C. E. Green, 397; Salmon v. Delaware, etc., R. R. Co., 38 N. J. L. 5, 20 Am. Rep. 356. Not contributory negligence to erect buildings without metallic roofs near a dangerous waste burner. Alpern v. Churchill, 53 Mich. 607. But if one employs in his business an engine known to throw sparks, he cannot recover of the owner. Marquette, etc., R. R. Co. v. Spear, 44 Mich. 169, 38 Am. Rep. 242. Piling lumber on inflammable waste in a dry season close to a track held to be contributory negligence. Post v. Buffalo, etc., R. R. Co., 108 Pa. St. 585.

[83] Blaine v. Ches. & Ohio R. R. Co., 9 W. Va. 252. And, see Trow v. Vt. Cent. R. R. Co., 24 Vt. 487, 58 Am. Dec. 191. Compare Fritz v. First Div., etc., R. R. Co., 22 Minn. 404; Wilder v. Maine Cent. R. R. Co., 65 Me. 332, 20 Am. Rep. 698; Trout v. Virginia, etc., R. R. Co., 23 Grat. 619; Van Horn v. Burlington, etc., Ry. Co, 59 Ia. 33. See, on proximate cause, *ante*, §§ 15, 16.

has no place whatever, and the defendant is responsible for the injury he inflicts irrespective of the fault which placed the plaintiff in the way of such injury.[84] The fact that one has carelessly put himself in a place of danger is never an excuse for another purposely or recklessly injuring him. Even the criminal is not out of the protection of the law, and is not to be struck down with impunity by other persons. If, therefore, the defendant discovered the negligence of the plaintiff in time, by the use of ordinary care, to prevent the injury, and did not make use of such care for the purpose, he is justly chargeable with reckless injury, and cannot rely upon the negligence of the plaintiff as a protection.[85] Or it may be said that in such a

[84] Hartfield v. Roper, 21 Wend. 615, 34 Am. Dec. 273; Vandegrift v. Rediker, 22 N. J. L. 185; Lafayette, etc., R. R. Co. v. Adams, 26 Ind. 76; Indianapolis, etc., R. R. Co. v. McClure, 26 Ind. 370; Mulherrin v. Delaware, etc., R. R. Co., 81 Pa. St. 366; Norris v. Litchfield, 35 N. H. 271, 69 Am. Dec. 546; Daley v. Norwich, etc., R Co., 26 Conn. 591, 68 Am. Dec. 413; Chicago, etc., R. Co. v. Donahue, 75 Ill. 106; Litchfield Coal Co. v. Taylor, 81 Ill. 590; Tanner v. Louisville, etc., R. R. Co., 60 Ala. 621; Georgia Pac. Ry. Co. v. O'Shields, 90 Ala. 29, 8 So. 248; Kansas City, etc., R. R. Co. v. Lackey, 114 Ala. 152, 21 So. 444; Essey v. Southern Pac. Co., 103 Cal. 541, 37 Pac. 500; Illinois Central R. R. Co. v. Leiner, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266; Kansas Pac. Ry. Co. v. Whipple, 39 Kan. 531, 18 Pac. 730; Battishill v. Humphreys, 64 Mich. 514, 31 N. W. 581; McAdoo v. Richmond, etc., R. R. Co., 105 N. C. 140, 11 S E. 316; Southern Ry. Co. v. Yancey, 141 Ala. 246; Rhymes v. Jackson Elec., etc., Co., 85 Miss. 140, 37 So. 708; Barmore v. Vicksburg, etc., Ry. Co., 85 Miss. 426, 38 So. 210; Rapp v. St. Louis Transit Co., 190 Mo. 144. See Claxton's Admr. v. Railroad Co., 13 Bush, 636, and cases cited; Banks v. Highland St. Ry. Co., 136 Mass. 485; Belt R. R., etc., Co. v. Mann, 107 Ind. 89; Louisville, etc., R. R. Co. v. Ader, 110 Ind. 376; Palmer v. Chicago, etc., R. R. Co., 112 Ind. 250, 14 N. E. 70; Brannen v. Kokomo, etc., Co., 115 Ind. 115, 17 N. E. 202.

[85] Essey v. Southern Pac. Co., 103 Cal. 541, 37 Pac. 500; Fox v. Oakland Con. St. Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238; Denver, etc., Rapid Transit Co. v. Dwyer, 20 Colo. 132, 36 Pac. 1106; Hector Min. Co. v. Robertson, 22 Colo. 491, 45 Pac. 406; Johnson v. Baltimore, etc., R. R. Co., 6 Mackey, 232; Cullen v. Baltimore, etc., R. R. Co., 8 App. D. C. 69; Hawley v. Columbia Ry. Co., 25 App. D. C. 1; Macon, etc., R. R. Co. v. Davis, 18 Ga. 679;

while the subsequently intervening negligence of the defendant was the proximate cause.[86] The rule is frequently spoken of as the doctrine of the last clear chance, which is that the one who has the last clear chance to avoid an injury and fails to do so is solely responsible for its happening and his negligence is the proximate cause of the same.[87]

Chicago West. Div. Ry. Co. v. Ryan, 131 Ill. 474, 23 N. E. 385; Cooper v. Central R. R. Co., 44 Ia. 134; Keefe v. Chicago, etc., Ry. Co., 92 Ia. 182, 60 N. W. 503, 54 Am. St. Rep. 542; Sutzin v. Chicago, etc., Ry. Co., 95 Ia. 304, 63 N. W. 709; Louisville, etc., R. R. Co. v. Earl's Adm'x, 94 Ky. 368, 22 S. W. 607; Louisville, etc., R. R. Co. v. Earl, 99 Ky. 368, 22 S. W. 607; McGuire v. Vicksburg, etc., R. R. Co., 46 La. Ann. 1543, 16 So. 457; Conley v. Me. Cent. R. R. Co., 95 Me. 149, 49 Atl. 668; North Baltimore Pass. Ry. Co. v. Arnreich, 78 Md. 589, 28 Atl. 809; Brown v. Hannibal, etc., R. R. Co., 50 Mo. 461, 11 Am. Rep. 420; Guenther v. St. Louis, etc., Ry. Co., 95 Mo. 286, 8 S. W. 371; Hicks v. Citizens' St. Ry. Co., 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508; Dailey v. Burlington, etc., R. R. Co., 58 Neb. 396, 78 N. W. 722; State v. Manchester, etc., R. R. Co., 52 N. H. 528; Camden, etc., Ry. Co. v. Preston, 59 N. J. L. 264, 35 Atl. 1119; Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 135; Clark v. Wilmington, etc., R. R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749; Pickett v. Wilmington, etc., R. R. Co., 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L R. A. 257; Kerwhacker v. Cleveland, etc., R. R. Co., 3 Ohio St. 172; Railroad Co. v. Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; Agulino v. New York, etc., R. R. Co., 21 R. I. 263, 43 Atl. 63; Hays v. Gainesville St. Ry. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; Texas, etc., Ry. Co. v. Breadow, 90 Tex. 26, 36 S. W. 410; Chesapeake, etc., Ry. Co. v. Rodgers, 100 Va. 324, 41 S. E. 732; Richmond Traction Co. v. Martin, 102 Va. 209, 45 S. E. 886; Inland, etc., Co. v. Tolson, 139 U. S. 551. See West Chicago St. R. R. Co. v. Liderman, 187 Ill. 463, 58 N. E. 367, 79 Am. St. Rep. 226; Illinois Cent. R. R. Co. v. Leiner, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266.

[86] Railroad Co. v. Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; Hays v. Gainesville St. Ry. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; Richmond Traction Co. v. Martin, 102 Va. 209, 45 S. E. 886; Balt. & Ohio R. R. Co. v. State, 33 Md. 542, 554; Burham v. St. Louis, etc., R. R. Co., 56 Mo. 338. See Greenland v. Chaplin, 5 Exch. 243; O'Brien v. McGlinchy, 68 Me. 552; Gunter v Wicker, 85 N. C. 310.

[87] Essey v. Southern Pac. Co., 103 Cal. 541, 37 Pac. 500; Lloyd v. Albermarle, etc., R. R. Co., 118 N. C. 1010, 24 S. E. 805, 54 Am.

the law regard human life, that it will not impute negligence to an effort to preserve it if, from the appearances, the party had reason to believe he might succeed in the attempt, though not without danger of failure and injury to himself.[88] "A rescuer, one who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril, ought not to hear from the law words of condemnation of his bravery, because he rushed into danger, to snatch from it the life of a fellow creature, imperiled by the negligence of another; but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence. This conscience and reason approve, and the best judgment of thoughtful and intelligent judges has declared it to be the law of the land."[89] The

St. Rep. 764; Thompson v. Salt Lake Rapid Transit Co., 16 Utah, 281, 52 Pac. 92, 67 Am. St. Rep. 621, 40 L. R. A. 172; Southern Ind. Ry. Co. v. Fine, 163 Ind. 617, 72 N. E. 589.

[88] Eckert v. Long Island, etc., R. R. Co., 43 N. Y. 502, 3 Am. Rep. 721. Compare Nor. Penn. R. R. Co. v. Mahoney, 57 Pa St. 187; Donahoe v. Wabash, etc., Co., 83 Mo. 560, 53 Am. Rep. 594; Clark v. Famous Shoe, etc., Co., 16 Mo. App. 463.

[89] Corbin v. Philadelphia, 195 Pa. St. 461, 468, 469, 45 Atl. 1070, 78 Am. St. Rep. 825, 49 L. R. A. 715. And see in support of same views: Kansas City, etc., R. R. Co. v. Thornhill, 141 Ala. 215; Central Ry. Co. v. Crosby, 74 Ga. 737, 58 Am. Rep. 463; West Chicago St. R. R. Co. v. Liderman, 187 Ill. 463, 58 N. E. 367, 79 Am St. Rep. 226; Chicago Terminal Transfer R. R. Co. v. Kotoski, 101 Ill. App. 300; Pennsylvania Co. v. Raney, 89 Ind. 453, 455, 46 Am. Rep. 473; Saylor v. Parsons, 122 Ia. 679, 98 N. W. 500, 101 Am. St. Rep. 283, 64 L. R. A. 542; Condiff v. Kansas City, etc., R. R. Co., 45 Kan. 260, 25 Pac. 562; Peyton v. Texas, etc., Ry. Co., 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430; Whitworth v. Shreveport Belt Ry. Co., 112 La. 363, 36 So. 414, 65 L. R. A. 129; Maryland Steel Co. v. Marney, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842; Linnehan v. Sampson, 126 Mass. 506, 511, 30 Am Rep. 692; Donahoe v. Wabash, etc., R. R. Co., 83 Mo. 560, 563, 53 Am. Rep. 594; Omaha, etc., Ry. Co. v. Krayonbuhl, 48 Neb. 553, 67 N. W. 447; Dailey v. Burlington, etc., R. R. Co., 58 Neb. 396, 78 N W. 722; Eckert v. Long Island R. R. Co., 43 N. Y. 502, 505, 3 Am. Rep. 721; Spooner v. Railroad Co., 115 N. Y. 22, 34, 21 N. E. 696; Manthey v. Rauenbuehler, 71 App. Div. 173, 75 N. Y. S. 714; Muhs v. Fire Ins Salvage Corps, 89 App Div. 389, 85 N. Y. S. 911; Pennsylvania Co

ligence of the defendant, and the rescue must not be attempted under such circumstances, or in such a manner, as to constitute recklessness.[90]

So a reasonable attempt to save property which is threatened with destruction by reason of the defendant's negligence, is not contributory negligence, whether the property belongs to the plaintiff or a third party.[91] But the attempt must not be rash [92] and peril to property will not justify the taking of so great risks as peril to human life.

§ 350. **Mistake in sudden peril.** Where one is placed by the negligent acts of another in such a position that he is compelled to choose upon the instant, and in the face of a grave and impending peril, between two hazards, and he makes such a choice as a person of ordinary prudence in the same position might make, and an injury results therefrom, the fact that if he had chosen the other hazard he would have escaped injury does not prove contributory negligence.[1] "A party suddenly realizing

v. Langendorf, 48 Ohio St. 316, 28 N. E. 172, 29 Am. St. Rep. 553; Pittsburg, etc, Ry. Co. v. Lynch, 69 Ohio St. 123, 68 N. E. 703, 100 Am. St. Rep. 658, 63 L. R. A. 504; Railroad Co. v. Ridley, 114 Tenn. 727; Cottrill v. Chicago, etc., Ry. Co., 47 Wis. 634, 638, 32 Am. Rep. 796.

[90] Sann v. Johns Mfg. Co., 16 App. Div. 252, 44 N. Y. S. 641; Pittsburg, etc., Ry. Co. v. Lynch, 69 Ohio St. 123, 68 N. E. 703, 100 Am. St. Rep. 658, 63 L. R. A. 504; Pennsylvania Co. v. Langendorf, 48 Ohio St. 316, 28 N. E. 172, 29 Am. St. Rep. 553.

[91] Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Lining v. Illinois Cent. R. R. Co., 81 Ia 246, 47 N. W. 66; Glanz v. Chicago, etc., Ry. Co., 119 Ia. 611, 93 N. W. 575; Berg v. Great Northern Ry. Co., 70 Minn. 272, 73 N. W. 648, 68 Am. St. Rep. 524; Rexter v. Starin, 73 N. Y. 601; Wasmer v. Delaware, etc., R. R. Co., 80 N. Y. 212, 36 Am. Rep. 608; Burnett v. Atlantic Coast Line R. R. Co., 132 N. C. 261, 43 S. E. 797; Pegram v. Railroad Co., 139 N. C. 303. *Contra*, Seale v. Gulf, etc., Ry. Co., 65 Tex. 274, 57 Am. Rep. 602.

[92] Cook v. Johnson, 58 Mich 437, 25 N. W. 388, 55 Am. Rep 703; Morris v. Lake Shore, etc., Ry. Co., 148 N. Y. 182, 32 N. E. 285, 18 L. R. A. 215; Chattanooga, L. & P. Co. v. Hodges, 109 Tenn. 331, 70 S. W. 616, 97 Am. St. Rep. 844.

[1] Twomley v. Central Park, etc., R. R. Co., 69 N. Y. 158, 25 Am. Rep. 162. For the same principle see Richmond, etc., R. R. Co. v. Farmer, 97 Ala. 141, 12 So. 86; Pierson L. Co. v. Hart, 144 Ala.

charged with contributory negligence for every error of judgment when practically instantaneous action is required."[2] But the rule does not apply where one is negligent in getting into the dilemma.[3]

§ 351. **Comparative negligence.** An early case in Illinois laid down the doctrine that "the degrees of negligence must be measured and considered, and whenever it shall appear that the

239; Railway Co. v. Murray, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787; Lawrence v. Green, 70 Cal. 417, 11 Pac. 750, 59 Am. Rep. 428; Mitchell v. Southern Pac. R. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; Macon, etc., R. R. Co. v. Winn, 26 Ga. 250; Frink v. Potter, 17 Ill. 406; Peoria, etc., Ry. Co. v. Rice, 144 Ill. 227, 33 N. E. 951; South Chicago City Ry. Co. v. Kinnare, 216 Ill. 451, 75 N. E. 179; Windeler v. Rush Co. Fair Ass'n, 27 Ind. App. 92, 59 N. E. 269, 60 N. E. 954; Kansas City, etc., R. R. Co. v. Langley, 70 Kan. 453, 78 Pac. 858; Chretien v. Northern Rys. Co., 113 La. Ann. 761, 37 So. 716; Western Md. R. R. Co. v. State, 95 Md. 637, 53 Atl. 969; Cody v. New York, etc., R. R. Co., 151 Mass. 462, 468, 24 N. E. 402, 7 L. R. A. 843; Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432, 99 N. W. 406; Mark v. St. Paul, etc., Co., 30 Minn. 493; Kleiber v. Peoples Ry. Co, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; Murphy v. St. Louis Transit Co., 189 Mo. 42, 87 S. W. 945; Chicago, etc., R. R. Co. v. Landauer, 36 Neb. 642, 54 N. W. 976; Lincoln Rapid Transit Co. v. Nichols, 37 Neb. 332, 55 N. W. 872, 20 L. R. A. 853; St. Joseph, etc., R. R. Co. v. Hodge, 44 Neb. 448, 62 N. W. 887; Tuttle v. Atlantic City R. R. Co., 66 N. J. L. 327, 49 Atl. 450, 88 Am. St. Rep. 491, 54 L. R. A. 582; Filer v. New York Cent., etc., R. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Benoit v. Troy, etc., R. R. Co., 154 N. Y. 223, 48 N. E. 24; Lewis v. Long Island R. R. Co., 162 N. Y. 52, 56 N. E. 548; Railroad Co. v. Mowery, 36 Ohio St. 418; Nosler v. Coos Bay R. R. Co., 39 Ore. 331, 64 Pac. 644; Pennsylvania R. R. Co. v. Kilgore, 32 Pa. St. 292, 72 Am. Dec. 787; Vallo v. U. S. Exp. Co., 147 Pa. St. 404, 23 Atl. 594, 30 Am. St. Rep. 741, 14 L. R. A. 743; Malone v. Pittsburgh, etc., R. R. Co., 152 Pa. St. 390, 25 Atl. 638; Marble Co. v. Black, 89 Tenn. 118, 14 S. W. 479; Missouri, etc., Ry. Co. v. Rogers, 91 Tex. 52, 40 S. W. 956; Haney v. Pittsburgh, etc., Ry. Co., 38 W. Va. 570, 18 S. E. 748; Brown v. Chicago, etc., R. R. Co., 54 Wis. 342; Berg v. Milwaukee, 83 Wis. 599, 53 N. W. 890; Stokes v. Saltonstall, 13 Pet. 181; Omaha Water Co. v. Schamel, 147 Fed. 502 (C. C. A.).

[2] Denver, etc., Rapid Transit Co. v. Dwyer, 20 Colo. 132, 36 Pac. 1106.

[3] Schneider v. Second Ave. R. R. Co., 133 N. Y. 583, 30 N. E. 752; Aiken v. Penn. R. R. Co., 130 Pa. St. 380, 18 Atl. 619, 17 Am. St. Rep. 775.

doctrine was followed for thirty years or more [5] but has been repudiated in the later decisions.[6] In Georgia a rule seems to be laid down not essentially different from that formerly held in Illinois. "It is this, that although the plaintiff be somewhat at fault, yet if the defendant be grossly negligent and thereby occasioned or did not prevent the mischief, the action may be maintained." [7] The doctrine of comparative negligence was approved in Kansas in an early case [8] but was later repudiated.[9] There has been a somewhat similar course of decision in Tennessee.[10] The doctrine of comparative negligence has been expressly disapproved in many cases.[11] The doctrine, perhaps,

[4] Galena, etc., R. R. Co. v. Jacobs, 20 Ill. 478, 496. Still earlier cases followed the general rule. Aurora Branch R. R. Co. v. Grimes, 13 Ill. 585.

[5] Ill. Cent. R. R. Co. v. Benton, 69 Ill. 174; Chicago, etc., R. R. Co. v. Donahue, 75 Ill. 106; Chicago, etc., R. R. Co. v. Hatch, 79 Ill. 137; Sterling Bridge Co. v. Pearl, 80 Ill. 251; Chicago, etc., R. R. Co. v. Harwood, 90 Ill. 425.

[6] Lake Shore, etc., Ry. Co. v. Hessions, 150 Ill. 546, 37 N. E. 905; Winona Coal Co. v. Holmquist, 152 Ill. 581, 38 N. E. 946; Lanark v. Dougherty, 153 Ill. 163, 38 N. E. 892; Macon v. Holcomb, 205 Ill. 643, 69 N. E. 79.

[7] Augusta, etc., R. R. Co. v. McElmurry, 24 Ga. 75, 80. See Atlanta, etc., Co. v. Wyly, 65 Ga. 120. By statute in this state the plaintiff may recover though guilty to some extent of contributory negligence but such negligence may go in mitigation of damages. Americus, etc., R. R. Co. v. Luckie, 87 Ga. 6, 13 S. E. 105; Central of Ga. Ry. Co. v. Tribble, 112 Ga. 803, 38 S. E. 356.

[8] Union Pac. R. R. Co. v. Rollins, 5 Kan. 167.

[9] Atchison, etc., R. R. Co. v. Morgan, 31 Kan. 77; Kansas, etc., Ry. Co. v. Peavy, 29 Kan. 169, 44 Am. Rep. 630; Atchison, etc., R. R. Co. v. Henry, 57 Kan. 154, 45 Pac. 576.

[10] Nashville, etc., R. R. Co. v. Smith, 6 Heisk. 174; Whirley v. Whitemore, 1 Head, 610; Nashville, etc., R. R. Co. v. Carroll, 6 Heisk. 347; Dusk v. Fitzhugh, 2 Lea, 307; Railway Co. v. Hall, 88 Tenn. 33, 12 S. W. 419.

[11] Sego v. Southern Pac. Co., 137 Cal. 405, 70 Pac. 279; Denver, etc., R. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. 211; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Banning v. Chicago, etc., Ry. Co., 89 Ia. 74, 56 N. W. 277; Matta v. Chicago, etc., Ry. Co., 69 Mich. 109, 37 N. W. 54; Hurt v. St. Louis, etc., Ry. Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; Culbertson v. Holliday, 50 Neb. 229, 69 N. W. 853; McAdoo v. Richmond, etc., R. R. Co., 105 N. C. 140, 11 S. E. 316; McDonald v. International, etc., Ry. Co., 86

necessarily inconsistent with ordinary care.[12]

§ 352. **Contributory negligence of children and other incompetents.** Very young children are held incapable of contributory negligence as matter of law.[13] Some authorities hold that this rule applies to all children under seven years of age,[14] and that children between seven and fourteen are presumed incapable of contributory negligence, but that the contrary may be shown.[15] But the general rule is that a child is required to exercise the degree of care which children of the same age ordinarily exercise under the same circumstances, taking into account the age, experience, capacity and understanding of the child.[16]

Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803; Missouri, etc., Ry. Co. v. Rodgers, 89 Tex. 675, 36 S. W. 243; Wolf v. Washington Ry. & Nav. Co., 37 Wash. 491, 79 Pac. 997; Tesch v. Milwaukee Elec. Ry. & Lt. Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618.

[12] Chicago, etc., R. R. Co. v. Randolph, 199 Ill. 126, 65 N. E. 142; Kansas, etc., Ry. Co. v. Peavy, 29 Kan. 169, 44 Am. Rep. 630; Houston, etc., Ry. Co. v. Gorbett, 49 Tex. 573; Dreher v. Fitchburg, 22 Wis. 675, 99 Am. Dec. 91; War v. Railway Co., 40 Wis. 35; Griffin v. Willow, 43 Wis. 509, 512.

[13] Children four years or younger. Crawford v. Southern Ry. Co., 106 Ga. 870, 32 S. E. 826; Chicago West Div. Ry. Co. v. Ryan, 131 Ill. 474, 23 N. E. 385; Indianapolis St. Ry. Co. v. Schomberg, 164 Ind. 111; South Covington, etc., St. Ry. Co. v. Herrklotz, 20 Ky. L. R. 750, 47 S. W. 265; Barnes v. Shreveport City Ry. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. Rep. 400; Shippy v. Au Sable, 85 Mich. 280, 48 N. W. 584; Macdonald v. O'Reilly, 45 Ore. 589, 78 Pac. 753; Summers v. Bergner Brewing Co., 143 Pa. St. 114, 22 Atl. 707, 24 Am. St. Rep. 518. So a child of five or six. American Tobacco Co. v. Polisco, 104 Va. 777; Gunn v. Ohio River R. R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575. Compare cases cited in following notes.

[14] Chicago City Ry. Co. v. Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 370, and cases cited; Illinois Cent. R. R. Co. v. Jernigan, 198 Ill. 297, 65 N. E. 88.

[15] Vicksburg v. McLain, 67 Miss. 4, 6 So. 774; Roanoke v. Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791; Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908.

[16] Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. 991; Pueblo Elec. St. Ry. Co. v. Sherman, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116; Rohloff v. Fair Haven, etc., R. R. Co., 76 Conn. 689, 58 Atl. 5; Western, etc., R. R. Co. v. Young, 83 Ga. 512; Central R. R., etc., Co. v. Rylee, 87 Ga. 491, 13 S. E. 584; Georgia Mid., etc., R. R.

no one is bound to take special care for such incompetents without he has notice of their infirmity.[18] Voluntary intoxication is no excuse for negligence and if one, by reason of such intoxication, exposes himself to danger and receives injuries which he could, and by the exercise of ordinary care would, have avoided if sober, he is guilty of contributory negligence and cannot recover for such injuries.[19] If the defendant knows of the intoxication he must exercise care accordingly.[20]

Co. v. Evans, 87 Ga. 673, 13 S. E. 580; Herrington v. Macon, 125 Ga. 58; Chicago, etc., R. R. Co. v. Becker, 76 Ill. 25; Illinois Cent. R. R. Co. v. Slater, 129 Ill. 91, 99, 21 N. E. 575; St. Louis, etc., Ry. Co. v. Valirius, 56 Ind. 511, 518; Fishburn v. Burlington, etc., Ry. Co., 127 Ia. 483; Kansas Pac. Ry. Co. v. Whipple, 39 Kan. 531, 540, 18 Pac. 730; Baltimore City Pass. Ry. Co. v. McDonnell, 43 Md. 534, 551; Hayes v. Norcross, 162 Mass. 546, 39 N. E. 282; Wright v. Detroit, etc., Ry. Co., 77 Mich. 123, 43 N. W. 765; Hepfel v. St. Paul, etc., Ry. Co., 49 Minn. 263, 51 N. W. 1049; Westbrook v. Mobile, etc., R. R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587; Holmes v. Missouri Pac. Ry. Co., 190 Mo. 98; Anderson v. Central R. R. Co., 68 N. J. L. 269, 53 Atl. 391; Stone v. Dry Dock, etc., R. R. Co., 115 N. Y. 104, 21 N. E. 712; Tucker v. New York Central, etc., R. R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 20 N. E. 466, 15 Am. St. Rep. 596, 3 L. R. A. 385; Schliger v. Northern Terminal Co., 43 Ore. 4, 72 Pac. 324; Dubiver v. City Ry. Co., 44 Ore. 227, 74 Pac. 915, 75 Pac. 693; Strawbridge v. Bradford, 128 Pa. St. 200, 18 Atl. 346, 15 Am. St. Rep. 670; Kelly v. Pittsburg, etc., Traction Co., 204 Pa. St. 623, 54 Atl. 482; Dynes v. Bromley, 208 Pa. St. 633, 57 Atl. 1123; Bridger v. Asheville, etc., R. R. Co., 27 S. C. 456; Queen v. Dayton C. & I. Co., 95 Tenn. 458, 32 S. W. 460; Avery v. Galveston, etc., Ry. Co., 81 Tex. 243, 16 S. W. 1015, 26 Am. St. Rep. 809; Young v. Clark, 16 Utah, 42, 50 Pac. 832; Roth v. Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855; Felton v. Aubrey, 74 Fed. 350, 20 C. C. A. 436; Shellaberger v. Fisher, 143 Fed. 937 (C. C. A.). A child of eight held guilty of contributory negligence in crossing before a street car. Poland v. Union R. R. Co., 26 R. I. 215.

[17] Worthington & Co. v. Mencer, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407.

[18] Ibid.

[19] Woods v. Board of Com'rs, 128 Ind. 289, 291; Illinois Cent. R. R. Co. v. Cragin, 71 Ill. 177, 181; Begeard v. Consol. Traction Co., 64

[20] Johnson v. Louisville, etc., R. R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39.

no answer to an action that the injured party, subsequent to the injury, was guilty of negligence which aggravated it, but any damage due to such negligence cannot be recovered.[21] The negligence that will constitute a defense must have concurred in producing the injury.

§ 354. **Imputed negligence—Parent and child.** In an action brought in New York for a negligent injury to a child two years of age, who was run over while at play in the public street, the court held that he was not entitled to recover, because it was negligent for him to be thus exposed to injury. It is true he was not of an age to be able to judge for himself whether or not the place was one of danger, but it was the duty of parents or others having charge of him to judge for him, and if they neglected this duty, their negligence was to be imputed to him.[22] This case has been followed as authority in several states,[23] but rejected in others. It was very soon questioned by

N. J. L. 316, 45 Atl. 620, 81 Am. St. Rep. 498, 49 L. R. A. 424; Smith v. Norfolk, etc., R. R. Co., 114 N. C. 728, 19 S. E. 863, 25 L. R. A. 287; Johnson v. Louisville, etc., R. R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39.

[21] Smithwick v. Hall & U. Co., 59 Conn. 261, 271, 21 Atl. 924; Georgia R. & B. Co. v. Eskew, 86 Ga. 641, 12 S. E. 1061; Illinois Cent. R. R. Co. v. Finnigan, 21 Ill. 646; Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Standard Oil Co. v. Bowker, 141 Ind. 12, 40 N. E. 128; Wright v. Ill., etc., Tel. Co., 20 Ia. 195; Sherman v. Fall Riv. Iron Works Co., 2 Allen, 524; Loeser v. Humphrey, 41 Ohio St. 378, 52 Am. Rep. 86; Gould v. McKenna, 86 Pa. St. 297; Bradford v. Downs, 126 Pa. St. 622, 17 Atl. 884; Wilmot v. Howard, 39 Vt. 447; Hathorn v. Richmond, 48 Vt. 557; Stebbins v. Central Vt. R. R. Co., 54 Vt. 464; Matthews v. Warner, 29 Gratt. 570; Page v. Sumpter, 53 Wis. 652.

[22] Hartfield v. Roper, 21 Wend 615, 34 Am. Dec. 273. See Mangam v. Brooklyn R. R. Co., 38 N. Y. 455, 98 Am. Dec. 66; Flynn v. Hatton, 4 Daly, 552.

[23] Wright v. Malden, etc., R. R. Co., 4 Allen, 283; Callahan v. Bean, 9 Allen, 401; Holly v. Boston Gas Light Co., 8 Gray, 123, 69 Am. Dec. 233; Lynch v. Smith, 104 Mass. 52, 6 Am. Rep. 188; Brown v. European, etc., R. R. Co., 58 Me. 384; Leslie v. Lewiston, 62 Me. 468; Pittsburgh, etc., R. R. Co. v. Vining, 27 Ind. 513, 92 Am. Dec. 269; Lafayette, etc., R. R. Co. v. Huffman, 28 Ind. 287, 92 Am. Dec. 318; Jeffersonville R. R. Co. v. Bowen, 40 Ind. 545; East Saginaw, etc., R. Co. v. Bohn, 27 Mich. 503; Karr v. Parks, 40 Cal. 188; Fitzgerald v. St. Paul, etc., Ry. Co., 29 Minn. 336, 43 Am. Rep. 212; Reed v. Min. St. Ry. Co., 34 Minn.

though a child or idiot, or lunatic may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger."[24] The conclusions in many other states have been to the same effect.[25] The law on the subject in this country is thus

557; Meeks v. South. Pac. R. R. Co., 52 Cal. 602; Cumberland v. Lottig, 95 Md. 42, 51 Atl. 841; Casey v. Smith, 152 Mass. 294, 25 N. E. 734, 23 Am. St. Rep. 842, 9 L. R. A. 259; Bamberger v. Citizens St. Ry. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486. See Leslie v. Lewiston, 62 Me. 468; Stillson v. Hannibal, etc., R. R. Co., 67 Mo. 671.

[24] Robinson v. Cone, 22 Vt. 213, 224, 54 Am. Dec. 67.

[25] Philadelphia, etc., R. R. Co. v. Kelly, 31 Pa. St. 372; Philadelphia, etc., R. R. Co. v. Spearen, 47 Pa. St. 300, 86 Am. Dec. 544; Oakland R. Co. v. Fielding, 48 Pa. St. 320; Nor. Penn. R. R. Co. v. Mahoney, 57 Pa. St. 187; Kay v. Penn. R. R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Bellefontaine, etc., R. R. Co. v. Snyder, 18 Ohio St. 399; Daley v. Norwich, etc., R. R. Co., 26 Conn. 591, 68 Am. Dec. 413; Norfolk, etc., R. R. Co. v. Ormsby, 27 Grat. 455; St. Paul v. Kuby, 8 Minn. 154; Cahill v. Eastman, 18 Minn. 324, 10 Am. Rep. 184; Whirley v. Whiteman, 1 Head, 610; Boland v. Missouri R. R. Co., 36 Mo. 484; Huff v. Ames, 16 Neb. 139, 49 Am. Rep. 716; Pratt, etc., Co. v. Brawley, 3 So. Rep. 556; Erie Pass. Ry. Co. v. Schuster, 113 Pa. St. 412, 57 Am. Rep. 471; Galveston, etc., Ry. Co. v. Moore, 59 Tex. 64, 46 Am. Rep. 265; St. Louis, etc., Ry. Co. v. Colum, 72 Ark. 1, 77 S. W. 596; Jacksonville Elec. Co. v. Adams (Fla.), 39 So. 183; Ferguson v. Columbus, etc., Ry. Co., 77 Ga. 102; Chicago City Ry. Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76; Evansville v. Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 68 Am. St. Rep. 218, 41 L. R. A. 728; Toner v. South Covington, etc., St. Ry. Co., 109 Ky. 41, 58 S. W. 439; South Covington, etc., St. Ry. Co. v. Herrklotz, 20 Ky. L. R. 750, 47 S. W. 265; Barnes v. Shreveport City Ry. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. Rep. 400; Shippy v. Au Sable, 85 Mich. 280, 48 N. W. 584; Westbrook v. Mobile, etc., R. R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587; Winters v. Kansas City Cable Ry. Co., 99 Mo 509, 12 S. W. 652, 17

to that of the New York courts.[26] In a suit by the parent in his own behalf for an injury to the child, the plaintiff's contributory negligence is a defense.[27]

§ 355. Imputed negligence generally. In general the negligence of third parties concurring with that of the defendant to produce an injury is no defense: it could at most only render the third party liable to be sued also as a joint wrong-doer.[28]

Am. St. Rep. 591, 6 L. R. A. 536; Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; Newman v. Phillipsburg Horse R. R. Co., 52 N. J. L. 446, 19 Atl. 1102, 8 L. R. A. 842; Bottoms v. Seaboard, etc., R. R. Co., 41 Am. St. Rep. 799, 25 L. R. A. 784; Norfolk, etc., R. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718; Roanoke v. Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791; Roth v. Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855.

[26] Waite v. Nor. East. R. Co., El. Bl. & El. 719, 728; Singleton v. Eastern Counties R. Co., 7 C. B. (N. S.) 287; Mangan v. Atterton, L. R. 1 Exch. 239. See Gardner v. Grace, 1 Fost. & F. 359.

[27] Frazer v. South., etc., R. R. Co., 81 Ala. 185, 60 Am. Rep. 145; Pratt Coal & I. Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751; Fox v. Oakland Con. St. Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Williams v. Texas, etc., Co., 60 Tex. 205; St. Louis, etc., Co. v. Freeman, 36 Ark. 41; Mayhew v. Burns, 103 Ind. 328; Cauley v. Pittsburgh, etc., Co., 95 Pa. St. 398; St. Louis, etc., Ry. Co. v. Colum, 72 Ark. 1, 77 S. W. 596; Atlanta, etc., Ry. Co. v. Gravitt, 93 Ga. 319, 20 S. E. 550, 44 Am. St. Rep. 149; Toner v. South Covington, etc., St. Ry. Co., 109 Ky. 41, 58 S. W. 439; Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321. So if the father entrusts his child to a third person, the latter's negligence will bar a suit for the father's benefit for injury to the child. Atlanta, etc., Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 149. The mother's negligence held no bar to a suit by the father. Donk Bros. C. & C. Co. v. Leavitt, 109 Ill. App. 385, citing as in point, Cleveland, etc., R. R. Co. v. Crawford, 24 Ohio St. 631; Wolf v. Lake Erie, etc., Ry. Co., 55 Ohio St. 517, 45 N. E. 708. *Contra*, Toner v. South Covington, etc., St. Ry. Co., 109 Ky. 41, 58 S. W. 439. Where a father sued for the death of his minor son employed as a brakeman, it was held that the son's negligence was a bar if the employment was with the consent of the father, otherwise not. Williams v. South & North Ala. R. R. Co., 91 Ala. 635, 9 So. 77. Where an infant of fourteen is employed with the consent of the father, both assume the ordinary risks of the service. Lovell v. De Bardelaben C. & I. Co., 90 Ala. 13, 7 So. 756.

[28] North Penn. R. Co. v. Mahoney, 57 Pa. St. 187; Cleveland, etc., R. R. Co. v. Terry, 8 Ohio St.

negligence concurred in producing the injury, this negligence has been held to be a bar to any recovery. In the leading English case the plaintiff, in alighting from a public omnibus, was knocked down and injured by an omnibus belonging to the defendant. The case was put to the jury under instructions that if it was found that the driver of each omnibus was guilty of negligence contributing to the injury, the plaintiff was not entitled to recover; he being so far identified with the driver of the vehicle he was riding in that he must be considered a party to the negligence.[29] The like rule has been laid down in many of the earlier cases in this country[30] and is still adhered to in Michigan[31] and, as applied to private vehicles, in Wisconsin, Nebraska and Montana.[32] Many states refused to follow the English case of *Thorogood v. Bryan* and the doctrine of that case is now generally repudiated, even in states which at first accepted it and the courts of this country, with the exceptions stated, hold

570; Pittsburgh, etc., R. Co. v. Spencer, 98 Ind. 186; Wabash, etc., Ry. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Consolidated Gas Co. v. Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603; Koelsch v. Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759.

[29] Thorogood v. Bryan, 8 C. B. 115. See, also, Bridge v. Grand Junction R. Co., 3 M. & W. 244; Child v. Hearn, L. R. 9 Exch. 176; Armstrong v. Lancashire, etc., R. Co., L. R. 10 Exch. 47.

[30] Lake Shore, etc., R. R. Co. v. Miller, 25 Mich. 274; Lockhart v. Lichtenthaler, 46 Pa. St. 151; Forks Township v. King, 84 Pa. St. 230; Phila., etc., R. R. Co. v. Boyer, 97 Pa. St. 91; Crescent v. Anderson, 114 Pa. St. 643, 60 Am. Rep. 367; Hershey v. Road Com'rs, 9 Atl Rep. 454 (Penn.); Payne v. Chicago, etc., R. R. Co., 39 Iowa, 523; Stafford v. Oskaloosa, 57 Ia. 748; Slater v. Burlington, etc., Co., 71 Ia. 209, 32 N. W. 264.

[31] Mullen v. Owosso, 100 Mich. 103, 58 N. W. 663, 43 Am. St. Rep. 436, 23 L. R. A. 696; Hills v. Foote, 125 Mich. 241, 84 N. W. 139. But the rule is not applied in case of a passenger on a steamboat. Cuddy v. Horn, 46 Mich. 596.

[32] Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 558; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Otis v. Janesville, 47 Wis. 422; Ritger v. Milwaukee, 99 Wis. 190, 74 N. W. 815; Lightfoot v. Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30; Whitaker v. Helena, 14 Mont. 124, 35 Pac. 904, 43 Am. St. Rep. 621; Omaha, etc., Ry. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599.

that the negligence of the driver of a vehicle will not be imputed to one riding therein, whether the vehicle is public or private.[33] *Thorogood v. Bryan* has been overruled in England, so that the case is now completely discredited.[34]

[33] The following cases include not only the case of ordinary vehicles, but street cars, steam cars, boats, etc.: Georgia Pac. Ry. Co. v. Hughes, 87 Ala. 610, 6 So. 413; Elyton Land Co. v. Mingea, 89 Ala. 521, 7 So. 666; Birmingham Ry. & Elec. Co. v. Baker, 132 Ala. 507, 31 So. 618; Thompkins v. Clay St. R. R. Co., 66 Cal. 163, 4 Pac. 1165; Railway Co. v. Harrell, 58 Ark. 454, 25 S. W. 117; Colorado, etc., Ry. Co. v. Thomas, 33 Colo. 517; Baltimore, etc., R. R. Co. v. Adams, 10 App. D. C. 97; Metropolitan St. R. R. Co. v. Powell, 89 Ga. 601, 16 S. E. 118; Roach v. Western, etc., R. R. Co., 93 Ga. 785, 21 S. E. 67; Wabash, etc., Ry. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Chicago, etc., R. R. Co. v. Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318; Springfield Consol. Ry. Co. v. Puntenny, 200 Ill. 9, 65 N. E. 442; Chicago Union Traction Co. v. Leach, 215 Ill. 184, 74 N. E. 119; Albion v. Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Brannen v. Kokomo, etc., Gravel Road Co., 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411; Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; Miller v. Louisville, etc., Ry. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416; Louisville, etc., Ry. Co. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Lake Shore, etc., Ry. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Nesbit v. Garner, 75 Ia. 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152; Larkin v. Burlington, etc., Ry. Co., 85 Ia. 492, 52 N. W. 480; Leavenworth v. Hatch, 57 Kan. 57, 45 Pac. 65, 57 Am. St. Rep. 309; Reading Tp. v. Telfer, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355; Holzab v. New Orleans, etc., Co., 38 La. Ann. 185, 58 Am. Rep. 177; State v. Boston, etc., R. R. Co., 80 Me. 430, 15 Atl. 36; Whitman v. Fisher, 98 Me 575, 57 Atl. 895; Philadelphia, etc., Co. v. Hogeland, 65 Md. 149; Baltimore, etc., R. R. Co. v. State, 79 Md. 335, 29 Atl. 518, 47 Am. St Rep. 415; United Rys. & Elec. Co. v. Biedler, 98 Md. 564, 56 Atl. 813; Randolph v. O'Riordon, 155 Mass. 331, 29 N. E. 583; Follman v. Mankato, 35 Minn. 522, 59 Am. Rep. 340; Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763; Alabama, etc., Ry. Co. v. Davis, 69 Miss. 444, 13 So. 693; Becke v. Missouri Pac. Ry. Co., 102 Mo. 544, 13 S. W. 1053; Sluder v. St Louis Transit Co., 189 Mo. 107, 88 S. W. 648; Noyes v. Boscawen, 64 N. H. 361, 10 Atl. 690, 10 Am. St Rep. 410; Bennett v. New Jersey R. R. Co., 36 N. J. L. 225; Mat thews v. Delaware, etc., R. R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R A. 261; Noonan v. Consol. Traction Co., 64 N. J. L. 579, 46 Atl. 770; Chapman v. New Haven, etc.,

[34] Mills v. Armstrong (The Bernina, L. R. 13 A. C. 1 (1888); The Bernina, L. R. 12 Prob. Div. 58.

must do so. Thus where the plaintiff was riding on the seat with the driver his failure to look or listen for a train when approaching a crossing will preclude his recovery for an injury received by colliding with the train.[35] If the driver is the plaintiff's servant or under his control, the negligence of the driver is imputable to the plaintiff.[36] So if the two are engaged in a

R. R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Colegrove v. New York, etc., R. R. Co., 20 N. Y. 492, 75 Am. Dec. 418; Robinson v. New York Cent. R. R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Masterson v. New York, etc., Co., 84 N. Y. 247, 38 Am. Rep. 510; Hoag v. New York Central, etc., R. R. Co., 111 N. Y. 199, 18 N. E. 648; Lewis v. Long Island R. R. Co., 162 N. Y. 52, 56 N. E. 548; Bailey v. Jourdan, 18 App. Div. 387, 46 N. Y. S. 399; Crampton v. Ivie Bros., 126 N. C. 894, 36 N. E. 351; Duval v. Atlantic Coast Line R. R. Co., 134 N. C. 331, 46 S. E. 750, 101 Am. St. Rep. 830, 65 L. R. A. 722; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558; Street Ry. Co. v. Eadie, 43 Ohio St. 91; Cincinnati St. Ry. Co. v. Wright, 54 Ohio St. 181, 43 N. E. 688, 32 L. R. A. 340; Dean v. Pennsylvania R. R. Co., 129 Pa. St. 514, 18 Atl. 718, 15 Am. St. Rep. 733, 6 L. R. A. 143; Bunting v. Hogsett, 139 Pa. St. 363, 21 Atl. 31, 23 Am. St. Rep. 192, 12 L. R. A. 268; O'Toole v. Pittsburgh, etc., R. R. Co., 158 Pa. St. 99, 27 Atl. 737, 38 Am. St. Rep. 830, 22 L. R. A. 606; Galveston, etc., Ry. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127; Markham v. Houston Direct Nav. Co., 73 Tex. 247, 11 S. W. 131; Gulf, etc., R. Co. v. Pendry, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. Rep. 125; New York, etc., R. R. Co. v. Cooper, 85 Va. 939, 9 S. E. 321; Atlantic, etc., R. R. Co. v. Ironmonger, 95 Va. 625, 29 S. E. 319; Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76; Little v. Hackett, 116 Ill. 366; Union Pac. Ry. Co. v. Lapsley, 51 Fed. 174, 2 C. C. A. 149; Pyle v. Clark, 79 Fed. 744, 25 C. C. A. 190. See McFadden v. Santa Ana, etc., Ry. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Joliet v. Seward, 86 Ill. 402, 29 Am. Rep. 35.

[35] Brickell v. New York, etc., R. R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648. To the same effect: Brannen v Kokomo, etc., 115 Ind. 115, 17 N. E. 202; Illinois Central R. R. Co. v. McLeod, 78 Miss. 334, 29 So. 76, 84 Am. St. Rep. 630, 52 L. R. A. 954; Dean v. Pennsylvania R. R. Co., 129 Pa. St. 514, 18 Atl. 718, 15 Am. St. Rep. 733, 6 L. R. A. 143.

[36] Read v. City & Suburban Ry. Co., 115 Ga. 366, 41 S. E. 629; Smith v. New York Central, etc., R. R. Co., 4 App. Div. 493, 38 N. Y. S. 666; Pennsylvania R. R. Co. v. Righter, 42 N. J. L. 180; Larkin v. Burlington, etc., Ry. Co., 85 Ia. 492, 52 N. W. 480.

ment of the vehicle.[37] "Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest or purpose appears, there is no sound principle upon which it can be held that one who is himself blameless and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law enjoined upon him."[38]

§ 356. Contracts against liability for negligence—Common carriers. The right of common carriers to agree for a limitation of their common-law liability has been supported in many cases, while their right to force contracts upon those who come to do business with them has been denied. The contracts are supported on the ground that the parties respectively have found it for their interest to make them, and no reason exists to preclude it.[40] But there may be contracts which, perhaps, public

[37] Roach v. Western, etc., R. R. Co., 93 Ga. 785, 21 S. E. 67; Donnelly v. Brooklyn, etc., Co., 109 N. Y. 16, 15 N. E. 733; New York, etc., R. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130; Boyden v. Fitchburg R. R. Co., 72 Vt. 89, 47 Atl. 409. "Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other in respect thereto." Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763.

[38] Knightstown v. Musgrove, 116 Ind. 121, 124, 18 N. E. 452, 9 Am. St. Rep. 827.

[40] Central R. R. & B. Co. v. Smithe, 85 Ala. 47, 4 So. 708; Mouton v. Louisville, etc., R. R. Co., 128 Ala. 537, 29 So. 602; Railway Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 38 Am. St. Rep. 230, 18 L. R. A. 527; Pacific Express Co. v. Wallace, 60 Ark. 100, 29 S. W. 32; Coupland v. Housatonic R. R. Co., 61 Conn. 531, 23 Atl. 870; Southern Ry. Co. v. White, 108 Ga. 201, 33 S. E. 952; Baxter v. Louisville, etc., Ry. Co., 165 Ill. 78, 45 N. E. 1003; Insurance Co. v. Lake Erie, etc., R. R. Co., 152 Ind. 333, 53 N. E. 382; Lake Erie,

only from liability for the inevitable risks attendant upon their business, but for risks from the negligence of themselves and their servants. In numerous cases it has been held that they could not by any stipulation relieve themselves from responsibility for injuries resulting from a want of ordinary care.[41]

etc., R. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138; Carpenter v. Eastern Ry. Co., 67 Minn. 188, 69 N. W. 720; Baltimore, etc., Exp. Co. v. Cooper, 66 Miss. 558, 6 So. 327, 14 Am. St. Rep. 586; Wilting v. St. Louis, etc., Ry. Co., 101 Mo. 631, 14 S. W. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602; Russell v. Erie R. R. Co., 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433; Park v. Preston, 108 N. Y. 434, 15 N. E. 705; Pennsylvania R. R. Co. v. Raiordon, 119 Pa. St. 577, 13 Atl. 324, 4 Am. Rep. 670; Merchants' Dispatch Trans. Co. v. Boch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; Louisville, etc., R. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Louisville, etc., R. R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; Lancaster Mills v. Merchants' Cotton Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586; Deming v. Merchants' Cotton Press Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Nashville, etc, Ry. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955; Gulf, etc., Ry. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419; Gulf, etc., Ry. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494; Gulf, etc., Ry. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; Davis v. Central Vt. R. R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; Cau v. Texas, etc., Ry. Co., 194 U. S. 427, 24 S. C. Rep. 663, 48 L. Ed. 1053; Charnock v. Texas, etc., Ry. Co., 194 U. S. 432, 24 S. C. 671, 48 L. Ed. 1057; New York, etc., R. R. Co. v. Sayles, 87 Fed. 444, 32 C. C. A. 485.

[41] Mobile, etc., R. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Alabama Gt. So. Ry. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211; California Powder Works v. Atlantic & Pac. R. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648; Union Pac. Ry. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986; Welch v. Boston, etc., R. R. Co., 41 Conn. 333; Central of Ga. Ry. Co. v. Liffman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Adams Exp. Co. v. Stettauers, 61 Ill. 184; Insurance Co. v. Lake Erie, etc., R. R. Co., 152 Ind. 333, 53 N. E. 382; Kansas City, etc., R. R. Co. v. Simpson, 30 Kan. 645; Orndorff v. Adams Exp. Co., 3 Bush, 194, 96 Am. Dec. 207; Sager v. Portsmouth, etc., R. R. Co., 31 Me. 228, 50 Am. Dec. 659; Smith v. Am. Exp. Co., 108 Mich. 572, 66 N. W. 479; Moulton v. St. Paul, etc., R. R. Co., 31 Minn. 85, 47 Am. Rep. 781; Whitesides v. Thurlkill, 20 Miss. 599, 51 Am.

declared by this court, in the absence of any statute controlling the subject, any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or his servants is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle on which the law of common carriers was established—the securing of the utmost care and diligence in the performance of their important duties to the public.''[42] Therefore, any general stipulation inserted in a carrier's bill of lading or receipt, by which the consignor is made to take upon himself the risks of conveyance, or any special risks like those of fire, will be read with an implied exception of injuries for the want of ordinary care on the part of the carrier himself or his servants.[43] And,

Dec. 128; Yazoo, etc., R. R. Co. v. Grant, 86 Miss. 565; Levering v. Union Trans. Co., 42 Mo. 88, 97 Am. Dec. 320; Welting v. St. Louis, etc., Ry. Co., 101 Mo 631, 14 S. W. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602; Nelson v. Great Northern R. R. Co., 28 Mont. 297, 72 Pac. 642; Atchison, etc., R. R. Co. v. Lawler, 40 Neb. 356, 58 N. W. 968; Russell v. Erie R. R. Co., 70 N. J. L. 808, 59 Atl. 150; Gardner v. Southern Ry. Co., 127 N. C. 293, 37 S. E. 328; Pittsburgh, etc., Ry. Co. v. Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732; Richmond v. Southern Pac. Co., 41 Ore. 54, 67 Pac. 947, 93 Am. St. Rep. 694, 57 L. R. A. 616; Goldey v. Pennsylvania R. R. Co., 30 Pa. St. 242, 72 Am. Dec. 703; Colton v. Cleveland, etc., R. R. Co., 67 Pa. St. 211, 5 Am. Rep. 424; Lackawana, etc., R. R. Co. v. Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168; Willcock v. Pennsylvania R. R. Co., 166 Pa. St. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228; Johnson v. Charleston, etc., Ry. Co., 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645; Merchants' Dispatch Trans. Co. v. Boch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; Louisville, etc., R. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Lancaster Mills v. Merchants' Cotton Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586; Missouri Pac. Ry. Co. v. Edwards, 78 Tex. 307, 14 S. W. 607; Richmond, etc., R. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; Abrams v. Milwaukee, etc., Ry. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55; Liverpool, etc., Co. v. Phenix Ins. Co., 129 U. S. 397, 9 S. C. Rep. 469, 32 L. Ed. 788; Chicago, etc., R. R. Co. v. Solan, 169 U. S. 133, 18 S. C. Rep. 552, 42 L. Ed. 688.

[42] Chicago, etc., R. R. Co. v. Solan, 169 U. S. 133, 135, 18 S. C. Rep. 552, 42 L. Ed. 688.

[43] New Jersey, etc., Co. v. Mer-

to limit his liability for negligence, applies as well to a partial limitation as to a total limitation. Any stipulation in the carrier's contract, the purpose and effect of which is to limit the liability of the carrier, in case of loss, to a sum less than the value of the property and fixed without any reference to such value, would seem to be clearly within the general rule and, therefore, void as against public policy.[45] But where the carrier graduates his compensation according to the value of the property and a contract is fairly made agreeing upon such value and the rate for transportation is based upon the valuation, the contract is binding and only the stipulated amount can be recovered, though it is less than the true value and the loss was due to negligence.[46] There is, however, much confusion in the au-

chants' Bank, 6 How. 344; York Co. v. Central R. R. Co., 3 Wall. 107; School Dist. v. Boston, etc., R. R. Co., 102 Mass. 552, 3 Am. Rep. 502; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Powell v. Pennsylvania R. R. Co., 32 Pa. St. 414, 75 Am. Dec. 564; Mo. Val. R. R. Co. v. Caldwell, 8 Kan. 244; N. O. Ins. Co. v. New Orleans, etc., R. R. Co., 20 La. Ann. 302; Erie, etc., Tr. Co. v. Dater, 91 Ill. 195; Merch. Desp. Tr. Co. v. Leysor, 89 Ill. 43; McFadden v. Miss. Pac. Ry. Co. 92 Mo. 343; California Powder Works v. Atlantic & Pac. R. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648.

[44] Amory Mfg. Co. v. Gulf, etc., Ry. Co., 89 Tex. 419, 37 S. W. 856, 59 Am. St. Rep. 65; Holmes v. No. G. L. S. S Co., 100 App. Div. 36, 90 N. Y. S. 834.

[45] Moulton v. St. Paul, etc., R. R. Co, 31 Minn. 85; Louisville, etc., R. R. Co. v. Wynn, 88 Tenn. 320; Chicago, etc., R. R. Co. v. Witty, 32 Neb. 275, 49 N. W. 183; Chicago, etc., R. R. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417; Kansas City, etc., R. R. Co. v. Simpson, 30 Kan. 645; Louisville, etc., R. R. Co. v. Owens, 93 Ky. 201, 19 S. W. 590; McFadden v. Missouri Pac. R. R. Co., 92 Mo. 343; Southern Pac. R. R. Co. v. Maddox, 75 Tex. 300, 12 S. W. 815; Chesapeake, etc., Ry. Co. v. Bensley, 104 Va. 788; Ullman v. Chicago, etc., Ry. Co., 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949, 56 L. R. A. 246.

[46] Louisville, etc., R. R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29; Coupland v. Housatonic R. R. Co., 61 Conn. 531, 23 Atl. 870; Pacific Exp. Co. v. Foley, 46 Kan. 457, 26 Pac. 665, 26 Am. St. Rep. 107; Brehme v. Adams Express Co., 25 Md. 328; Graves v. Lake Shore, etc., R. R. Co., 137 Mass. 33; Hill v. Boston, etc., R. R. Co., 144 Mass. 284; Graves v. Adams Exp. Co., 176 Mass. 280, 57 N. E. 462; Smith v. Am. Exp. Co., 108 Mich. 572, 66 N. W. 479; Alair v. Northern Pac. R. R. Co., 53 Minn. 160,

tion limiting the amount of recovery or fixing the value of the property is held valid in one jurisdiction and void in others.[47]

Carriers of passengers, it is also held, cannot relieve them-

54 N. W. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764; J. J. Douglas Co. v. Minn. Transfer Ry. Co., 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860; Kellerman v. Kansas City, etc., R. R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Duntley v. Boston, etc., R. R. Co., 66 N. H. 263, 20 Atl. 327, 49 Am. St. Rep. 610, 9 L. R. A. 449; Belger v. Dinsmore, 51 N. Y. 166; Zimmer v. New York Central, etc., R. R. Co., 137 N. Y. 460, 33 N. E. 642; Gardner v. Southern Ry. Co., 127 N. C. 293, 37 S. E. 328; Baltimore, etc., R. R. Co. v. Hubbard, 72 Ohio St. 302; Ballou v. Earle, 17 R. I. 441, 22 Atl. 1113, 33 Am. St. Rep. 881, 14 L. R. A. 433; Elkins v. Empire Trans. Co., *81 Pa. St. 315; Johnstone v. Richmond, etc., R. R. Co., 39 S. C. 55, 17 S. E. 512; Levy v. Southern Exp. Co., 4 Rich. 234; Louisville, etc., R. R. Co. v. Stowell, 90 Tenn. 17, 15 S. W. 837; Richmond, etc., R. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; Hill v. Northern Pac. Ry. Co., 33 Wash. 697, 74 Pac. 1054; Zouch v. Chesapeake, etc., Ry. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116; Loeser v. Chicago, etc., Ry. Co., 94 Wis 571, 69 N. W. 372; Hart v. Pennsylvania Co., 112 U. S. 331.

[47] Stipulation held valid: South & North Ala. R. R. Co. v. Harlein, 56 Ala. 368; Western Ry. of Ala. v. Harwell, 91 Ala. 340, 8 So. 649, 11 So. 781; St. Louis, etc., R. R. Co. v. Lesser, 46 Ark. 236; St. Louis, etc., R. R. Co. v. Weakley, 50 Ark. 397; Lawrence v. New York, etc., R. R. Co., 36 Conn. 63; Oppenheimer v. U. S. Express Co., 69 Ill. 62; Gerry v. Am. Exp. Co., 100 Me. 519; Squire v. New York Central R. R. Co., 98 Mass. 239; Harvey v. Terre Haute, etc., R. R. Co., 74 Mo. 538; Durgin v. Am. Exp. Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; Steers v. Liverpool, etc., S. S. Co., 57 N. Y. 1; Tewes v. North German Lloyd S. S. Co., 186 N. Y. 151; Bowman v. Am. Exp. Co., 21 Wis. 152; Calderon v. Atlas S. S. Co., 170 U. S. 272, 18 S. C. Rep. 588. Stipulation held invalid: Georgia Southern R. R. Co. v. Hughart, 90 Ala. 36, 8 So. 623; Southern Ry. Co. v. Jones, 132 Ala. 437, 31 So. 501; Overland Mail & Exp. Co. v. Carroll, 7 Colo. 43; Boscowitz v. Adams Exp. Co., 93 Ill. 523; Rosenfield v. Peoria, etc., R. R. Co., 103 Ind. 121; Kansas City, etc., R. R. Co. v. Rodebaugh, 38 Kan. 45; Adams Express Co. v. Hoeing, 88 Ky. 373; Boehl v. Chicago, etc., R. R. Co., 44 Minn. 191, 43 N. W. 333; Chicago, etc., R. R. Co. v. Abels, 60 Miss. 1017; Illinois Central R. R. Co. v. Bogard, 78 Miss. 11, 27 So. 879; Chicago, etc., R. R. Co. v. Gardnier, 51 Neb. 70, 70 N. W. 508; Union Pac. Ry. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457; United States Exp. Co. v. Backman, 28 Ohio St. 144; Pittsburgh, etc., Ry. Co v. Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep

otherwise giving a consideration for their carriage, as in the case of "drover's passes," which are given without extra charge to those who accompany consignments of cattle and the like.[48] Where transportation is absolutely free, as where a pass is given as a mere matter of courtesy, or favor, the authorities are divided as to whether the carrier may stipulate for exemption from negligence. Perhaps the weight of authority is in favor of

732; Normile v. Oregon Nav. Co., 41 Ore. 177, 69 Pac. 928; Grogan v. Adams Exp. Co., 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360; Weiller v. Pennsylvania R. R. Co., 134 Pa. St. 310, 19 Atl. 702, 19 Am. St. Rep. 700; Willcock v. Pennsylvania R. R. Co., 166 Pa. St. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228; Louisville, etc., R. R. Co. v. Gilbert, 88 Tenn. 430; Missouri Pac. Ry. Co. v. Edwards, 78 Tex. 307, 14 S. W. 607; Galveston, etc., Ry. Co. v. Ball, 80 Tex. 602, 16 S. W. 441; Fort Worth, etc., Ry. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; Black v. Goodrich Trans. Co., 55 Wis. 319.

[48] Flynn v. Phila., etc., R. R. Co., 1 Houst. 469; Illinois Cent. R. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210; Illinois Cent. R. R. Co. v. Anderson, 184 Ill. 294, 307, 56 N. E. 331; Ohio, etc., R. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Solan v. Chicago, etc., Ry. Co., 95 Ia. 260, 63 N. W. 692; Tibby v. Mo. Pac. Ry. Co., 82 Mo. 292; Carroll v. Mo. Pac. Ry. Co., 88 Mo. 239, 57 Am. Rep. 382; Cleveland, etc., R. R. Co. v. Curran, 19 Ohio St. 1; Pennsylvania R. R. Co. v. McCloskey, 23 Pa. St. 526; Missouri Pac. Ry. Co. v. Cornwall, 70 Tex. 611, 8 S. W. 312; Missouri Pac. Ry. Co. Ivy, 71 Tex. 409; Saunders v. Southern Pac. Co., 13 Utah, 275, 44 Pac. 932; Nelson v. Southern Pac. Co., 18 Utah, 244, 55 Pac. 364; Spriggs v. Rutland R. R. Co., 77 Vt. 347; Lawson v. Chicago, etc., Ry. Co., 64 Wis. 447, 54 Am. Rep. 634; Davis v. Chicago, etc., Ry. Co., 93 Wis. 470, 67 N. W. 16; Railroad Co. v. Lockwood, 17 Wall. 357; Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 296; Railway Co. v. Stevens, 95 U. S. 655. See Gardner v. New Haven, etc., R. R. Co., 51 Conn. 143, 50 Am. Rep. 12; Poucher v. N. Y. Cent. R. R. Co., 49 N. Y. 263, 10 Am Rep. 364. The carrier does not escape liability to a U. S. mail agent for negligence, by which he is injured in the course of his duty, because he has a pass with an exemption clause endorsed on it. Seybolt v. New York, etc., Co., 95 N. Y. 562, 47 Am. Rep. 75. So of Pullman porter. Jones v. St. Louis S. W. Ry. Co., 125 Mo. 666, 28 S. W. 883, 46 Am. St. Rep. 514, 26 L. R. A. 718. In Massachusetts an express messenger riding under a release contract in a baggage car is held bound by the contract if injured there. Bates v. Old Colony R. R. Co., 147 Mass. 255, 17 N. E. 633.

most of the arguments against that right in case of paid transportation apply with equal force in case of free transportation In order to secure exemption there must be an express contract to that effect.[51] A gratuitous passenger, in the absence of such stipulation is entitled to the same care as one who pays fare.[52] In Illinois it is held that the carrier, in case of gratuitous transportation, may stipulate against liability for all except gross negligence.[53] Some courts recognize a distinction between the carrier's personal negligence and the negligence of his agents and servants, holding that he may contract against liability for

[49] Griswold v. New York, etc., R. R. Co., 53 Conn. 371, 55 Am. Rep. 115; Rogers v. Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; Payne v. Terre Haute, etc., Ry. Co., 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472; Higgins v. New Orleans, etc., R. R. Co., 28 La. Ann. 133; Quimby v. Boston, etc., R. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Kinney v. Central R. R. Co., 32 N. J. L. 407; S. C., 34 N. J. L. 513, 3 Am. Rep. 265; Bissell v. N. Y. Cent. R. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; Wells v. New York Cent. R. R. Co., 24 N. Y. 181; Perkins v. N. Y. Cent. R. R. Co., 24 N. Y. 196, 82 Am. Dec. 281; Smith v. N. Y. Cent. R. R. Co., 24 N. Y. 222; Ulrich v. New York Central, etc., R. R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. Rep. 369; Muldoon v. Seattle City Ry. Co., 7 Wash. 528, 35 Pac. 422, 38 Am. St. Rep. 901, 22 L. R. A. 794; Muldoon v. Seattle City Ry. Co., 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787; Gallin v. London, etc., Ry. Co., L. R. 10 Q. B. 212.

[50] Indiana Cent. R. R. Co. v. Mundy, 21 Ind. 48; Louisville, etc., Ry. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Rose v. Des Moines Val. R. R. Co., 39 Ia. 246; Jacobus v. St. Paul, etc., Ry. Co., 20 Minn. 125; Gradin v. St. Paul, etc., Ry. Co., 30 Minn. 217; McNeill v. Dunham, etc., R. R. Co., 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227, overruling S. C. in 132 N. C. 510, 44 S. E. 39, 95 Am. St. Rep. 641; Pennsylvania R. R. Co. v. Butler, 57 Pa. St. 335; Prince v. International, etc., R. R. Co., 64 Tex. 144; Gulf, etc., Ry. Co. v. McGown, 65 Tex. 640.

[51] Holsoffer v. Rome, etc., R. R. Co., 86 N. Y. 275; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394.

[52] Philadelphia, etc., R. R. Co. v. Derby, 14 How. 468; Sherman v. Hannibal, etc., R. R. Co., 72 Mo. 62.

[53] Chicago, etc., R. R. Co. v. Hawk, 36 Ill. App. 327, 332; Illinois Cent. R. R. Co. v. Read, 37 Ill. 484; Arnold v. Illinois Cent. R. R. Co., 83 Ill. 273. Compare Illinois Cent. R. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210; Illinois Cent. R. R. Co. v. Anderson, 184 Ill. 294, 56 N. E. 331.

portation of the country is done by corporations and is managed by their agents and servants, this distinction can have little practical effect.

§ 357. **Same—Telegraph companies.** It is customary for telegraph companies to send messages subject to a condition that they shall not be responsible for errors or delays, unless the message is repeated at the sender's cost. Some courts hold that this is a reasonable and valid stipulation or regulation, and that one, who does not have his message repeated, is bound by the stipulation and cannot recover for errors or delay though due to the negligence of the company, its agents or servants.[55] But the weight of authority is decidedly the other way and such stipulations are held to be contrary to public policy and without force to shield the companies from responsibility for negligence.[56] In California and Nebraska the stipulation is held to be good, ex-

[54] See New York and New Jersey cases cited in note 49; also Jones v. St. Louis, etc., R. R. Co., 125 Mo. 666, 28 S. W. 883.

[55] Camp v. Western U. Tel. Co., 1 Met. (Ky.) 164, 71 Am Dec. 461; Ellis v. American Tel. Co., 13 Allen, 226; Grinnell v. Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Clement v. Western Union Tel. Co., 137 Mass. 463; Western Union Tel. Co. v. Carew, 15 Mich. 524; Birkett v. Western Union Tel. Co., 103 Mich. 361, 61 N. W. 645; Breese v. U. S. Tel. Co., 48 N. Y. 132, 8 Am. Rep 526; Kiley v. Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75; Passmore v. Western Union Tel. Co., 78 Pa. St. 238; Western Union Tel. Co. v. Stevenson, 128 Pa. St. 442; Primrose v. Western Union Tel. Co., 154 U. S. 1, 14 S. C. Rep. 1098; Baxter v. Dominion Tel. Co., 37 U. C. Q. B. 470; McAndrews v. Elec. Tel. Co., 17 C. B. 3. See United States Tel. Co. v. Gildersleeve, 29 Md. 232.

[56] Western Union Tel. Co. v. Way, 83 Ala. 542, 4 So. 844; American Union Tel. Co v. Daughtery, 89 Ala. 191, 7 So. 660; Western Union Tel. Co. v. Crawford, 110 Ala. 46, 20 So. 111; Western Union Tel. Co. v. Chamblee, 122 Ala. 428, 25 So. 232, 82 Am. St. Rep. 89; Western Union Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 Am. St. Rep. 744; Western Union Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Tyler v. Western Union Tel. Co., 60 Ill. 421; Western Union Tel. Co. v. Tyler, 74 Ill. 168; Western Union Tel. Co. v. Berckman, 35 Ind. 429, 9 Am. Rep 744; Western Union Tel. Co. v. Adams, 87 Ind. 598, 44 Am. Rep. 776; Western Union Tel. Co. v. Meredith, 95 Ind. 93; Wheatland v. Ill. & M. Tel. Co., 27 Ia. 433; Western Union Tel. Co. v. Crall, 38 Kan. 679; Western Union

is held to be on the plaintiff to bring his case within the exception.[57] The stipulation is held to have no application when there is a failure to deliver or a failure to send at all.[58] It is also customary for such companies to send night messages at half rates, on condition that they shall not be liable for errors or delay in the transmission or delivery of the same, beyond the amount paid for the message or, it may be, beyond ten times that amount. This form of stipulation is uniformly held to be invalid as against negligence.[59] In Texas it is held that the stipulation both as to unrepeated messages and as to half rate messages is valid and binding, except the failure is due to misconduct, fraud or want of due care on the part of the company.[60] An error in transmit-

Tel. Co. v. Howell, 38 Kan. 685; Ayer v. Western Union Tel. Co., 79 Me. 493; Reed v. Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492, overruling Warm v. Western Union Tel. Co., 37 Mo. 472, 90 Am. Dec. 395; Brown v. Postal Tel. Co., 111 N. C. 187, 16 S. E. 179; Sherrill v. Western Union Tel. Co., 116 N. C. 655, 21 S. E. 429; Telegraph Co. v. Griswold, 37 Ohio St. 301; Marr v. Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 490; Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; Wertz v. Western Union Tel. Co., 7 Utah, 446, 29 Pac. 172; Wertz v. Western Union Tel. Co., 8 Utah, 499, 33 Pac. 136; Gillis v. Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611; Thompson v. Western Union Tel. Co., 64 Wis. 531, 54 Am. Rep. 641.

[57] Hart v. Western Union Tel. Co., 66 Cal. 579, 56 Am. Rep. 119; Redington v. Pac. Postal Tel. Co., 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132; Becker v. Western Union Tel. Co., 11 Neb. 87, 38 Am. Rep. 356.

[58] Western Union Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; Gulf, etc., Co. v. Wilson, 69 Tex. 739, 7 S. W. 653; Birney v. New York, etc., Tel. Co., 18 Md. 341; Beatty L. Co. v. Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

[59] Western Union Tel. Co. v. Fontaine, 58 Ga. 433; Western Union Tel. Co. v. Fenton, 52 Ind. 1; Western Union Tel. Co. v. Meek, 49 Ind. 53; Harkness v. Western Union Tel. Co., 73 Ia. 190, 34 N. W. 811; Garrett v. Western Union Tel. Co., 83 Ia. 257, 49 N. W. 88; Smith v. Western Union Tel. Co., 83 Ky. 104; True v. International Tel. Co., 60 Me. 9; Bartlett v. Western Union Tel. Co., 62 Me. 209; Fowler v. Western Union Tel. Co., 80 Me. 381, 15 Atl. 29; Aiken v. Telegraph Co., 5 S. C. 335; Hibbard v. Western Union Tel. Co., 33 Wis. 558; Candee v. Western Union Tel. Co., 34 Wis. 471.

[60] Western Union Tel. Co. v. Neill, 57 Tex. 283; Womack v.

graph cases are, on the whole, strongly against the right of a party to contract against liability for the negligence of himself or his servants.

§ 358. Same—Other cases. The cases of carriers and telegraph companies have been specifically mentioned, because it is chiefly in these cases that contracts against liability for negligence are met with. But although the reasons which forbid such contracts have special force in the business of carrying persons and goods, and of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct. A contract exempting the master from liability to his servant for negligence is of this character and is void.[62]

Western Union Tel. Co., 58 Tex. 176; Western Union Tel. Co. v. Edsall, 63 Tex. 668; Gulf, etc., Ry. Co. v. Wilson, 69 Tex. 739; Western Union Tel. Co. v. Hearne, 77 Tex. 83, 13 S. W. 970.

[61] Ibid. A stipulation requiring a claim for damages to be presented within sixty days held to be reasonable and valid. Western Union Tel. Co. v. Meredith, 95 Ind. 93; Young v. Western Union Tel. Co., 65 N. Y. 163; Wolf v. Western Union Tel. Co., 62 Pa. St. 83; Western Union Tel. Co. v. Stevenson, 128 Pa. St. 442; Kirby v. Western Union Tel. Co., 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612; S. C. on rehearing, 7 S. D. 623, 65 N. W. 37. So of thirty days and twenty days. Aiken v. Telegraph Co., 5 S. C. 358; Western Union Tel. Co. v. Culberson, 79 Tex. 65, 15 S. W. 219.

[62] A contract exempting the master from liability to his servant for negligence is void. N. N. & N. V. Co. v. Eifort, 15 Ky. L. R. 600; Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149; Johnston v. Fargo, 184 N. Y. 379. See Starr v. Great Northern Ry. Co., 67 Minn. 18, 69 N. W. 632. Where a railroad company permits an elevator to be built on its right of way, it may stipulate that it shall not be liable for its destruction by fire even by its own negligence. Griswold v. Illinois Central Ry. Co., 90 Ia. 265, 57 N. W. 843; Greenwich Ins. Co. v. Louisville, etc., R. R. Co., 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 99 Am. St. Rep. 313, 56 L. R. A. 477. A contract between a railroad company and a news company that the latter should indemnify the former for any loss which it might sustain by being held liable for injuries to its agents, was held valid in Kansas City, etc., R. R. Co. v. Southern Ry. News Co., 151 Mo. 373, 52 S. W. 205, 74 Am. St. Rep. 545, 45 L. R. A. 380. A contract which exempts one from liability for negligence will be strictly construed. Crew v. Bradstreet Co., 134 Pa.

When one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.[1] Thus, individuals holding a fair and erecting structures for the purpose are liable for injuries to their patrons caused by the breaking down of these structures through such defects in construction as the exercise of proper care would have avoided.[2]

St. 161, 19 Atl. 500, 19 Am. St. Rep. 681, 7 L. R. A. 661.

[1] Sloss Iron & Steel Co. v. Tilson, 141 Ala. 152; Grundel v. Union Iron Works, 141 Cal. 564, 75 Pac. 184; Atlanta Cotton Seed Oil Mills v. Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244; Archer v. Blalock, 97 Ga. 719, 25 S. E. 391; Hart v. Washington Park Club, 157 Ill. 9, 41 N. E. 620, 48 Am. St. Rep. 298, 29 L. R. A. 492; Mastin v. Levagood, 47 Kan. 36, 764, 27 Pac. 122, 28 Pac. 977, 27 Am. St. Rep. 277; People's Bank v. Morgolofski, 75 Md. 432, 23 Atl. 1027, 32 Am. St. Rep. 403; Elliott v. Pray, 10 Allen, 378; Thompson v. Lowell, etc., St. Ry. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345; Engel v. Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549; Brown v. Stevens, 136 Mich. 311, 99 N. W. 12; Massey v. Seller, 45 Ore. 267, 77 Pac. 397; Emery v. Minneapolis Industrial Exposition, 56 Minn. 460, 57 N. W. 1132; Lepnick v. Gaddis, 72 Miss. 200, 16 So. 213, 26 L. R. A. 686; Phillips v. Library Co., 55 N. J. L. 307, 27 Atl. 478; Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990; Hart v. Grennell, 122 N. Y. 371, 25 N. E. 354; Flynn v. Central R. R. Co., 142 N. Y. 439, 37 N. E. 514; Harriman v. Pittsburgh, etc., Ry. Co., 45 Ohio St. 11, 12 N. E. 451; League v. Stradley, 68 S. C. 515, 47 S. E. 975; Clapp v. La Grill, 103 Tenn. 164, 52 S. W. 134; Selinas v. Vt. State Agricultural Soc., 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114; Nichols v. Washington, etc., R. R. Co., 83 Va. 99, 5 S. E. 171, 5 Am. St. Rep. 257; Richmond, etc., Ry. Co. v. Moore, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; Barowski v. Schulz, 112 Wis. 415, 88 N. W. 236; Bennett v. Railroad Co., 102 U. S. 577; Bush v. Steinman, 1 B. & P. 404; Burgess v. Gray, 1 M., G. & S. 578; Randleson v. Murray, 8 Ad. & El. 109; Southcote v. Stanley, 1 H. & N. 247; S. C., 38 E. L. & Eq. 295; Indermaur v. Dames, L. R. 1 C. P. 274, and L. R. 2 C. P. 181; Pickard v. Smith, 10 C. B. (N. S.) 470; Francis v. Cockrell, L. R. 5 Q. B. 184. But the exercise of reasonable care is all that is required. One by inviting others upon his premises does not become an insurer of their safety. Flynn v. Central R. R. Co., 142 N. Y. 439, 37 N. E. 514.

[2] Latham v. Roach, 72 Ill. 179; Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. S. 788; Dunn v. Agri-

to use due care to protect those who come from injury, not only from defects in the premises but also from other dangers arising from the use of the premises by himself or his licensees.[3] A railroad company is liable to a hackman doing business with it, who steps without fault into a cavity negligently left by it in its platform, whereby he is injured,[4] and to people who, coming to the station to welcome an arrival, are injured by the giving way of the platform.[5] And, generally, the keeper of a store or other place of business to which the public are invited, is bound to exercise due care to keep his premises and the approaches thereto

cultural Society, 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754.

[3] Schofield v. Wood, 170 Mass. 415, 49 N. E. 636; Thompson v. Lowell, etc., St. Ry. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345; Mastad v. Swedish Brethren, 83 Minn. 40, 85 N. W. 513, 85 Am. St. Rep. 446, 53 L. R. A. 803; Curran v. Olson, 88 Minn. 307, 92 N. W. 1124, 97 Am. St. Rep. 517, 60 L. R. A. 733; Brotherton v. Manhattan Beach Imp. Co., 48 Neb. 563, 67 N. W. 479, 58 Am. St. Rep. 709, 33 L. R. A. 598; Brotherton v. Manhattan Beach Imp. Co., 50 Neb. 214, 69 N. W. 757; Dinnihan v. Lake Ontario Beach Imp. Co., 8 App. Div. 509, 40 N. Y. S. 764; Rommel v. Schambacher, 120 Pa. St. 579, 11 Atl. 779, 6 Am. St. Rep. 732; Boyce v. Union Pac. Ry. Co., 8 Utah, 353, 31 Pac. 450, 18 L. R. A. 509; Selinas v. Vt. State Agricultural Soc., 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114; Richmond, etc., Ry. Co. v. Moore, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258.

[4] Tobin v. Portland, etc., R. R. Co., 59 Me. 183, 8 Am. Rep. 415. See Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295. So to one who had brought meals to railway mail clerks at station for eight years, and was injured by obstructions on platform. Illinois Central R. R. Co. v. Hopkins, 100 Ill. App. 594. But one who is about to do business with a railroad company at its office is a mere licensee, if injured in its yard, when his business did not call him there. Diebold v. Penn. R. R. Co., 50 N. J. L. 478, 14 Atl. 576. So is one who, having missed a train, waits about the station for a horse car. Heinlein v. Boston, etc., Ry. Co., 147 Mass. 136, 16 Atl. 698.

[5] McKone v. Mich. Centr. R. R. Co., 51 Mich. 601, 47 Am. Rep. 596; Gillis v. Penn. R. R. Co., 59 Penn. St. 129, 98 Am. Dec. 317; Hamilton v. Texas, etc., Ry. Co., 64 Tex. 251, 53 Am. Rep. 756; Holmes v. N. E. Ry. Co., L. R. 4 Exch. 254; Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 S. C. Rep. 619, 38 L. Ed. 434.

tained in consequence of a failure so to do.[6]

In such cases the plaintiff must not only show an invitation express or implied, but also that at the time the injury was received he was in a part into which he was invited to go and that he was using the premises in a manner authorized by the invitation.[7] An invitation may be inferred when there is a common interest or mutual advantage, a license when the object is the mere pleasure or benefit of the person using it.[8] The status of

[6] Malone v. Hawley, 46 Cal. 409; Rosenberg v. Durfee, 87 Cal. 545, 26 Pac. 793; Atlanta Cotton Seed Oil Mills v. Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244; Archer v. Blalock, 97 Ga. 719, 25 S E. 391; Fairbank v. Hoentzsche, 73 Ill. 236; Nave v. Flack, 90 Ind. 205, 46 Am. Rep. 205; Brosnan v. Sweetser, 127 Ind. 1, 26 N. E. 555; Burk v. Walsh, 118 Ia. 397, 92 N. W. 65; Stratton v. Staples, 59 Me. 94; Foran v. Rodick, 90 Me. 276, 38 Atl. 175; Elliott v. Pray, 10 Allen, 378; Gilbert v. Nagle, 118 Mass. 278; McIntire v. Roberts, 149 Mass. 450, 22 N. E. 13, 14 Am. St. Rep. 432, 4 L R. A. 519; Little v. Holyoke, 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 417; Toland v. Paine Furn. Co., 179 Mass 501, 61 N. E. 52; Lepnick v. Gaddis, 72 Miss. 200, 16 So. 213, 26 L. R. A. 686; True v. Meredith Creamery Co., 72 N. H. 154, 55 Atl. 893; Totten v. Phipps, 52 N. Y. 354; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; Swinarton v. Le Boutillier, 7 Misc. 639, 28 N. Y. S. 53; Hydraulic Works v. Orr, 83 Pa. St. 332; Schilling v. Abernethy, 112 Pa. St. 437; Clapp v. Mear, 134 Pa. St. 203, 19 Atl. 504; Freer v. Cameron, 4 Rich. 228, 55 Am. Dec. 663; League v. Stradley, 68 S. C. 515, 47 S. E. 975; Rosenbaum v. Shoffner, 98 Tenn. 624, 40 S. W. 1086; Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; Chapman v. Rothwell, El., Bl. & El. 168. So a church is liable to a member of another society attending service by invitation for defects in its premises. Davis v. Centr. Cong. Soc., 129 Mass. 367, 37 Am. Rep. 368.

[7] Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; Holbrook v. Aldrich, 168 Mass. 15, 46 N. E. 115, 60 Am. St. Rep. 364, 36 L. R. A. 493; Ryerson v. Bathgate, 67 N. J. L. 337, 51 Atl. 708, 57 L. R. A. 307.

[8] Campbell, Neg. § 44, quoted and aproved in Bennett v. Railroad Co., 102 U. S. 577, 584, 585 and in Archer v. Union Pac. R. R. Co., 110 Mo. App. 349, 353. "One who puts a building or part of a building to use in a business, and fits it up so as to show the use to which it is adapted, impliedly invites all persons to come there whose coming is naturally incident to the prosecution of the business. If the place is open,

all parts of the same daily, is there at the implied invitation of the owner.[10] Though one is invited to go upon the defendant's premises on business, yet if a part is given over to repairs or building operations, the invitation is impliedly withdrawn as to such part, and one goes there at his own risk.[11]

§ 360. Liability to licensees and trespassers. One whose unenclosed grounds people cross without objection is not liable to one who falls into an unguarded cistern there.[12] The owner of a

and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. The mere fact that premises are fitted conveniently for use by the owner or his tenants, and by those who come to transact such business as is carried on there, does not constitute an implied invitation to strangers to come and use the place for purposes of their own. To such persons it gives no more than an implied license to come for any other purpose." Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463. The plaintiff wishing to visit a friend went to the wrong building and fell into an open elevator shaft. Held a licensee. McCarvell v. Sawyer, 173 Mass. 540, 54 N. E. 259, 73 Am. St. Rep. 318. The servant of an independent contractor engaged in papering certain rooms in the defendant's house, stepped out on a balcony, where his work did not require him to go but solely for his own convenience in calling to another workman, and was injured by the fall of the balcony. Held no liability. Smith v. Trimble, 111 Ky. 861, 64 S. W. 915. And see Barker v. Boston Elec. Lt. Co., 178 Mass. 503, 60 N. E. 2.

[9] See 2 Shear. & R. Neg. § 706; Burdick, Torts, p. 457.

[10] Anderson & Nelson Distilleries Co. v. Hair, 103 Ky. 196, 44 S. W. 658.

[11] Downes v. Elmira Bridge Co., 179 N. Y. 136, 141, 71 N. E. 743.

[12] Hargreaves v. Deacon, 25 Mich. 1; or into a pond of surface water. Klix v. Nieman, 68 Wis. 271, 32 N. W. 223; Schmidt v. Kansas City, etc., Co., 90 Mo. 284, 59 Am. Rep. 16; Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74; or a pit, Morgan v. Penn. etc., Co., 19 Blatchf. 239; Gramlich v. Wurst, 86 Pa. St. 74, 27 Am. Rep. 684; Early v. Lake Shore, etc., Co., 66 Mich. 349, 33 N. W. 813. But see Mackey v. Vicksburg, 64 Miss. 777; Evansville, etc., Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; Gillespie v. McGowan, 100 Pa. St. 144, 45 Am. Rep. 365. If one comes on premises to see for his own benefit a person employed there, he is not invited to enter. Galveston Oil Co. v. Morton, 70 Tex. 400, 7 S. W. 756; Dixon v. Swift, 98 Me 207, 56 Atl. 761.

dering about the vessel from curiosity, falls through a scuttle.[13] On the request of the principal of a school, the graduating class was permitted to visit the defendant's power house in order to examine its works and machinery. One of the class fell into a vat of hot water in a dimly lighted part of the building. The visitors were held to be mere licensees and the defendant was held to owe them no duty to make the premises safe for their use.[14] Firemen who enter a building in case of fire are licensees merely and the owner or occupant is not liable for their injury by reason of any defects or unguarded pitfalls, or other dangers.[15] And the general rule supported by the authorities is that the owner or occupant of premises owes no duty to licensees and trespassers, further than to refrain from willful acts of injury.[16]

[13] Severy v. Nickerson, 120 Mass. 306, 21 Am. Rep. 514. See, for cases like this in principle, Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; and Caniff v. Blanchard Nav. Co., 66 Mich. 638, 33 N. W. 744. So if without invitation a stranger goes aboard. Metcalfe v. Cunard S. S. Co., 147 Mass. 66, 16 N. E. 701.

[14] Benson v. Baltimore Traction Co., 77 Md. 535, 26 Atl. 973, 39 Am. St. Rep. 436, 20 L. R. A. 714.

[15] Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; Baker v. Otis Elevator Co., 78 App. Div. 513, 79 N. Y. S. 663; Eckes v. Stetler, 98 App. Div. 76, 90 N. Y. S. 473; Beehler v. Daniels, 18 R. I. 563, 29 Atl. 6, 49 Am. St. Rep. 790, 27 L. R. A. 512. It is held to make no difference that the negligence alleged is in leaving an elevator shaft unguarded in violation of an ordinance or statute, as such regulation is not for the benefit of firemen. Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350.

[16] Louisville, etc., R. R. Co. v. Sides, 129 Ala. 399, 29 So. 798; Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 Pac. 1001; Butler v. Lewman, 115 Ga. 752, 42 S. E. 98; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; Faris v. Hoberg, 134 Ind. 269, 276, 33 N. E. 1028, 39 Am. St. Rep. 261; Wagner v. Chicago, etc., Ry. Co., 124 Ia. 462, 100 N. W. 332; Lackart v. Lutz, 94 Ky. 287, 22 S. W. 218; Mergenthaler v. Kirby, 79 Md. 182, 28 Atl. 1065, 47 Am. St. Rep. 371; Zoebisch v. Tarbell, 10 Allen, 385, 87 Am. Dec. 660; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Sullivan v. Boston, etc., R. R. Co., 156 Mass. 378, 31

where the owner or occupant of premises maintains or permits thereon something attractive to children and also dangerous to

N. E. 128; Hart v. Cole, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557; Blatt v. McBarron, 161 Mass. 21, 36 N. E. 468, 42 Am. St. Rep. 385; Shea v. Gurney, 163 Mass. 184, 39 N. E. 996, 47 Am. St. Rep. 446; Blackston v. Chelmsford Foundry Co., 170 Mass. 321, 49 N. E. 635; Moffatt v. Kenny, 174 Mass. 311, 54 N. E. 850; Fornall v. Standard Oil Co., 127 Mich. 496, 86 N. W. 946; Trask v. Shotwell, 41 Minn. 66, 42 N. W. 699; Fredenburg v. Baer, 89 Minn. 241, 94 N. W. 683; Buch v. Amory Mfg. Co., 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163; Mathews v. Bensel, 51 N. J. L. 30, 16 Atl. 195; Fitzpatrick v. Cumberland Glass Mfg. Co., 61 N. J. L. 378, 39 Atl. 675; Cusick v. Adams, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772; Magar v. Hammond, 183 N. Y. 387; Emry v. Roanoke Nav., etc., Co., 111 N. C. 94, 16 S. E. 18, 17 L. R. A. 699; O'Leary v. Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677; Gramlich v. Wurst, 86 Pa. St. 74, 27 Am. Rep. 684; Gillespie v. McGowan, 100 Pa. St. 144, 45 Am. Rep. 365; Horstick v. Dunkle, 145 Pa. St. 220, 23 Atl. 378, 27 Am. St. Rep. 685; Magner v. Frankford Baptist Church, 174 Pa. St. 84, 34 Atl. 456; Clapp v. La Grill, 103 Tenn. 164, 52 S. W. 134; Williams v. Nashville, 106 Tenn. 533, 63 S. W. 231; Brehmer v. Lyman, 71 Vt. 98, 42 Atl. 613; Anderson v. Northern Pac. Ry. Co., 19 Wash. 340, 63 Pac. 345; Woolwine v. Chesapeake, etc., Ry. Co., 36 W. Va. 329, 15 S. E. 81, 32 Am. St. Rep. 859, 16 L. R. A. 271. In Louisiana it is held that where one knowingly leaves open his land under circumstances calculated to lead others to think that they are invited to use it, he impliedly invites the public to such use and is under a duty to keep it reasonably safe. Lawson v. Shreveport W. W. Co., 111 La. 73, 35 So. 390. Where the plaintiff's eye was put out by the explosion of a giant fire cracker in a show tent, the explosion being a part of the performance, it was held to be no defense that the plaintiff was a trespasser in the tent, he being one of the audience and his presence known. Herrick v. Wixom, 121 Mich. 384, 81 N. W. 333. The explosion of the cracker, under the circumstances, might be regarded as so reckless as to amount to a willful injury. As to trespassers on railroad tracks and cars, see: Georgia Pac. R. R. Co. v. Blanton, 84 Ala. 154, 4 So. 621; Louisville, etc., R. R. Co. v. Black, 89 Ala. 313, 8 So. 246; Toomey v. Southern Pac. R. R. Co., 86 Cal. 374, 24 Pac. 1074, 10 L. R. A. 139; Snyder v. Natchez, etc., R. R. Co., 42 La. Ann. 302, 7 So. 582; Kelly v. Mich. Cent. R. R. Co., 65 Mich. 186, 31 N. W. 904, 8 Am. St. Rep. 876; Hepfel v. St. Paul, etc., Ry. Co., 49 Minn. 263, 51 N. W. 1049; Barker v. Hannibal, etc., R. R. Co., 98 Mo.

without anything to warn them or keep them out of the danger. What are known as the "turntable cases" are of this character. A railroad turntable is a machine attractive to children and a dangerous plaything, and to leave one in a place frequented by children unlocked and unguarded is held to be negligence, that will render the company liable to a child injured while playing thereon and who is too young to appreciate the danger and take care of himself.[17] The rule has been extended to dangerous machinery in general.[18] "To impose the duty of care, the machine must be such that it is dangerous for very young children to play with or about it; it must be of such character that such children would naturally be attracted to play with or about it, and it

50, 11 S. W. 254; Smalley v. Southern Ry. Co., 57 S. C. 243, 35 S. E. 489; Seaboard, etc., R. R. Co. v. Joyner, 92 Va. 354, 23 S. E. 773; Tucker v. Norfolk, etc., R. R. Co., 92 Va. 549, 24 S. E. 229; Washington v. Quayle, 95 Va. 741, 30 S. E. 391; O. R. & N. Co. v. Egley, 2 Wash. 409, 26 Pac. 973. Where people are accustomed to cross a track on the private property of the company with its knowledge, they are not trespassers. Cahill v. Chicago, etc., R. R. Co., 74 Fed. 285, 20 C. C. A. 184; Felton v. Ambrey, 74 Fed. 350, 20 C. C. A. 436.

[17] Barrett v. Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; Callahan v. Eel River, etc., R. R. Co., 92 Cal. 89, 28 Pac. 104; Ferguson v. Columbus, etc., Ry. Co., 77 Ga. 102; Kansas Central Ry. Co. v. Fitzsimmons, 22 Kan. 686; Keffe v. Milwaukee, etc., Ry. Co., 21 Minn. 207; O'Malley v. St. Paul, etc., Ry. Co., 43 Minn. 289, 45 N. W. 440; Koons v. St. Louis, etc., R. R. Co., 65 Mo. 592; Nagel v. Missouri Pac. R. R. Co., 75 Mo. 653; Chicago, etc., R. R. Co. v. Krayenbuhl, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920; Railroad Co. v. Cargille, 105 Tenn. 628, 59 S. W. 141; Evanisch v. Gulf, etc., Ry. Co., 57 Tex. 126; Houston, etc., R. R. Co. v. Simpson, 60 Tex. 103; Gulf, etc., R. R. Co. v. Styson, 66 Tex. 421; Gulf, etc., Ry. Co. v. McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755; San Antonio, etc., Ry. Co. v. Morgan, 92 Tex. 98, 46 S. W. 28; Ilwaco Ry. & Nav. Co. v. Hedrich, 1 Wash. 446, 25 Pac. 335, 346, 22 Am. St. Rep. 169; Railroad Co. v. Stout 17 Wall. 657.

[18] Barrett v. Southern Pac. Co., 91 Cal. 296, 303, 27 Pac. 666, 25 Am. St. Rep. 186; Coppner v. Penn. etc., Co., 12 Ill. App. 600; Osage City v. Larkin, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56; Consolidated E. L. & P. Co. v. Healy, 65 Kan. 798, 70 Pac. 884; Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154.

come for that purpose.''[19] The exception has been extended in some cases to a pond of water or to any dangerous agency permitted to exist on one's lot and calculated to attract children.[20] Other cases go further and hold that an owner or occupant of property is liable for injuries to children trespassing upon his private ground, when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature and exposed and open condition of something thereon, which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs.[21] But the trend of authority is against any extension of the exception exemplified in the turntable cases,[22] and many courts repudiate even that exception.[23]

[19] O'Malley v. St. Paul, etc., Ry. Co., 43 Minn. 289, 291, 292, 45 N. W. 440.

[20] Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114; Kansas City v. Seise, 71 Kan. 283, 80 Pac. 626; Omaha v. Richards, 50 Neb. 804, 70 N. W. 363.

[21] Brinkley Car Co. v. Cooper, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216; S. C., Brinkley Car Co. v. Cooper, 70 Ark. 331, 67 S. W. 752, 57 L. R. A. 724; Kinchlow v. Midland Elevator Co., 57 Kan. 374, 46 Pac. 703; Penso v. McCormick, 125 Ind. 116, 25 N. E. 156, 9 L. R. A. 313; Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321. See Holt v. Spokane, etc., Ry. Co., 3 Idaho, 703, 35 Pac. 39.

[22] Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106; Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; O'Connor v. Brucker, 117 Ga. 451, 43 S. E. 731; American A. & D. P. Co., 100 Ill. App. 452; Northwestern El. R. R. Co. v. O'Malley, 107 Ill. App. 599; Talty v. Atlantic, 92 Ia. 135, 60 N.

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[23] Daniels v. New York, etc., R. R. Co., 154 Mass. 349, 28 N. E. 283; Frost v. Eastern R. R. Co., 64 N. H. 220, 9 Atl. 790; Turess v. New York, etc., R. R. Co., 61 N. J. L. 314, 40 Atl. 614; Delaware, etc., R. R. Co. v. Reich, 61 N. J. L. 635, 40 Atl. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831; Walsh v. Fitchburg R. R. Co., 145 N. Y. 301, 39 N. E. 1068, 45 Am. St. Rep. 615, 27 L. R. A. 724; Bates v. Railway Co., 90 Tenn. 36, 15 S. W. 1069, 25 Am. St. Rep. 665; Dobbins v. Missouri, etc., Ry. Co., 91 Tex. 60, 64, 41 S. W. 62, 66 Am. St. Rep. 856, 38 L. R. A. 573. And see Ryan v. Towar, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310; Paolino v. McKendall, 24 R. I. 432, 53 Atl. 268, 96 Am. St. Rep. 736, 60 L. R. A. 133.

landlord, by his covenants with his tenants, assumes the obligation of repairs, he is responsible for any injuries consequent upon his failure to make them, not to the tenants merely, but to third persons lawfully coming upon the premises.[24] And so if there are concealed defects about the premises which are known to the lessor and which a careful examination would not disclose to the

W. 516; Schauf's Admr. v. Paducah, 106 Ky. 228, 50 S. W. 42, 90 Am. St. Rep. 220; Sullivan v. Boston, etc., R. R. Co., 156 Mass. 378, 31 N. E. 128; Formall v. Standard Oil Co., 127 Mich. 496, 86 N. W. 946; Ryan v. Towar, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310; Peninsular Trust Co. v. Grand Rapids, 131 Mich. 571, 92 N. W. 38; Rattle v. Dawson, 50 Minn. 450, 52 N. W. 965; Stendal v. Boyd, 73 Minn. 53, 75 N. W. 735, 72 Am. St. Rep. 597, 42 L. R. A. 88; Dehanitz v. St. Paul, 73 Minn. 385, 76 N. W. 48; White v. Stifel, 126 Mo. 295, 28 S. W. 891, 47 Am. St. Rep. 668; Moran v. Pullman P. C. Co., 134 Mo. 641, 36 S. W. 659, 56 Am. St. Rep. 543, 33 L. R. A. 755; Arnold v. St. Louis, 152 Mo. 173, 53 S. W. 900, 75 Am. St. Rep. 447, 48 L. R. A. 291; Driscoll v. Clark, 32 Mont. 172; Richards v. Connell, 45 Neb. 467, 63 N. W. 915; Omaha v. Bowman, 52 Neb. 293, 72 N. W. 316, 66 Am. St. Rep. 506, 40 L. R. A. 531; Haack v. Brooklyn Labor Lyceum Ass'n, 44 Misc. 273, 89 N. Y. S. 888; Ann Arbor R. R. Co. v. Kinz, 68 Ohio St. 210, 67 N. E. 479; Gillespie v. McGowan, 100 Pa. St. 144, 45 Am. Rep. 365; Rodgers v. Lees, 140 Pa. St. 475, 21 Atl. 399, 23 Am. St. Rep. 250, 12 L. R. A. 216; Poalino v. McKendall, 24 R. I. 432, 53 Atl. 268, 96 Am. St. Rep. 736, 60 L. R. A. 133; Cooper v. Overton, 102 Tenn. 211, 52 S. W. 183, 73 Am. St. Rep. 864, 45 L. R. A. 591; Missouri, etc., Ry. Co. v. Edwards, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825; North Tex. Con. Co. v. Bostick, 98 Tex. 239; Curtis v. Tenino Stone Quarries, 37 Wash. 355, 79 Pac. 955; Harris v. Cowles, 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep. 747; Uthermohlen v. Bogg's Run Co., 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 911. And see Heimann v. Kinnare, 190 Ill. 156, 60 N. E. 215, 83 Am. St. Rep. 123, 52 L. R. A. 652; Norman v. Bartholomew, 104 Ill. App. 667; Donk Bros. C. & C. Co. v. Leavitt, 109 Ill. App. 385; Chicago, etc., R. R. Co. v. Bockhoven, 53 Kan. 279, 36 Pac. 322; Price v. Atchison Water Co., 58 Kan. 551, 50 Pac. 882, 62 Am. St. Rep. 625; Kaumeier v. City Elec. Ry. Co., 116 Mich. 306, 74 N. W. 481, 72 Am. St. Rep. 525, 40 L. R. A. 385; Gunderson v. N. W. Elevator Co., 47 Minn. 161, 49 N. W. 694.

[24] Campbell v. Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767; Stack v. Harris, 111 Ga. 149, 36 S. E. 615; Looney v. McLean, 129 Mass. 33, 39 Am. Rep. 295.

known by the exercise of reasonable care.[26] Other cases hold that the owner in such cases is not liable if he did not have knowledge and there was no concealment on his part.[27] The mere letting without additional stipulations by the lessor, simply implies that he holds the title and that the lessee shall quietly enjoy the use and occupation during his tenancy; and not that the premises are or shall be in any particular condition or state of re-

[25] Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117; Cutter v. Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; Martin v. Richards, 155 Mass. 381, 29 N. E. 591, 16 L. R. A. 400; Sunasack v. Morey, 196 Ill. 569, 63 N. E. 1039. *Contra*, Land v. Fitzgerald, 68 N. J. L. 28, 52 Atl. 229. If the defects are obvious the lessor is not liable. Davidson v. Fischer, 11 Colo. 583, 19 Pac. 652, 7 Am. St. Rep. 267; Freeman v. Hunnewell, 163 Mass. 210, 39 N. E. 1012; Booth v. Merriam, 155 Mass. 521, 30 N. E. 85; Eyre v. Jordan, 111 Mo. 424, 19 S. W. 1095, 33 Am. St. Rep. 543.

[26] State v. Boyce, 73 Md. 469, 21 Atl. 322; Quigley v. Johns Mfg. Co., 26 App. Div. 434, 50 N. Y. S. 98; Hines v. Willcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824; S. C. on rehearing, 96 Tenn. 328, 34 S. W. 420; Sternberg v. Willcox, 96 Tenn. 163, 33 S. W. 917, 34 L. R. A. 615; S. C. on rehearing, 96 Tenn. 328, 34 S. W. 420; Willcox v. Hines, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761; Willcox v. Hines, 100 Tenn. 538, 46 S. W. 297, 66 Am. St. Rep. 770, 41 L. R. A. 278. The above cases from Tennessee arose out of the same accident in which a tenant and members of his family and guests were injured by the fall of a back porch and a recovery was sustained. It is said that these cases go to the limit and that if the lessor is ignorant of the defect without fault he is not liable. Schmalzried v. White, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782. The guest of a tenant has no greater right than the tenant. Roche v. Sawyer, 176 Mass. 71, 57 N. E. 216, 78 Am. St. Rep. 471; Jordan v. Sullivan, 181 Mass. 348, 63 N. E. 909. So of a servant of the tenant. Whitmore v. Orono Pulp & Paper Co., 91 Me. 297, 39 Atl. 1032, 64 Am. St. Rep. 229, 40 L. R. A. 377.

[27] Whitmore v. Orono P. & P. Co., 91 Me. 297, 39 Atl. 1032, 64 Am. St. Rep. 229, 40 L. R. A. 377; Whitley v. McLaughlin, 183 Mo. 160, 81 S. W. 1094, 66 L. R. A. 484; Shinkle, W. & K. Co. v. Birney, 68 Ohio St. 328, 67 N. E. 715; Shackford v. Coffin, 95 Me. 69, 49 Atl. 57. See McConnel v. Lemley, 48 La. Ann. 1433, 20 So. 887, 55 Am. St. Rep. 319, 34 L. R. A. 609; Griffin v. Jackson Lt. & P. Co., 128 Mich. 653, 87 N. W. 888, 92 Am. St. Rep. 496, 55 L. R. A. 318.

part, or that they are suitable for the purpose for which they were let.[28] In case of office and apartment buildings the landlord must exercise due care to keep the halls, stairs, passage ways and like appurtenances reasonably safe for the tenants and their families and servants and for those who come to visit or transact business with them.[29] As a general rule the liability for dangerous premises is one that pertains to occupancy, rather than ownership.[30]

§ 363. **Hazardous undertakings—Setting fires.** Fire being a dangerous element, a degree of care is required in making use of it corresponding to the danger. The obligation of the party kindling it is well stated in a case in Maine. He must do it at a proper time and in a suitable manner, and use "reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet if he be guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and an injury is done in consequence

[28] McKenzie v. Cheetham, 83 Me. 543, 22 Atl. 469.

[29] Fisher v. Jansen, 30 Ill. App. 91; Foren v. Rodick, 90 Me. 276, 38 Atl. 175; People's Bank v. Morgolofski, 75 Md. 432, 23 Atl. 1027, 32 Am. St. Rep. 403; O'Malley v. Twenty-five Associates, 170 Mass. 471, 49 N. E. 641; Little v. Holyoke, 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 417; Gleason v. Boehm, 58 N. J. L. 475, 34 Atl. 886; Miller v. Hancock, (1893) 2 Q. B. 177; Washington Market Co. v. Clagett, 19 App. D. C. 12; Hirst v. Ringen Real Est. Co., 169 Mo. 194, 69 S. W. 368; Davis v. Pacific Power Co., 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156. The tenant takes the risk of such obvious defects in such halls and passageways as exist at the time of the demise. Quinn v. Perham 151 Mass. 162, 23 N. E. 735. Landlord need not keep halls lighted in absence of statute. Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; Brugher v. Buchtenkirch, 167 N. Y. 153, 60 N. E. 420; Capen v. Hall, 21 R. I. 364, 43 Atl. 847. But see Brugher v. Buchtenkirch, 29 App. Div. 342, 51 N. Y. S. 464. Those who go into such a building out of curiosity, or for some purpose of their own not connected with the occupants or with any business carried on there are mere licensees. Hart v. Cole, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557; Ganley v. Hall, 168 Mass. 513, 47 N. E. 416.

[30] Rich v. Basterfield, 4 M. G. & S. 783.

proof establishes gross negligence or only a want of ordinary care on the part of defendant."[31] But there must be some evidence which will warrant imputing the injury to the negligence or misconduct of the defendant or his servants, and the burden is upon the plaintiff to make this showing.[32] The plaintiff makes out this part of his case by showing that the fire was kindled when and where it would be likely to spread as it did, or pass beyond control, or that it was left without proper care afterwards.[33]

[31] Hewey v. Nourse, 54 Me. 256, citing Barnard v. Poor, 21 Pick. 378, Bachelder v. Heagan, 18 Me. 30; Tourtellot v. Rosebrook, 11 Met. 462; Dean v. McCarty, 2 Up. Can. Q. B. 448. And see Clark v. San Francisco, etc., Ry. Co., 142 Cal. 614, 76 Pac. 507; Regan v. New York, etc., R. R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306; Sweeney v. Merrill, 38 Kan. 216, 16 Pac. 454; Polzen v. Morse, 91 Mich. 208, 51 N. W. 940; Needham v. King, 95 Mich. 303, 54 N. W. 891; Bolton v. Calkins, 102 Mich. 69, 60 N. W. 297; Kelley v. Anderson, 15 S. D. 107, 87 N. W. 579.

[32] Clark v. Foot, 8 Johns. 421; Hanlon v. Ingram, 3 Iowa, 81; Gagg v. Vetter, 41 Ind. 228, 13 Am. Rep. 322; Clealand v. Thornton, 43 Cal. 437; Stuart v. Hawley, 22 Barb. 619; Teall v. Barton, 40 Barb. 137; Calkins v. Barger, 44 Barb. 424; Miller v. Martin, 16 Mo. 508, 57 Am. Dec. 242; Averitt v. Murrell, 4 Jones (N. C.) 322; Fahn v. Reichart, 8 Wis. 255, 76 Am. Dec. 237. If there was no negligence there is no liability; Garnier v. Porter, 90 Cal. 105, 27 Pac. 55; Sweeney v. Merrill, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734; Atchison, etc., R. R. Co. v. Dennis, 38 Kan. 424, 17 Pac. 153; Hitchcock v. Riley, 44 Misc. 260, 89 N. Y. S. 890; Warden v. Millar, 112 Wis. 67, 87 N. W. 828.

[33] Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63; Cleland v. Thornton, 43 Cal. 437; Garrett v. Freeman, 5 Jones (N. C.) 78; Hewey v. Nourse, 54 Me. 257; Fahn v. Reichart, 8 Wis. 255, 76 Am. Dec. 237; Barnard v. Poor, 21 Pick. 378; Jacobs v. Andrews, 4 Iowa, 506; St. Louis S. W. Ry. Co. v. Ford, 65 Ark. 96, 45 S. W. 55; Louisville, etc., Ry. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750; Needham v. King, 95 Mich. 303, 54 N. W. 891; Jesperson v. Phillips, 46 Minn. 147, 48 N. W. 770. Where the defendant went to sleep in his own barn with a lighted pipe in his mouth, whereby his barn was set on fire, and the fire was communicated to and destroyed the plaintiff's buildings, he was held liable Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381. Leaving an oil can on a hot stove is evidence of negligence. Read v. Penn. R. R. Co., 44 N. J. L. 280.

ter's business, and acting within the general scope of the employment, it is no excuse for the master that the servant departed from his instructions in doing so.[34] A case of spontaneous combustion may be one of negligent fire, if ignition was reasonably to be looked for.[35] It is immaterial whether the fire spreads by running along the ground or by sparks or brands being carried through the air by the wind.[36] Where the setting of fires is prohibited by statute, a violation of the statute renders one liable for all consequences.[37]

§ 364. Fires communicated by machinery. Steam machinery is so exceedingly liable to cause unintentional fires that special precautions are required to prevent them. But where the use is lawful, the principles already mentioned apply. If fires are kindled by sparks or otherwise in the use of it, no action lies unless negligence appears.[38] But it is negligence if those employing such machinery fail to make use of improved appliances for arresting sparks, or if the machinery, by reason of being unsuitable or out of order, is likely to scatter fire.[39] Those using such

[34] Johnson v. Barber, 10 Ill. 425; Armstrong v. Cooley, 10 Ill. 509. Compare Wilson v. Peverly, 2 N. H. 548; Garrett v. Freeman, 5 Jones (N. C.) 78; Wickham v. Wolcott, 1 Neb. (Unof.) 160, 95 N. W. 366; Andrews v. Green, 62 N. H. 436. But for negligence of an independent contractor in clearing land the owner is not liable. Ferguson v. Hubbell, 97 N. Y. 507, 49 Am. Rep. 544.

[35] Vaughan v. Menlove, 3 Bing. (N. C.) 468.

[36] Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63; Ayer v. Starkey, 30 Conn. 304; Chicago, etc., R. R. Co. v. Williams, 131 Ind. 30, 30 N. E. 696; Cincinnati, etc., R. R. Co. v. Baker, 94 Ky. 71, 21 S. W. 347; Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381.

[37] Thoburn v. Campbell, 80 Ia. 338, 45 N. W. 769; Ellsworth v. Ellingson, 96 Ia. 154, 64 N. W. 774; Burton v. McClellan, 3 Ill. 434.

[38] Burroughs v. Housatonic, etc., R. R. Co., 15 Conn. 124, 38 Am. Dec. 64; Hoyt v. Jeffers, 30 Mich. 181; Jeffries v. Philadelphia, etc., R. R. Co., 3 Houst. 447. See Huyett v. Philadelphia, etc., R. R. Co., 23 Pa. St. 373; McCready v. Sou. Car. R. R. Co., 2 Strob. 356; Hull v Sac. Val. R. R. Co., 14 Cal. 387, 73 Am. Dec. 656; Sheldon v. Hud. Riv. R. R. Co., 29 Barb. 226; Hinds v. Barton, 25 N. Y. 544; Flinn v. New York Cent. R. R. Co., 142 N. Y. 11, 36 N. E. 1046; Lienallen v. Mosgrove, 37 Ore., 446, 61 Pac. 1022.

[39] Ill. Cent. R. R. Co. v. McClelland, 42 Ill. 355; Frankford,

of railroad engines it has been repeatedly decided that the fact that fire had been communicated by them to the premises of individuals is sufficient to raise a presumption that the railroad company was not employing the best known contrivances to retain the fire and to make out a *prima facie* case of negligence.[41]

It is held to be negligent in a railroad company to leave grass and other combustibles lying along the track, where they are peculiarly liable to take fire by falling sparks or coals.[42] The rules

etc., Co. v. Philadelphia, etc., R. R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Hoyt v. Jeffers, 30 Mich. 181; Anderson v. Cape Fear Steamboat Co., 64 N. C. 399; Southern Ry. Co. v. Wilson, 138 Ala. 510, 35 So. 561; John Monat Lumber Co. v. Wilmore, 15 Colo. 136, 25 Pac. 556; Hubbard v. New York, etc., R. R. Co., 70 Conn. 563, 40 Atl. 533; American Strawboard Co. v. Chicago, etc., R. R. Co., 177 Ill. 513, 53 N. E. 97; Chicago, etc., R. R. Co. v Williams, 131 Ind 30, 30 N. E. 696; Richardson v. Douglass, 100 Ia. 239, 69 N. W. 530; Cincinnati, etc., R. R. Co. v. Baker, 94 Ky. 71, 21 S. W. 347; York v. Cleaves, 97 Me. 413, 54 Atl. 915; Webster v. Symes, 109 Mich. 1, 66 N. W. 580; Mobile, etc., R. R. Co. v. Stinson, 74 Miss. 453, 21 So. 14, 522; Watt v. Nevada Cent. R. R. Co., 22 Nev. 154, 46 Pac. 52, 726; Blue v. Aberdeen, etc., R. R. Co., 117 N. C. 644, 23 S. E. 275; Railroad Co. v. Short, 110 Tenn. 713, 77 S. W. 936; Collins v. George, 102 Va. 509, 46 S. E. 684.

[40] Martin v. McCrary, 115 Tenn. 316.

[41] Pigott v. East. Counties R., 3 C. B. 229; Ill. Cent. R. R. Co. v. Mills, 42 Ill. 407; Ellis v. Portsmouth, etc., R. R. Co., 2 Ired. 138; Galpin v. Chicago, etc., R. R. Co., 19 Wis. 638; Brusberg v. Milw., etc., Ry. Co., 55 Wis. 106; Miller v. St. Louis, etc., Ry. Co., 90 Mo. 389; St. Louis, etc., Ry. Co. v. Ayres, 67 Ark. 371, 55 S. W. 159; Greenfield v. Chicago, etc., Ry. Co., 83 Ia. 270, 49 N. W. 95; Fort Scott, etc., Ry. Co. v. Tubbs, 47 Kan. 630, 28 Pac. 612; Raleigh Hosiery Co. v. Raleigh, etc., R. R. Co., 131 N. C. 238, 42 S. E. 602; Johnson v. Northern Pac. R. R. Co., 1 N. D. 354, 48 N. W. 227; Koontz v. Oregon Ry. & Nav. Co., 20 Ore. 3, 23 Pac. 820; Louisville, etc., R. R. Co. v. Reese, 85 Ala. 497, 5 So. 283, 7 Am. St. Rep. 66; Louisville, etc., R. R. Co. v. Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; Kelsey v. Chicago, etc., Ry. Co., 1 S. D. 80, 45 N. W. 204; Gulf, etc., Ry. Co. v. Johnson, 92 Tex. 591, 50 S. W. 563; Kimball v. Borden, 95 Va. 203, 28 S. E. 207.

[42] Flynn v. San Francisco, etc., R. R. Co., 40 Cal. 14, 6 Am. Rep. 595; Webb v. Rome, etc., R. R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Kellogg v. Chicago, etc., R. R. Co., 26 Wis. 223, 7 Am. Rep.

of contributory negligence apply here, as in other cases, but the fact that the neighboring land owner leaves grass and other combustibles on his premises, near the road, does not render him chargeable with contributory negligence; the obligation of care to prevent fires resting not upon him, but upon the company.[43] Nor is it contributory negligence to put up a building,[44] stack straw,[45] or leave cotton [46] near the track.[47] If the plaintiff could have put out the fire and makes no effort to do so, he cannot recover.[48] If the plaintiff sets a back fire to protect his property from an approaching fire due to the defendant's negligence and the two unite and burn his property, the liability of the defendant depends upon whether the plaintiff's property would have

69; Delaware, etc., R. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Ohio, etc., R. R. Co. v. Clutter, 82 Ill. 123; Troxler v. Richmond, etc., R. R. Co., 74 N. C. 377; Fort Worth, etc., R. R. Co. v. Hogsett, 67 Tex. 685; Jones v. Mich. Cent. R. R. Co., 59 Mich. 437; St. Johns, etc., R. R. Co. v. Ransom, 33 Fla. 406, 14 So. 892; Louisville, etc., Ry. Co. v. Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Livermon v. Roanoke, etc., R. R. Co., 131 N. C. 527, 42 S. E. 942; Richmond v. McNeill, 31 Ore. 342, 49 Pac. 879; New York, etc., R. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264.

[43] Flynn v. San Francisco, etc., R. R. Co., 40 Cal. 14, 6 Am. Rep. 595; Philadelphia, etc., R. R. Co. v. Hendrickson, 80 Penn. St. 183, 21 Am. Rep. 97; Delaware, etc., Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Fero v. Buffalo, etc., R. R. Co., 22 N. Y. 209, 78 Am. Dec. 178; Louisville, etc., R. R. Co. v. Malone, 116 Ala. 600, 22 So. 897; Cleveland, etc., Ry. Co. v. Stephens, 173 Ill. 430, 51 N. E. 69; Louisville, etc., Ry. Co. v. Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Fort Scott, etc., Ry. Co. v. Tubbs, 47 Kan. 630, 28 Pac. 612; Mobile, etc., R. R. Co. v. Stinson, 74 Miss. 453, 21 So. 14, 522; Tacoma L. & M. Co. v. Tacoma, 1 Wash. 12, 23 Pac. 929, 24 Pac. 29.

[44] Cleveland, etc., Ry. Co. v. Scantland, 151 Ind. 488, 51 N. E. 1068; Confer v. New York, etc., R. R. Co., 146 Pa. St. 31, 23 Atl. 202.

[45] American Strawboard Co. v. Chicago, etc., R. R. Co., 177 Ill. 513, 53 N. E. 97.

[46] Southern Ry. Co. v. Wilson, 138 Ala. 510, 35 So. 561; Railway Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43; Alabama, etc., Ry. Co. v. Fried, 81 Miss. 314, 33 So. 74; Railroad Co. v. Short, 110 Tenn. 713, 77 S. W. 936.

[47] See Omaha Fair Ass'n v. Missouri Pac. R. R. Co., 42 Neb. 105, 60 N. W. 330.

[48] Tatley v. Courter, 93 Mich. 473, 53 N. W. 621; Illinois Central R. R. Co. v. McKay, 69 Miss. 139, 12 So. 447; Eaton v. Oregon Ry. & Nav. Co., 19 Ore. 391, 24 Pac. 415.

in such a case, the united fires burned the property of a third party, the proximate cause of the loss was held to be the original fire and not the back fire.[50]

In some states statutes exist which either render railroad companies responsible for all injuries by fire originating with their engines, or which expressly impose upon them the burden of showing that the fire originated without negligence on their part.[51]

§ 365. Injuries by fire-arms and explosives. When one makes use of loaded weapons, he is responsible only as he might be for any negligent handling of dangerous machinery, that is to say, for a care proportioned to the danger of injury from it.[52] A high degree of care is necessary in the use or manipulation of loaded weapons in the presence or vicinity of other persons and where injury results from a failure to exercise such care the defendant is liable.[53] The firing of guns for sport or exercise is

[49] Thoburn v. Campbell, 80 Ia. 338, 45 N. W. 769.

[50] Owen v. Cook, 9 N. D. 134, 81 N. W. 285, 47 L. R. A. 646. See McKenna v. Boessler, 86 Ia. 197, 53 N. W. 103; Jesperson v. Phillips, 46 Minn. 147, 48 N. W. 770.

[51] See Lyman v. Boston, etc., R. R. Co., 4 Cush. 288; Hart v. Western R. R. Co., 13 Met. 99, 46 Am. Dec. 719; Ingersoll v. Stockbridge, etc., R. R. Co., 8 Allen, 438; Perley v. Eastern R. R. Co., 98 Mass. 414, 96 Am. Dec. 645; Chapman v. Atlantic, etc., R. R. Co., 37 Me. 92; Pratt v. Same, 42 Me. 579; Stearns v. Same, 46 Me. 95; Chicago, etc., R. R. Co. v. McCahill, 56 Ill. 28; Baltimore, etc., R. R. Co. v. Shipley, 39 Md. 251; Hooksett v. Concord, etc., R. R. Co., 38 N. H. 242; Rowell v. Railroad, 57 N. H. 132, 24 Am. Rep. 59; Grand Trunk R. Co. v. Richardson, 91 U. S. 454.

[52] Underwood v. Hewson, Stra. 596; Weaver v. Ward, Hob. 134; Chataigne v. Bergeron, 10 La. Ann. 699. See Sutton v. Bonnett, 114 Ind. 243, 16 N. E. 180.

[53] Glueck v. Scheld, 125 Cal. 288, 57 Pac. 1003; Thornton v. Me. State Ag. Soc., 97 Me. 108, 53 Atl. 979, 94 Am. St. Rep. 488; Hankins v. Watkins, 77 Hun, 360, 28 N. Y. S. 867; Winans v. Randolph, 169 Pa. St. 606, 32 Atl. 622; Tally v. Ayres, 3 Sneed, 677. In Cleghorn v. Thompson, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 442, defendant C worked for the other defendants at a slaughter house from which the ground rose to a highway seventy-five rods away. C fired a rifle at some dogs about seventy-five yards away and the ball after being widely deflected hit and killed a person on the highway. The person killed was far without the range of the rifle and the ball would naturally have

not unlawful if a suitable place is chosen for the purpose; but in the streets of a city, or in any place where many persons are congregated, it might be negligence in itself.[54] In New York a military officer has been held liable for negligence in ordering the firing of blank cartridges by the men under his command, at an assembled crowd of people, whereby one of them was injured.[55] But the owner of a vessel is not responsible for an injury caused by the firing of a gun therefrom, where the firing was by one of the crew, not in the line of his employment and against the owner's orders.[56] An injury by a young child with a loaded gun placed in its hands negligently by another, is the wrong of the person putting it in his hands.[57] It has been held not to be negligent for a father to give his boy of nine or eleven a toy air gun,[58] but when he knows that the boy is careless and reckless in its use, it is negligence to permit him to keep it.[59]

The same rule applies to explosives as to firearms, and those who use such agencies in their business must exercise due care in their custody and use. Thus where railroad employes carelessly left a signal torpedo on the track at a crossing or place frequented by the public and a boy who picked it up and exploded it was injured, the company was held liable.[60] So where such

buried itself in the rise of ground. It was held as matter of law that there was no negligence and no liability.

[54] Welch v. Durand, 36 Conn. 182, 4 Am. Rep. 55; Jenne v. Sutton, 43 N. J. L. 257; Bissell v. Booker, 16 Ark. 308; Cole v. Fisher, 11 Mass. 137; Conklin v. Thompson, 29 Barb. 218.

[55] Castle v. Duryee, 2 Keyes, 169.

[56] Haack v. Fearing, 5 Rob. 528.

[57] Dixon v. Bell, 5 M. & S. 198; S. C., 1 Stark, 287; Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013, 53 L. R. A. 789. But it is not ordinarily negligence for a father to give his seventeen-year old son a 22-rifle. Taylor v. Seil, 120 Wis. 32, 97 N. W. 498. See Palm v. Ivorson, 117 Ill. App. 535.

[58] Chaddock v. Plummer, 88 Mich. 225, 50 N. W. 135, 26 Am. St. Rep. 223; Harris v. Cameron 81 Wis. 239, 51 N. W. 437, 29 Am St. Rep. 891. In both these cases the gun was loaned to another boy who did the mischief.

[59] Johnson v. Glidden, 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep 795.

[60] Harriman v. Railway Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Pittsburgh, etc., Ry Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840 8 L. R. A. 464; Cleveland, etc., R. R. Co. v. Marsh, 63 Ohio St. 236 58 N. E. 821, 52 L. R. A. 142

charge and persons lawfully in the vicinity were injured.[61] But where a boy, walking along a track at a distance from any station or crossing, picked up a torpedo and was injured by exploding it, the company was held not liable, as the company was not bound to keep its track safe for trespassers.[62] A contractor for street work left dynamite sticks half buried in a vacant lot where children were accustomed to play, whereby one of them was injured. He was held liable.[63] So where the defendant negligently left an explosive cartridge in a public alley.[64] But in all such cases some negligence on the part of the defendant in the custody or use of the article must be shown, or no recovery can be had.[65]

If one deliver to a carrier explosive articles for transportation, without disclosing what they are, he will be responsible to parties injured if an explosion takes place.[66] If the carrier is in-

But where a boy of eight found such a torpedo on the track at a crossing and was injured by exploding it; the company was held not liable, though there was evidence to show that a brakeman threw the torpedo at a flagman who tossed it back to the brakeman and, the latter failing to catch it, it fell to the ground and was left there. The act of the brakeman was held not to be within the scope of his employment and the fact of the torpedo being found on the crossing was held not to be evidence of negligence. Obertoni v. Boston, etc., R. R. Co., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422.

[61] Euting v. Chicago, etc., Ry. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158; Euting v. Chicago, etc., Ry. Co., 120 Wis. 651, 98 N. W. 944. *Contra*, Sullivan v. Louisville, etc., R. R. Co., 115 Ky. 447, 74 S. W. 171.

[62] Hughes v. Boston, etc., R. R. Co., 71 N. H. 279, 51 Atl. 1070, 93 Am. St. Rep. 518.

[63] Nelson v. McLellan, 31 Wash. 208, 71 Pac. 747, 96 Am. St. Rep. 902, 60 L. R. A. 793.

[64] Wells v. Gallagher, 144 Ala. 363.

[65] Affick v. Bates, 21 R. I. 281, 43 Atl. 539, 79 Am. St. Rep. 801. A child too young to understand the effects of exploding powder, and who injures himself therewith may have his action against the person who sold it to him. Carter v. Towne, 98 Mass. 567. It is a nuisance to explode fireworks in streets. Conklin v. Thompson, 29 Barb. 218.

[66] Williams v. East India Co., 3 East, 192; Farrant v. Barnes, 11 C. B. (N. S.) 553; Carter v Towne, 98 Mass. 567; Boston, etc. R. R. Co. v. Carney, 107 Mass 568; Standard Oil Co. v. Tierney, 92 Ky. 367, 17 S. W. 1025, 36 Am. St. Rep. 595, 14 L. R. A. 677; Standard Oil Co. v. Tierney, 96 Ky. 89, 27 S. W. 983. See Kil-

formed and the article properly marked the consignor is not liable.[67] If the carrier is not informed and there is nothing about the package to excite suspicion, the carrier will not be responsible for an explosion which results from handling the package in the usual manner of handling packages of like appearance.[68] It would probably be negligence for a carrier to knowingly permit fire works or other similar explosives to be carried in a passenger car or smoker, but to hold the carrier for an accident arising therefrom, knowledge or its equivalent would have to be shown.[69]

Steam boilers may be considered in this connection, as they are highly dangerous instruments, unless properly managed. The rule here is that of ordinary care, that is care in proportion to the danger, and where damage is done by the explosion of a boiler, there is no liability unless the explosion is due to negligence.[70] In Pennsylvania it is held that if the owner employs competent mechanics to make repairs when needed and competent persons to inspect the condition of his boilers at proper intervals, he has discharged his whole duty in the premises, and is not bound to see that the repairs are properly made or that the inspection is sufficient.[71] But the true rule would seem to be that the owner or person in possession of a boiler is under a positive duty to use due care to keep the boiler in a safe condition and that he must see that the duty is performed and that any negli-

bride v. Carbon Dioxide, etc., Co., 210 Pa. St. 552, 51 Atl. 347, 88 Am. St. Rep. 829.

[67] Standard Oil Co. v. Tierney, 92 Ky. 367, 17 S. W. 1025, 36 Am. St. Rep. 595, 14 L. R. A. 677. In this case the defendant shipped naphtha as "carbon oil" and the package was marked "Unsafe for illuminating purposes." It was held to be a question for the jury whether this was sufficient to give notice of the danger.

[68] Nitro Glycerine Case, 15 Wall. 524.

[69] East Indian Ry. Co. v. Mukerjee, (1901) A. C. 396.

[70] Marshall v. Welwood, 38 N. J. L. 339; Losee v. Buchanan, 51 N. Y. 476; Olive v. Whitney Marble Co., 103 N. Y. 292, 8 N. E. 552; Egan v. Dry Dock, etc., R. R. Co., 12 App. Div. 556, 42 N. Y. S. 188; Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613; Spencer v. Campbell, 9 W. & S. 32; Snodgrass v. Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104; Young v. Bransford, 12 Lea, 232; Veith v. Salt Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

[71] Anderson v. Hays Mfg. Co., 207 Pa. St. 106, 56 Atl. 345, 63 L. R. A. 540; McNeil v. Crucible Steel Co., 207 Pa. St. 493, 56 Atl. 1067.

negligence of their employer.[72] The explosion of a steam boiler whereby one is injured is held in Illinois *prima facie* evidence of negligence in those having the management of it,[73] but this does not seem to be the rule elsewhere.[74]

Where an insurance company stipulated for the right to inspect the boiler insured and did actually make such inspection and was negligent about it and the boiler exploded by reason of defects which proper inspection would have disclosed, and injured the property of a third party, it was held that the insurance company was liable for the damage.[75]

§ 366. **Poisons and like dangerous commodities.** Where a person puts articles in the trade for a certain use, in which they would be dangerous,[76] or sells poisonous drugs wrongfully labeled, or labeled as being innocent,[77] he will be liable to one injured in consequence. But a druggist who sells a regular proprietary or patent medicine is not responsible for its effects. "If he delivers to the consumer the article called for with the label of the proprietor or patentee upon it, he cannot justly be charged with negligence in so doing."[78] The subject is further considered in a subsequent section.[79]

§ 367. **Electricity.** Electricity is an invisible, impalpable force, highly dangerous to life and property, and those who

[72] Egan v. Dry Dock, etc., R. R. Co., 12 App. Div. 556, 42 N. Y. S. 188.

[73] Ill. Cent. R. R. Co. v. Phillips, 99 Ill. 234, and 55 Ill. 194.

[74] See cases in note 70.

[75] Van Winkle v. Am. Steam Boiler Ins. Co., 52 N. J. L. 240, 19 Atl. 472.

[76] Wellington v. Downer, etc., Co., 104 Mass. 64; Faro v. Remington Arms Co., 67 App. Div. 414, 73 N. Y. S. 788.

[77] Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; George v. Skivington, L. R. 5 Ex. 1; Loop v. Litchfield, 42 N. Y. 351; Hansford v. Payne, 11 Bush, 380; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Burgess v. Sims Drug Co., 114 Ia. 275, 86 N. W. 307, 89 Am. St. Rep. 359, 54 L. R. A. 364; Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698; Fisher v. Galladay, 38 Mo. App. 531; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Wise v. Morgan, 101 Tenn. 273, 48 S. W. 971; Peters v. Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428. See Rouker v. St. John, 21 Ohio C. C. 39.

[78] West v. Emanuel, 198 Pa. St. 180, 47 Atl. 965, 53 L. R. A. 329.

[79] *Post*, § 373.

make, sell, distribute, use or handle it are bound to exercise care in proportion to the danger involved.[80] This is the general rule. "Electricity," says the supreme court of Kentucky, ' is a powerful and subtle force, and its nature and manner of use are not well understood by the public, nor its presence easily determined or ascertained. Its use for private gain is very extensive, and becoming more and more so. The daily avocations of many thousands of necessity bring them near to this subtle force, and it seems clear that the electric companies should be held to the use of the utmost care to avoid injuring those whose business or pleasure requires them to come near such a death-dealing force." [81]

[80] Denver Con. Elec. Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; McAdam v. Central Ry. & Elec. Co., 67 Conn. 445, 35 Atl. 341; Nelson v. Branford L. & W. Co., 75 Conn. 548, 54 Atl. 303; Broyles v. Prisock, 97 Ga. 643, 25 S. E. 389; Heidt v. Southern Tel. & Tel. Co., 122 Ga. 474; Economy Lt. & P. Co. v. Hiller, 203 Ill. 518, 68 N. E. 72; Rowe v. Taylorville Elec. Co., 213 Ill. 318, 72 N. E. 711; Leavenworth Coal Co. v. Ratchford, 5 Kan. App. 150, 48 Pac. 927; McLaughlin v. Louisville Elec. Lt. Co., 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; Thomas v. Maysville Gas Co., 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 147; Macon v. Paducah St. Ry. Co., 110 Ky. 680, 62 S. W. 496; Potts v. Shreveport Belt. Ry. Co., 110 La. 1, 34 So. 107, 98 Am. St. Rep. 452; Gannon v. Laclede Gas Lt. Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907; Newark Elec. Lt. Co. v. McGilvery, 62 N. J. L. 451, 41 Atl. 955; New York, etc., Tel. Co. v. Bennett, 62 N. J. L. 742, 42 Atl. 759; Perham v. Portland Elec. Co., 33 Ore. 451, 53 Pac. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799; Boyd v. Portland Elec. Co., 40 Ore. 126, 66 Pac. 576, 57 L. R. A 619; Boyd v. Portland Elec. Co 41 Ore. 336, 68 Pac. 810; Mooney v. Luzerne, 186 Pa. St. 161, 40 Atl. 311, 40 L. R. A. 811; Herron v. Pittsburg, 204 Pa. St. 509, 54 Atl. 311, 93 Am. St. Rep. 798; Daltry v. Media Elec. Lt., etc., Co., 208 Pa. St. 403, 57 Atl. 833; Emery v. Philadelphia, 208 Pa St. 492, 57 Atl. 977; Moran v. Corliss Steam Engine Co., 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267; Miles v. Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493, Parsons v. Charleston Con. Ry., etc., Co., 69 S. C. 305; Wehner v. Lagerfelt, 27 Tex. Civ. App. 520, 66 S. W. 221; Richmond, etc., Elec. Ry. Co. v. Rubin, 102 Va. 809, 47 S. E. 834; Newark Elec. L. & P. Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649.

[81] McLaughlin v. Louisville Electric Light Co., 100 Ky. 173, 189, 37 S. W. 851, 34 L. R. A. 812. "Electricity is a silent, deadly and instantaneous force and one, who uses it for profit is bound to exercise care corresponding to the

gerous current are bound to use a very high degree of care in the construction, use and repair of such lines, to prevent injury to those lawfully upon such ways.[82] A broken or fallen wire in a street, charged with a dangerous current of electricity, affords a presumption of negligence on the part of the owner of the wire.[83] Wires carried on a bridge or attached to an elevated station, where boys are accustomed to play, should be properly insulated.[84] When a storm occurs that is liable to prostrate the wires, due care requires prompt efforts to discover and repair broken lines.[85] Where the wires of two companies cross or are otherwise so related that there is danger of contact between them, there is a duty on both to guard against such contact, and for a neglect of

dangers incident to its use." Rowe v. Taylorville Elec. Co., 213 Ill. 318, 72 N. E. 711.

[82] City Elec. St. Ry. Co. v. Convery, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 R. A. 570; McAdam v. Central Ry. & Elec. Co., 67 Conn. 445, 35 Atl. 341; Clare v. Sacramento Elec. P. & L. Co., 122 Cal. 504, 55 Pac. 326; Denver Con. Elec. Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; Macon v. Paducah St. Ry. Co., 110 Ky. 680, 62 S. W. 496; Western Union Tel. Co. v. State, 82 Md. 313, 33 Atl. 763, 51 Am. St. Rep. 473, 31 L. R. A. 572; Gannon v. Laclede Gas Lt. Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907; Newark Elec. Lt. Co. v. McGilvery, 62 N. J. L. 451, 41 Atl. 955; Turton v. Powelton Elec. Co., 185 Pa. St. 406, 39 Atl. 1053; Wehner v. Lagerfelt, 27 Tex. Civ. App. 520, 66 S. W. 221; Cole v. Parker, 27 Tex. Civ. App. 563, 66 S. W. 135.

[83] Newark Elec. Lt. Co. v. Ruddy, 62 N. J. L. 505, 41 Atl. 712, 57 L. R. A. 624; Jones v. Union Ry. Co., 18 App. Div. 267, 46 N. Y. S. 321; Clancy v. New York, etc., Ry. Co., 82 App. Div. 563, 81 N Y.. S. 875; Chaperon v. Portland Elec. Co., 41 Ore. 39, 67 Pac. 928; Boyd v. Portland Elec. Co., 40 Ore. 126, 66 Pac. 576, 57 L. R. A. 619; Boyd v. Portland Elec. Co., 41 Ore. 336, 68 Pac. 810. See United Elec. L. & P. Co. v. State, 100 Md. 634.

[84] Nelson v. Branford L. & W Co., 75 Conn. 548, 54 Atl. 303; Wittleder v. Citizens' Elec. Ill Co., 47 App. Div. 410, 62 N. Y. S 297; Wittleder v. Citizens' Elec. Ill. Co., 50 App. Div. 478, 64 N Y. S. 114.

[85] Texarkana Gas & Elec. L. Co. v. Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30; Boyd v. Portland Elec. Co., 37 Ore. 567, 62 Pac. 378, 52 L. R. A. 509; Boyd v. Portland Elec. Co., 40 Ore. 126, 66 Pac. 576, 57 L. R. A. 619; Boyd v. Portland Elec .Co., 41 Ore. 336, 68 Pac. 810; Mitchell v. Charleston L. & P. Co., 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577.

this duty the companies are jointly and severally liable.[86] Cases of this sort arise mainly where telegraph or telephone wires cross or parallel light or trolley wires. Where the plaintiff's store was set on fire and burned by an electric current from the defendant's trolley wires which had come in contact with the telephone wire to the plaintiff's premises, it was held that the defendant owed a high degree of care in the management of its wires, that both the defendant and the telephone company were bound to guard against a contact of their wires, and that it was immaterial which wires were first installed.[87] Wires attached to buildings or carried near or over them should be so placed that there is no danger of contact on the part of persons about the buildings or the wires should be so insulated that contact will be harmless, and a neglect to so place the wires or to have and keep them properly insulated will render the owners liable.[88] And gener-

[86] McKay v. Southern Bell Tel. Co., 111 Ala. 337, 19 So. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589; City Elec. St. Ry. Co. v. Conery, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570; McAdam v. Central Ry. & Elec. Co., 67 Conn. 445, 35 Atl. 341; Broyles v. Prisock, 97 Ga. 643, 25 S. E. 389; Economy Lt. & P. Co. v. Hiller, 203 Ill. 518, 68 N. E. 72; Cumberland Tel. & Tel. Co. v. Ware, 115 Ky. 581, 74 S. W. 289; Western Union Tel. Co. v. State, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572; New York, etc., Telephone Co. v. Bennett, 62 N. J. L. 742, 42 Atl. 759; Rowe v. New York, etc., Telephone Co., 66 N. J. L. 19, 48 Atl. 523; Paine v. Elec. Ill., etc., Co., 64 App. Div. 477, 72 N. Y. S. 279; Dillon v. Allegheny County Lt. Co., 179 Pa. St. 482, 36 Atl. 164; Parsons v. Charleston Con. Ry. etc., 69 S. C. 305; United Elec. Ry. Co. v. Shelton, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614; Block v. Milwaukee St. Ry. Co., 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365; Western Union Tel. Co. v. Thorn, 64 Fed. 287, 12 C. C. A. 104. See Heidt v. Southern Tel. & Tel. Co., 122 Ga. 474; Albany v. Watervliet, etc., R. R. Co., 76 Hun, 136, 27 N. Y. S. 848.

[87] Richmond, etc., Elec. Ry. Co. v. Rubin, 102 Va. 809, 47 S. E. 834.

[88] Wales v. Pac. Elec. Motor Co., 130 Cal 521, 62 Pac. 1120; Walters v. Denver Con. Elec. Lt. Co., 12 Colo. App. 145, 54 Pac. 960; Walters v. Denver Con. Elec. Lt. Co., 17 Colo. App. 192, 68 Pac. 117; Leavenworth Coal Co. v. Ratchford, 5 Kan. App. 150, 48 Pac. 927; McLaughlin v. Louisville Electric Light Co., 100 Ky. 173, 193, 37 S. W. 851, 34 L. R. A. 812; Brown v. Edison Electric Co., 90 Md. 400, 45 Atl. 182, 78 Am. St. Rep. 442, 46 L. R. A. 745; Griffin v. United Electric Lt. Co., 164 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477, 32 L. R. A. 400;

ple have a right to go for business or pleasure, the utmost care, or, at least a very high degree of care, must be exercised to make and keep them safe.[89] It is held in Louisiana that "it is the duty of the company under such conditions to keep its wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places."[90] And in Kentucky the rule is held to be "that those who manufacture or use electricity for private advantage must do so at their peril, and the only way to prevent accidents, where a deadly current is used, is to have perfect protection at those points where people are likely to come in contact with it.[91]

Those who equip buildings for the use of electricity and those who furnish the current are bound to exercise proper care to prevent damage to the buildings or to those who use the electric appliances. Thus where, owing to defendant's negligence in wiring a jail, the building was set on fire and an occupant burned to death, the defendant was held liable.[92] So where, owing to defects in the equipment installed by the defendant, an electric explosion occurred and injured the plaintiff.[93] Where a person in

Brooks v. Consolidated Gas. Co., 70 N. J. L. 211, 57 Atl 396; Fitzgerald v. Edison Elec. Ill. Co., 207 Pa. St. 118, 56 Atl. 350. Light wires placed where there is no reason to suppose anyone will go, need not be insulated. Brush Elec. Lt. & P. Co. v. Lefevre, 93 Tex. 604, 57 S. W. 640, 77 Am. St. Rep. 898, 49 L. R. A. 771.

[89] New Omaha T.-H. Elec. Lt. Co. v. Johnson, 67 Neb. 393, 93 N. W. 778; Perham v. Portland Elec. Co., 33 Ore. 451, 53 Pac. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799; Mooney v. Luzerne, 186 Pa. St. 161, 40 Atl. 311, 40 L. R. A. 811; Herron v. Pittsburg, 204 Pa. St. 509, 54 Atl. 311, 93 Am. St. Rep. 798; Daltry v. Media Elec. Lt., etc., Co., 208 Pa. St. 403, 57 Atl. 833; Emery v. Philadelphia, 208 Pa. St. 492, 57 Atl. 977; Sorrell v. Titusville Elec. Traction Co., 23 Pa. Supr. Ct. 425; Miles v. Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493; Wilbert v. Sheboygan, 121 Wis. 518, 99 N. W. 330; Newark Elec. L. T. Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649.

[90] Potts v. Shreveport Belt Ry. Co., 110 La. 1, 34 So. 107, 98 Am. St. Rep. 452.

[91] Lexington Ry. Co. v. Fain, 24 Ky. L. R. 1443, 71 S. W. 628; Owensboro v. Knox, 25 Ky. L. R. 680.

[92] Miller v. Ouray Elec. L. & P. Co., 18 Colo. App. 131, 70 Pac. 447.

[93] Yates v. S. W. Brush Elec. L. & P. Co., 40 La. Ann. 467, 4 So. 250.

turning on an ordinary electric light in a house, received a shock, negligence was presumed and the company furnishing the light held liable.[94] In two of the cases cited the person was killed. Where a person was killed by lightning conducted to his house over a telephone wire of the defendant, the company was held liable.[95] The evidence tended to show that there were devices for arresting atmospheric electricity which the defendant had failed to use and this tended to show negligence.

Where a gas company supplied current to an electric street railway, and, owing to the wires of the latter being out of repair, a traveler was killed by contact with a loose wire charged by the current, the gas company was held liable, on the ground that the defendant was bound to see that the wires into which it sent the current were in proper condition to carry it.[96] One who creates electricity on his own premises and discharges it into the ground is responsible for injuries to others thereby.[97]

§ 368. **Gas works.** Gas is a dangerous substance and a high degree of care is necessary in dealing with it.[98] It is held that a higher degree of care is required in dealing with such an agency than is necessary in the ordinary affairs of business.[99] It follows that reasonable care, in view of the dangers incident to the business should be exercised in the construction and maintainance of mains, pipes and other apparatus for its distribution, and in the inspection and repair of the same, and if, by reason of negligence in any of these respects, gas escapes and causes damage to persons or property, the company supplying the gas will be liable.[1]

[94] Gilbert v. Duluth General Elec. Co., 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; Alexander v. Nanticoke Lt. Co., 209 Pa. St. 571, 58 Atl. 1068, 67 L. R. A. 475; Crowe v. Nanticoke Lt. Co., 209 Pa. St. 580, 58 Atl. 1071. See United States Elec. Lt. Co. v. Sullivan, 22 App. D. C. 115.

[95] Griffith v. New England Tel. & Tel. Co., 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919.

[96] Thomas v. Maysville Gas Co., 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 147. A light company was held not liable for the burning of the plaintiff's house by reason of defective wiring done by a third party. National Fire Ins. Co. v. Denver Con. Elec. Co., 16 Colo. App. 86, 63 Pac. 949.

[97] National Tel. Co. v. Baker, (1893) 2 Ch. 186.

[98] Heh v. Consolidated Gas Co., 201 Pa. St. 443, 50 Atl. 994, 88 Am. St. Rep. 819.

[99] United Oil Co. v. Roseberry, 30 Colo. 177, 69 Pac. 588.

[1] Koelsch v. Philadelphia Company, 152 Pa. St. 355, 25 Atl. 522,

In such cases it is no defense that the explosion was caused by the negligent act of a third party,[2] but otherwise if caused by the negligence of the plaintiff.[3] It is not negligence as matter of law to look for a leak with a light.[4] It is no defense that the leak was caused by the act of a third party if the defendant was negligent in not discovering and repairing the leak.[5] The escape of gas from the defendant's mains or apparatus has been held to be *prima facie* evidence of negligence.[6]

34 Am. St. Rep. 653, 18 L. R. A. 759; Pine Bluff W. & L. Co. v. Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; Pine Bluff W. & L. Co. v. McCain, 62 Ark. 118, 34 S. W. 549; United Oil Co. v. Roseberry, 30 Colo. 177, 69 Pac. 588; Washington Gas Lt. Co. v. Eckloff, 4 App. D. C. 174; Washington Gas Lt. Co. v. Eckloff, 7 App. D. C. 372; Chisholm v. Atlantic Gas Co., 57 Ga. 28; Mississinewa Min. Co. v. Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203; Lebanon L. H. & P. Co. v. Leap, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342; Consumers' Gas Co. v. Perrego, 144 Ind. 350, 43 N. E. 306; Richmond Gas Co. v. Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683; Consolidated Gas Co. v. Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785; Consolidated Gas Co. v. Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603; Emerson v. Lowell Gas Co., 3 Allen, 410; Holly v. Boston Gas Co., 8 Gray, 123, 69 Am. Dec. 233; Powers v. Boston Gas Lt. Co., 158 Mass. 257, 33 N. E. 523; Greaney v. Holyoke Water Power Co., 174 Mass. 437, 54 N. E. 880; Kebel v. Philadelphia, 105 Pa. St. 41; Ottersbach v. Philadelphia, 161 Pa. St. 111, 28 Atl. 991; Garner v. Citizens' Nat. Gas Co., 198 Pa. St. 16, 47 Atl. 965; Heh v. Consolidated Gas Co., 201 Pa. St. 443, 50 Atl. 994, 88 Am. St. Rep. 819; Butcher v. Providence Gas Co., 12 R. I. 149, 34 Am. Rep. 626.

[2] Pine Bluff W. & L. Co. v. McCain, 62 Ark. 118, 34 S. W. 549; Lebanon L. H. & P. Co. v. Leap, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342; Consolidated Gas Co. v. Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603; Koplan v. Boston Gas Lt. Co., 177 Mass. 15, 58 N. E. 183; Koelsch v. Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759

[3] Pine Bluff W. & L. Co. v Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; Triple State Nat. Gas Co. v. Wellman, 114 Ky 79, 70 S. W. 49.

[4] Pine Bluff W. & L. Co. v. Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; Consolidated Gas Co. v. Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785; Schmeer v. Gas Lt. Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653.

[5] Pine Bluff W. & L. Co. v. Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366. Otherwise if there was no negligence on the part of the defendant. McKenna v. Bridgewater Gas Co., 193 Pa. St. 633, 45 Atl. 52, 47 L. R. A. 790.

[6] Smith v. Boston Gas Co., 129

Where gas escaped into a greenhouse and injured plants the company was held liable.[7] So where trees were damaged.[8] Where a company permitted gas to be turned on to an apartment building to supply two apartments in which it had set meters, without inspecting other parts of the building to see if the openings were properly capped, and gas escaping from an uncapped opening in an upper hall, exploded and injured the plaintiff, it was held a question for the jury whether the defendant was negligent in failing to make such inspection.[9] While a company is not liable for defects in gas fixtures which it has not supplied and does not control, yet if it undertakes to repair leaks therein it must exercise due diligence in doing so or answer for its neglect.[10]

A gas company may be negligent in its management of the supply of gas or in the regulation of its pressure. Where an excessive pressure was given to the gas whereby the plaintiff's stoves were overheated and his house burned, the company was held liable.[11] It is negligent to turn the gas off from an apartment building and then to turn it on without warning.[12]

Where a company was engaged in supplying gas for fuel and in cold weather shut off the supply from the plaintiff's house without warning, whereby her husband, who was convalescent from typhoid fever, contracted pneumonia and died, the company was held liable in tort for his death.[13] So where there was a failure to keep up the supply and in consequence sick children had a relapse and died.[14]

Mass. 318; Carmody v. Boston Gas Co., 162 Mass. 539, 39 N. E. 184. See McGahon v. Indianapolis Nat. Gas Co., 140 Ind. 335, 37 N. E. 601, 49 Am. St. Rep. 199, 29 L. R. A. 355.

[7] Dow v. Winnipesaukee Gas, etc., Co., 69 N. H. 312, 41 Atl. 288, 76 Am. St. Rep. 173, 42 L. R. A. 569; Siebrecht v. East River Gas Co., 21 App. Div. 110, 47 N. Y. S. 262.

[8] Evans v. Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651.

[9] Schmeer v. Gas Lt. Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653.

[10] Ferguson v. Boston Gas Lt. Co., 170 Mass. 182, 49 N. E. 115.

[11] Indiana, etc., Gas Co. v. Long, 27 Ind. App. 219, 59 N. E. 410.

[12] Beyer v. Consolidated Gas Co., 44 App. Div. 158, 60 N. Y. S. 628. Here the plaintiff had lain down leaving her stove lighted and was injured by the escaping gas.

[13] Hoehle v. Allegheny Heating Co., 5 Pa. Supr. Ct. 21.

[14] Coy v. Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R.

greater part of tort cases are those based upon negligence. Of these the principal classes are the following: 1. Injuries to servants through the negligence of the master. 2. Injuries to passengers through the negligence of the carrier. 3. Injuries to persons on or near railroad tracks, through the negligent operation of trains and engines. 4. Injuries to travelers upon the highways, by reason of the negligence of those responsible for their condition, in permitting them to become out of repair and dangerous. The first two of these classes have already been treated.[15] The last two will be briefly considered in the following sections.

§ 370. **Injuries to persons on or near railroad tracks.** As to persons on the private tracks of a railroad company, the same general rules apply as in the case of other private property.[16] A railroad company is under no obligation to be on the lookout for trespassers and it owes them no duty until their presence is discovered and then only the duty to refrain from wilful or wanton injury.[17] An engineer may assume that a trespasser on the track will get out of the way and he is not obliged to slacken speed or take any precautions, until he has some reason to believe that the person is not aware of his danger or that he cannot or will not get out of the way.[18]

A. 535. And see Indiana, etc., Gas Co. v. Anthony, 26 Ind. App. 307, 58 N. E. 868.

[15] See chapter XVI and XVIII.

[16] *Ante*, §§ 359, 360.

[17] Memphis, etc., R. R. Co. v. Womack, 84 Ala. 149; Louisville, etc., R. R. Co. v. Black, 89 Ala. 313, 8 So. 246; Glass v. Memphis, etc., R. R. Co., 94 Ala. 581; Toomey v. Southern Pac. R. R. Co., 86 Cal. 374, 24 Pac. 1074, 10 L. R. A. 139; Terre Haute, etc., R. R. Co. v. Graham, 95 Ind. 286, 48 Am. Rep. 719; Palmer v. Chicago, etc., R. R. Co., 112 Ind. 250; Snyder v. Natchez, etc., R. R. Co., 42 La. Ann. 302, 7 So. 582; Copp v. Me. Cent. R. R. Co., 100 Me. 568, 62 Atl. 735; Wright v. Boston, etc., R. R. Co., 142 Mass. 296; Hepfel v. St. Paul, etc., Ry. Co., 49 Minn. 263, 51 N. W. 1049; Dahlstrom v. St. Louis, etc., Ry. Co., 96 Mo. 99; Barker v. Hannibal, etc., R. R. Co., 98 Mo. 50, 11 S. W. 254; Cauley v. Pittsburg, etc., Ry. Co., 95 Pa. St. 398; Smalley v. Southern Ry. Co., 57 S. C. 243, 35 S. E. 489; Seaboard, etc., R. R. Co. v. Joyner, 92 Va. 354, 23 S. E. 773; Tucker v. Norfolk, etc., R. R. Co., 92 Va. 549, 24 S. E. 229; Spicer v. Chesapeake, etc., Ry. Co., 34 W. Va. 514.

[18] Louisville, etc., R. R. Co. v. Black, 89 Ala. 313, 8 So. 246; Terre Haute, etc., R. R. Co. v. Graham, 95 Ind. 286, 48 Am. Rep. 719; Copp

In the case of highway crossings at the same grade, there are mutual rights and duties, which have been very aptly stated by former Justice Bradley of the federal supreme court, as follows: "If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely may depend on many circumstances. It cannot be such if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing.

"On the other hand, those who are crossing a railroad track are bound to use ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence,

v. Me. Cent. R. R. Co., 100 Me. 568, 62 Atl. 735; Frech v. Philadelphia R. R. Co, 39 Md. 574; Bouwmeester v. Grand Rapids, etc., Co., 67 Mich. 87, 34 N. W. 414; Gregory v. Cleveland, etc., Co., 112 Ind. 385, 14 N. E. 228; Maloy v. Wabash, etc., Co., 84 Mo. 270; Boyd v. Wabash Western Ry. Co., 105 Mo. 371, 16 S. W. 909.

notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them—such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. They are the authors of their own misfortunes.''[19] This language has been often cited, quoted and approved in subsequent cases [20] and is a very succinct and authoritative statement of the law of the subject.

Both parties at a public crossing have mutual and reciprocal rights and obligations [21] and both are bound to the exercise of ordinary care to avoid a collision,[22] that is such care as an ordinarily prudent man would exercise under the same circumstances.

[19] Continental Imp. Co. v. Stead, 95 U. S. 161, 164, 165.

[20] Chicago, etc., R. R. Co. v. Lee, 87 Ill. 455; Brown v. Texas, etc., Ry. Co., 42 La. Ann. 350, 7 So. 683, 21 Am. St. Rep. 377; Baltimore, etc., R. R. Co. v. Owings, 65 Md. 502, 5 Atl. 332; Huntress v. Boston, etc., R. R. Co., 66 N. H. 185, 34 Atl. 155, 49 Am. St. Rep. 602; Cooper v. Railroad Co., 140 N. C. 209, 52 S. E. 932; Olsen v. Oregon Short Line, 9 Utah, 129, 33 Pac. 623; Marks v. Petersburg R. R. Co., 88 Va. 1, 13 S. E. 299; Baltimore, etc., R. R. Co. v. Griffith, 159 U. S. 603; Texas, etc., Ry. Co. v. Cody, 166 U. S. 606.

[21] Louisville, etc., R. R. Co. v. Webb, 90 Ala. 185, 8 So. 521, 11 L. R. A. 677; Chicago, etc., R. R. Co. v. Lee, 87 Ill. 455; Lake Shore, etc., Ry. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 482; Louisville, etc., R. R. Co. v. Goetz, 79 Ky. 442, 42 Am. Rep. 231; Brown v. Texas, etc., Ry. Co., 42 La. Ann. 350, 7 So. 683, 21 Am. St. Rep. 377; Lesan v. Me. Cent. R. R. Co., 77 Me. 85; Baltimore, etc., R. R. Co. v. Owings, 65 Md 502, 5 Atl. 332; Hutchinson v. St. Paul, etc., Ry. Co., 32 Minn. 398, 21 N. W. 215; Cooper v. Railroad Co., 140 N. C. 209, 52 S. E. 932; Olsen v. Oregon Short Line, 9 Utah, 129, 33 Pac. 623; Marks v. Petersburg R. R. Co., 88 Va. 1, 13 S. E. 299; Baltimore, etc., R. R. Co. v. Griffith, 159 U. S. 603; Texas, etc., Ry. Co. v. Cody, 166 U. S. 606.

[22] Ibid.; Clifton Iron Co. v. Dye, 87 Ala. 471, 6 So. 192; Railway Co. v. Cullen, 54 Ark. 431, 16 S. W. 170; Atchison, etc., R. R. Co. v. Morgan, 43 Kan. 1, 22 Pac. 1000; Louisville, etc., R. R. Co. v. Goetz, 79 Ky. 442, 42 Am. Rep. 231; Huntress v. Railroad Co., 66 N. H. 185, 34 Atl. 155, 49 Am. St. Rep. 602; Judson v. Central, etc., R. R. Co., 158 N. Y. 597, 53 N. E. 517; Continental Imp. Co. v. Stead, 95 U. S. 161, 165.

While the railroad has precedence, this does not mean that the traveler on the highway has any greater duty of avoiding injury than the railroad.[23] Usually the railroad is required by statute to give certain signals or warnings and, when this is the case, a neglect to give such signals is usually regarded as negligence *per se*.[24] But the giving of the statutory signals is not the sole measure of duty on the part of the railroad. The statutory signals represent the minimum of what the law requires.[25] The common law still imposes the duty of exercising care and prudence commensurate with the danger involved, and this imposes the obligation of taking such additional precautions as the peculiar circumstances of the case may require.[26] The more dangerous the crossing, the greater the care required on both sides.[27] Ordinary care requires of a person who is about to cross a railroad track that he should look and listen for an approaching train, and if he goes on the track without doing so and is injured by a train, his contributory negligence will bar a recovery, though the railroad company was negligent in not giving the statutory signals or otherwise.[28] If the view is obstructed or the hearing made in-

[23] Continental Imp. Co. v. Stead, 95 U. S. 161, 165.

[24] Chicago, etc., R. R. Co. v. Lee, 87 Ill. 455; Terre Haute, etc., R. R. Co. v. Brunker, 128 Ind. 542, 26 N. E. 180; Loucks v. Chicago, etc., Ry. Co., 31 Minn. 526, 18 N. W. 654; *ante*, § 349.

[25] Smith v. Me. Cent. R. R. Co., 87 Me. 339, 32 Atl. 970.

[26] Smith v. Me. Cent. R. R. Co., 87 Me. 339, 32 Atl. 970; Chicago, etc., R. R. Co. v. Sanders, 154 Ill. 531, 39 N. E. 483; Lesan v. Me. Cent. R. R. Co., 77 Me. 85; Loucks v. Chicago, etc., Ry. Co., 31 Minn. 526, 18 N. W. 654; Huntress v. Boston, etc., R. R. Co., 66 N. H. 185, 34 Atl. 155; 49 Am. St. Rep. 602; Olsen v. Oregon Short Line, 9 Utah, 129, 33 Pac. 623.

[27] Nehrbus v. Central Pac. R. R. Co., 62 Cal. 320; Lake Shore, etc., Ry. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 482; Funston v. Chicago, etc., Ry. Co., 61 Ia. 452, 16 N. W. 523; Continental Imp. Co. v. Stead, 95 U. S. 161.

[28] Louisville, etc., R. R. Co. v. Webb, 90 Ala. 185, 8 So. 521, 11 L. R. A. 677; St. Louis, etc., Ry. Co. v. Dillard, 78 Ark 520; Lambert v. Southern Pac. R. R. Co., 146 Cal. 231, 79 Pac. 873; Chicago, etc., R. R. Co. v. Hutchinson, 120 Ill. 587; Cadwalleder v. Railway Co., 128 Ind. 518, 27 N. E. 161; Wabash R. R. Co. v. Keister 163 Ind. 609, 67 N. E. 521; Reed v. Chicago, etc., R. R. Co., 74 Ia. 188, 37 N. W. 149; Sala v. Railway Co., 85 Ia. 678, 52 N. W. 664; Wichita, etc., R. R. Co. v. Davis, 37 Kan. 743, 16 Pac. 81, 1 Am. St. Rep. 277; Brown v. Texas, etc.,

care in proportion to the difficulty and danger.[29] In Pennsyl-

Ry. Co., 42 La. Ann. 350, 7 So. 683; 21 Am. St. Rep. 377; Lesan v. Me. Cent. R. R. Co. 77 Me. 85; Smith v. Me. Cent. R. R. Co., 87 Me. 339, 32 Atl. 970; Baltimore, etc., R. R. Co. v. Mali, 66 Md. 53; Butterfield v. Western R. R. Co., 10 Allen, 533, 87 Am. Dec. 678; Wheelwright v. Boston, etc., R. R. Co., 135 Mass. 225; Potter v. Flint, etc., R. R. Co., 62 Mich. 22, 28 N. W. 714; Grostick v. Detroit, etc., R. R. Co., 90 Mich. 594, 51 N. W. 667; Brown v. Milwaukee, etc., R. R. Co., 22 Minn. 165; Wagner v. Truedale, 53 Minn. 436, 55 N. W. 607; Kelsey v. Railway Co., 129 Mo. 362, 30 S. W. 329; Schmidt v. Mo. Pac. Ry. Co., 191 Mo. 215, 90 S. W. 136; Omaha, etc., Ry. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599; Hamilton v. Delaware, etc., R. R. Co., 50 N. J. L. 263, 13 Atl. 29; Delaware, etc., R. R. Co. v. Heffernan, 57 N. J. L. 149, 30 Atl. 578; Tolman v. Syracuse, etc., R. R. Co., 90 N. Y. 198, 50 Am. Rep. 649; Brickell v. New York, etc., R. R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; McAdoo v. Richmond, etc., R. R. Co., 105 N. C. 140, 11 S. E. 316; Cooper v. Railroad Co., 140 N. C. 209, 52 S. E. 932; New York, etc., R. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130; Marland v. Pittsburg, etc., R. R. Co., 123 Pa. St. 487, 16 Atl. 624, 10 Am. St. Rep. 541; Dean v. Pennsylvania R. R. Co., 129 Pa. St. 514, 18 Atl. 718, 15 Am. St. Rep. 733, 6 L. R. A. 143; Aikin v. Pennsylvania R. R. Co., 130 Pa. St. 380, 18 Atl. 619, 17 Am. St. Rep. 775; Zeigler v. North East. R. R. Co., 5 S. C. 221; Railway Co. v. Howard, 90 Tenn. 144, 19 S. W. 116; Galveston, etc., Ry. Co. v. Kutac, 72 Tex. 343, 11 S. W. 127; Marks v. Petersburg R. R. Co., 88 Va. 1, 13 S. E. 299; Kimball v. Friend, 95 Va. 125, 27 S. E. 901; Woolf v. Washington R. & N. Co., 37 Wash. 491, 79 Pac. 997; Beyel v. Newport News, etc., R. R. Co., 34 W. Va. 538, 12 S. E. 532; Berkely v. Chesapeake, etc., Ry. Co., 43 W. Va. 11, 26 S. E. 351; Hansen v. Railway Co., 83 Wis. 631, 53 N. W. 909; White v. Chicago, etc., Ry. Co., 102 Wis. 489, 78 N. W. 585; Railroad Co. v. Whitton, 13 Wall. 270; Railroad Co. v. Houston, 95 U. S. 697; Schofield v. Chicago, etc., Ry. Co., 114 U. S. 615; Pyle v. Clark, 79 Fed. 744, 25 C. C. A. 190.

[29] South, etc., R. R. Co. v. Donovan, 84 Ala. 141, 4 So. 142; Colorado, etc., Ry. Co. v. Thomas, 33 Colo. 517; Laverenz v. Chicago, etc., R. R. Co., 56 Ia. 689; Young v. New York, etc., Co., 107 N. Y. 500, 14 N. E. 434; Woodard v. New York, etc., Co., 106 N. Y. 369; Davey v. London, etc., Co., L. R. 12 Q. B. D. 70; Mahlen v. Lake Shore, etc., Ry. Co., 49 Mich. 585; Ormsbee v. Boston, etc., Corp., 14 R. I. 102; Central R. R. Co. v. Smalley, 61 N. J. L. 277, 39 Atl. 695; Swanson v. Central R. R. Co., 63 N. J. L. 605, 44 Atl. 852; Conklin v. Erie R. R. Co., 63 N. J. L. 338, 43 Atl. 666; Baltimore, etc., R. R. Co. v. McClellan, 69 Ohio St. 142, 68 N. E. 816; Sherwin v. Rutland R. R. Co., 74 Vt. 1, 51 Atl. 1089; Beyel v. Newport News,

vania, the failure to stop, look and listen is held to be contributory negligence as matter of law,[30] but in most jurisdictions such failure is not necessarily contributory negligence, but may or may not be, according to circumstances.[31]

§ 371. Street railways. Street railway companies, by the grant of a franchise to construct and operate a railway in a street for the accommodation of street traffic, do not acquire any rights superior to the public. The grant is to use the street in common with the public, and street cars, however propelled, have simply equal rights with other vehicles, and each must exercise its right with due regard to the equal right of the other.[32] The

etc., R. R. Co., 34 W. Va. 538, 12 S. E. 532. See Lake Shore, etc., R. R. Co. v. Miller, 25 Mich. 274; Craig v. N. Y., etc., R. R. Co., 118 Mass. 431; Miss. Pac. Ry. Co. v. Lee, 70 Tex. 496, 7 S. W. 857; Atchison, etc., R. R. Co. v. Townsend, 39 Kan. 115, 17 Pac. 804; Strong v. Sacramento, etc., Co., 61 Cal. 326; Klanowski v. Grand Trunk, etc., Co., 57 Mich. 525; Chase v. Maine Centr. R. R. Co., 78 Me. 346; Seefeld v. Chicago, etc., Co., 70 Wis. 216, 35 N. W. 278.

[30] Pennsylvania R. R. Co. v. Beale, 73 Pa. St. 504, 13 Am. Rep. 753; Gray v. Pennsylvania R. R. Co., 172 Pa. St. 383; Coppuck v. Philadelphia, etc., R. R. Co., 191 Pa. St. 172.

[31] Funston v. Chicago, etc., Ry. Co., 61 Ia. 452, 16 N. W. 523; Louisville, etc., R. R. Co. v. Goetz, 79 Ky. 442, 42 Am. Rep. 231; Judson v. Central Vt. R. R. Co., 158 N. Y. 597, 53 N. E. 517; Cooper v. Railroad Co., 140 N. C. 209, 52 S. E. 932.

[32] Mahoney v. San Francisco, etc., Ry. Co., 110 Cal. 471, 42 Pac. 968; Clark v. Bennett, 123 Cal. 375, 55 Pac. 908; Laufer v. Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533; Flewelling v. Lewiston, etc., Horse R. R. Co., 89 Me. 585, 36 Atl. 1056; Cooke v. Baltimore Traction Co., 80 Md. 551, 31 Atl. 327; Lake Roland El. Ry. Co. v. McKewen, 80 Md. 593, 31 Atl. 797; Baltimore Traction Co. v. Appel, 80 Md. 603, 31 Atl. 964; Rascher v. East Detroit, etc., Ry. Co., 90 Mich. 413, 51 N. W. 463, 30 Am. St. Rep. 447; Lorthem v. Fort Wayne, etc., R. R. Co., 100 Mich. 297, 58 N. W. 996; Shea v. St. Paul R. R. Co., 50 Minn. 395, 52 N. W. 902; Watson v. Minneapolis R. R. Co., 53 Minn. 551, 55 N. W. 742; Omaha St. R. R. Co. v. Cameron, 43 Neb. 297, 61 N. W. 606; Newark R. R. Co. v. Block, 55 N. J. L. 605, 27 Atl. 1067; Butelli v. Jersey City, etc., Elec. Ry. Co., 59 N. J. L. 302, 36 Atl. 700; New Jersey Elec. Ry Co. v. Miller, 59 N. J. L. 423, 36 Atl. 885, 39 Atl. 645; Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 135; Atlantic Coast Elec. R. R. Co. v. Rennard, 62 N. J. L. 773, 42 Atl. 1041; Woodland v. North Jersey St. Ry. Co., 66 N. J. L. 455, 49 Atl. 479; Conrad v. Elizabeth, etc., Ry. Co.,

to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not to unreasonably abridge or interfere with the rights of the other."[33] It is held or intimated in some cases that street cars have a superior or paramount right to so much of the street as is occupied by their tracks.[34] But it is doubtful whether anything more is meant than that other vehicles may not delay or obstruct their passage. A person has a right to drive along the tracks and cars coming up behind must be operated with due care to avoid injury.[35] Even if the vehicle unnecessarily obstructs the car, the company has no right to take the law into its own hands and force the vehicle out of the way.[36] In Illinois, where the plaintiff was driving on the track in front of a car and was injured by a collision, it was held to be negligence in the plaintiff to obstruct the car and that, if such negligence contributed to the injury, he could not recover.[37] One about to cross or drive on to a street

70 N. J. L. 676, 58 Atl. 376; O'Neil v. Dry Dock, etc., R. R. Co., 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512; Saunders v. City, etc., R. R. Co, 99 Tenn. 130, 41 S. W. 1031; Bass v. Norfolk Ry. & Lt. Co., 100 Va. 1, 40 S. E. 100; Danville Ry. & Elec. Co. v. Hodnett, 101 Va. 361, 43 S. E. 606; Richmond Traction Co. v. Clarke, 101 Va. 382, 43 S. E. 618; Spurrier v. Front St. Cable Ry. Co., 3 Wash. 659, 29 Pac. 346; Thoresen v. La Crosse City Ry. Co., 87 Wis. 597, 58 N. W. 1051, 41 Am. St. Rep. 64; Tesch v. Milwaukee Elec. Ry. & Lt. Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618.

[33] Lake Roland El. Ry. Co. v. McKewen, 80 Md. 593, 607, 31 Atl. 797. And see Laufer v. Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533; Omaha St. R. R. Co. v. Cameron, 43 Neb. 297, 61 N. W. 606.

[34] North Chicago Elec. Ry. Co. v. Penser, 190 Ill. 67, 60 N. E. 78; Moore v. Kansas City, etc., R. R. Co., 126 Mo. 265, 29 S. W. 9; Fleckenstein v. Dry Dock, etc, R. R. Co., 105 N. Y. 655, 11 N. E. 951; O'Neil v. Dry Dock, etc., R. R. Co., 129 N. Y. 125, 29 N. E. 84.

[35] Mahoney v. San Francisco, etc., Ry. Co., 110 Cal. 471, 42 Pac. 968; Hicks v. Citizens' St. Ry. Co., 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508; Camden, etc., Ry. Co. v. Preston, 59 N. J. L. 264, 35 Atl. 1119.

[36] Camden, etc., Ry. Co. v. Preston, 59 N. J. L. 264, 35 Atl. 1119. And see Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 135.

[37] North Chicago Elec. Ry. Co. v. Penser, 190 Ill. 67, 60 N. E. 78

car track must exercise due care to avoid a collision, but the same degree of care is not required as in crossing the tracks of steam railroads.[38] In Wisconsin it is held that a different rule applies to the driver of a hose cart going to a fire than in case of ordinary vehicles.[39]

Pedestrians have the same rights as vehicles, and the same rules in general apply as between them and the street railways.[40] It was held negligence in Pennsylvania to run a car along a narrow, unlighted alley in a dark night at a speed which would not permit of its being stopped within the distance illuminated by its headlight.[41] In operating a car through a street where small children are known to be playing, a high degree of care and vigilance must be exercised to avoid injury.[42]

[38] Lake Roland El. Ry. Co. v. McKewen, 80 Md. 593, 31 Atl. 797; Baltimore Traction Co. v. Appel, 80 Md. 603, 31 Atl. 964; Woodland v. North Jersey St. Ry. Co., 66 N. J. L. 455, 49 Atl. 479; Bass v. Norfolk Ry. & Lt. Co., 100 Va. 1, 40 S. E. 100; Portsmouth St. R. R. Co. v. Peed, 102 Va. 662, 47 S. E. 850; Tesch v. Milwaukee Elec. Ry. & Lt. Co., 108 Wis 593, 84 N. W. 823, 53 L. R. A. 618. If it appears that the motorman is not going to respect your right to cross first you must wait. Schwanewede v. North Hudson Co. Ry. Co., 67 N. J. L. 449, 51 Atl. 696. If one turns suddenly on to a street car track in front of a car and a collision is unavoidable on the part of the company, the latter is not liable. Chicago Union Traction Co. v. Browdy, 206 Ill. 615, 69 N. E. 570; Roberts v. Spokane St. Ry. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184.

[39] Hanlon v. Milwaukee Elec. Ry. & Lt. Co., 118 Wis. 210, 95 N. W. 100. But see Birmingham Ry. & Elec. Co. v. Baker, 126 Ala. 135, 28 So. 87.

[40] Driscoll v. Market St. Cable Ry. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203; Hayden v. Fair Haven, etc., R. R. Co., 76 Conn. 355, 56 Atl. 613; Louisville Ry. Co. v. Colston, 117 Ky. 804; Baltimore Traction Co. v. Helms, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215; Deitring v. St. Louis Transfer Co., 109 Mo. App. 524, 85 S. W. 140; Cincinnati St. Ry. Co. v. Snell, 54 Ohio St. 197, 43 N. E. 702, 32 L. R. A. 276; Gilmore v. Federal St., etc., Ry. Co., 153 Pa. St. 31, 25 Atl. 651, 34 Am. St. Rep. 682; Burgess v. Salt Lake City R. R. Co., 17 Utah, 406, 53 Pac. 1013.

[41] Gilmore v. Federal St., etc., Ry. Co., 153 Pa. St. 31, 25 Atl. 651, 34 Am. St. Rep. 682.

[42] Bergen Co. Traction Co. v. Heitman, 61 N. J. L. 682, 40 Atl. 651. And see Passamaneck v. Louisville Ry. Co., 98 Ky. 195, 32 S. W. 620.

use of the general public and are under the control of the state.[43] The duty to construct and keep them in repair is usually devolved upon the cities, villages and towns in which they are situated. Sometimes this duty is devolved upon counties, in whole or in part. The duty is owed to the state and not to individuals, and it would seem to follow, according to principles already laid down, that an individual cannot maintain a private action for a neglect of this duty, whereby he has suffered injury, unless such action is given by statute.[44] This rule is applied as respects counties almost universally and they are not liable for the want of repair or defective condition of the highways under their control, unless made so by statute.[45] The same rule is applied in the New England states to towns and cities[46] and to some extent elsewhere.[47] Outside of New England municipal corporations proper are generally held liable for negligence in the repair and maintenance of streets.[48] In New England and

[43] 1 Shearman & R. Neg. § 332; Elliott, Roads & Sts. p. 445.

[44] *Ante*, § 28.

[45] Lee County v. Yarborough, 85 Ala. 590, 5 So. 341; Tyler v. Thama County, 109 Cal. 618, 42 Pac. 240; Millwood v. De Kalb County, 106 Ga. 743, 32 S. E. 577; Board of Commissioners v. Arnett, 116 Ind. 438, 19 N. E. 299; Cones v. Board of Commissioners, 137 Ind. 404, 37 N. E. 272; Board of Commissioners v. Allman, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; Pundman v. St. Charles County, 110 Mo. 594, 19 S. W. 733; Markey v. Queens County, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46; Heigel v. Wichita County, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 63.

[46] Mower v. Leicester, 9 Mass. 247, 6 Am. Dec. 63; State v. Cumberland, 7 R. I. 75; Frazer v. Lewiston, 76 Me. 531; Haines v. Lewiston, 84 Me. 18, 24 Atl. 429. There is no common-law liability for defective highways in England. Russell v. Men of Devon, 2 T. R. 667; Young v. Commissioner of Roads, 2 N. & McC. 537.

[47] Detroit v. Blakely, 21 Mich. 84, 4 Am. Rep. 450; Young v. Charleston, 20 S. C. 116, 47 Am. Rep. 827; Stilling v. Thorp, 54 Wis. 528; McLimans v. Lancaster, 63 Wis. 596.

[48] Bradford v. Anniston, 92 Ala. 349, 8 So. 683, 25 Am. St. Rep. 60; Birmingham v. Lewis, 92 Ala. 352, 9 So. 243; Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Lord v. Mobile, 113 Ala. 360, 21 So. 366; Davis v. Alexander City, 137 Ala. 206, 33 So. 863; Corts v. District of Columbia, 7 Mackey, 277; McPherson v. District of Columbia, 7 Mackey, 564; Augusta v. Tharpe, 113 Ga. 152, 38 S.E. 389; Carson v. Genesee, 9 Idaho, 244, 74 Pac. 862; Moreton v. St. Anthony, 9 Idaho, 532, 75 Pac. 262; Michigan City v.

other states, where the liability is held not to exist at common law, it is generally imposed by statute.[49] The result is that now, either by common law or statute, practically all municipal and public corporations vested with the power or duty of keeping the highways in repair, are liable for a neglect of that duty to anyone who sustains an injury thereby. The duty and liability with their limitations are thus stated in one of the cases already cited: "Municipal governments owe to the public the specific, clear and legal duty of putting and maintaining the public highways which are in their care, or under their management, in a good, safe and secure condition, and any default in making them safe and secure, or in so maintaining them, if occurring through the negligence of the officials, upon whom a duty is devolved by law, will render the city liable. Where the unsafe condition occurs through some other agency or instrumentality, negligence is not imputable until a sufficient time has elapsed to charge the

Boeckling, 122 Ind. 39, 23 N. E. 518; Carney v. Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328; Byerly v. Anamosa, 79 Ia. 204, 44 N. W. 359; Kansas City v. Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; Kansas City v. Gilbert, 65 Kan. 469, 70 Pac. 350; O'Neill v. New Orleans, 30 La. Ann. 220; Cline v. Crescent City R. R. Co., 41 La. Ann. 1031, 6 So. 851; Bohen v. Waseca, 32 Minn. 176; Grant v. Stillwater, 35 Minn. 242; Maus v. Springfield, 101 Mo. 613, 14 S. W. 630; Voglegesang v. St. Louis, 139 Mo. 127, 40 S. W. 653; Snook v. Anaconda, 26 Mont. 128, 66 Pac. 756; May v. Anaconda, 26 Mont. 140, 66 Pac. 759; Weet v. Brockport, 16 N. Y. 161; Nelson v. Canisteo, 100 N. Y. 89; Turner v. Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Pettingill v. Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442; Circleville v. Sohn, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777; Guthrie v. Swan, 5 Okl. 779, 51 Pac. 562; Burrell v. Uncapher, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 664; Gillard v. Chester, 212 Pa. St. 338; Galveston v. Posnainsky, 62 Tex. 118; Gonzales v. Galveston, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17; Thomas v. Springfield City, 9 Utah, 426, 35 Pac. 503; Clark v. Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281; Roanoke v. Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791; Sutton v. Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; Saylor v. Montesano, 11 Wash. 328, 39 Pac. 653; Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76; Gibson v. Huntington, 38 W. Va. 177; Weightman v. Washington, 1 Black, 39; Chicago v. Robbins, 2 Black, 418; Nebraska v. Campbell, 2 Black, 590; Manchester v. Ericsson, 105 U. S. 347; District of Columbia v. Woodbury, 136 U. S. 450.

[49] 1 Shearman & R. Neg. § 338.

public use, those who travel upon it have the right to assume that it is in a reasonably safe condition, and if, without fault of their own, or without knowledge of some existing obstruction, they are injured while lawfully using the street, the city is liable, unless the defect which caused the injury has existed for so short a time that the city officials, by the exercise of reasonable care and supervision could not have known of it. The city is not an insurer of the safety of those who travel upon its highways, and those who do so are bound to use their faculties and are held to the exercise of ordinary care and prudence. The duty of the city to keep its streets in a safe condition for public travel is absolute, and it is bound to exercise reasonable diligence and care to accomplish that end."[50]

Where the liability is statutory it has been held to extend only to those who were using the highway for the purpose of travel at the time of the injury. A child at play[51] and a person stopping to converse or rest and leaning against a defective railing,[52] have been held not to be travelers. But generally the duty is held to extend to all who are lawfully upon the highway and who are making a lawful use of it at the time, whether for travel, labor or pleasure.[53] A child at play may recover under this rule.[54]

[50] Turner v. Newburgh, 109 N. Y. 301, 305, 16 N. E. 344, 4 Am. St. Rep. 453.

[51] Blodgett v. Boston, 8 Allen, 237; Tighe v. Lowell, 119 Mass. 472.

[52] Stinson v. Gardiner, 42 Me. 248; Orcutt v. Kittery Point Bridge Co., 53 Me. 500; Stickney v. Salem, 3 Allen, 374. One who stops a few minutes to watch a procession does not necessarily cease to be a traveler. Varney v. Manchester, 58 N. H. 430, 42 Am. Rep. 592. So where one stopped for a few moments to look into a shop window and got his foot caught in a defective grating as he turned away. Hunt v. Salem, 121 Mass. 294.

[53] Augusta v. Tharp, 113 Ga. 152 38 S. E. 389; Columbus v. Anglin 120 Ga. 785, 48 S. E. 315; Chicago v Keefe, 114 Ill. 222, 55 Am. Rep 860; Duffy v. Dubuque, 63 Ia. 171; Gulline v. Lowell, 144 Mass. 491, 59 Am. Rep. 102; Rehberg v. New York, 91 N. Y. 137.

[54] Chicago v. Keefe, 114 Ill. 222, 55 Am. Rep. 860; Indianapolis v. Emmelman, 108 Ind. 530; Donoho v. Vulcan Iron Works, 75 Mo. 401; McGuire v. Spence, 91 N. Y. 303; Gibson v. Huntington, 38 W. Va. 177; Reed v. Madison, 83 Wis. 171. See Arnold v. St. Louis, 152 Mo. 173, 53 S. W. 900, 75 Am. St. Rep. 447, 48 L. R. A. 291.

As to what will constitute such a defect or want of repair as will render the municipality liable, no general rule can be laid down. "Any object in, upon or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which from its nature and position, would be likely to produce that result, would generally constitute a defect in the way." [55] Ordinarily the question is one of fact for the jury.[56] A street car rail projecting four inches above the level of the street,[57] a trolley pole eighteen inches from the curb in the traveled way,[58] or stumps and logs left in the road [59] may constitute defects. The absence of proper railings or barriers at the side of the traveled way where there are dangerous declivities or excavations, has frequently been held an actionable defect.[60] So are things on, over or near the street or traveled path which, by reason of being insecurely placed or fastened or by reason of age, decay or dilapidation, are liable to fall upon those lawfully using the highway.[61]

[55] Hewison v. New Haven, 34 Conn. 136; Davis v. Bangor, 42 Me. 522.

[56] Cleveland v. Bangor, 87 Me. 259, 32 Atl. 892; 1 Shearman & R. Neg. § 350.

[57] Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518.

[58] Cleveland v. Bangor, 87 Me. 257, 32 Ala. 892.

[59] Snow v. Adams, 1 Cush. 443; Coggswell v. Lexington, 4 Cush. 307; Ward v. Jefferson, 24 Wis. 342.

[60] Collins v. Dorchester, 6 Cush. 396; Sparhawk v. Salem, 1 Allen, 30, 79 Am. Dec. 700; Alger v. Lowell, 3 Allen, 402; Stevens v. Boxford, 10 Allen, 25, 87 Am. Dec. 616; Burnham v. Boston, 10 Allen, 290; Murdock v. Warwick, 4 Gray, 178; Palmer v. Andover, 2 Cush. 600; Hayden v. Attleborough, 7 Gray, 338; Titus v. Northbridge, 97 Mass. 258; Horton v. Taunton, 97 Mass. 266, note; Hinckley v. Somerset, 145 Mass. 326; Cobb v. Standish, 14 Me. 198; Blaisdell v. Portland, 39 Me. 113; Stinson v. Gardiner, 42 Me. 248, 66 Am. Dec 281; Moulton v. Sanford, 51 Me. 127; Hey v. Philadelphia, 81 Pa. St. 44; Winship v. Enfield, 42 N. H. 197; Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568; Hunt v. Pownal, 9 Vt. 411; Glidden v. Reading, 38 Vt. 52; Weeks v. Conn., etc., Turnpike Co., 20 Conn. 134. See Barnes v. Ward, 9 C. B. 392; Toms v. Whitby, 35 Up. Can. Q. B. 195; Hyatt v. Rondout, 44 Barb. 385; Palmer v. Andover, 2 Cush. 600; As to liability for unguarded area near street lines, see Clarke v. Richmond, 83 Va. 355, 5 S. E. 369; Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65; Hubbell v. Yonkers, 104 N. Y. 434, 58 Am. Rep. 522; Monk v. New Utrecht, Id. 552.

[61] Duffy v. Dubuque, 63 Ia. 171;

Thus cities have been held liable for the fall of an unsafe awning,[62] of an improperly constructed cornice, overhanging the street,[63] and for the fall of decayed trees and limbs.[64] So for the fall of a dilapidated wall,[65] or insecure bill board[66] adjacent to the street, or the caving of a bank of earth.[67] Objects within the limits of the highway, but outside the traveled way, are held in Massachusetts not to be defects, merely from their tendency to frighten horses; and the towns are held, therefore, not liable for injuries occasioned by teams becoming frightened by them and running away.[68] But in Connecticut and Vermont the contrary doctrine is maintained.[69] And this is the general rule.[70] As a general rule mere slipperiness due to snow and ice from natural causes, does not constitute an actionable defect.[71] But if the ice or snow is allowed to form

Rehberg v. New York, 91 N. Y. 137.

[62] Drake v. Lowell, 13 Met. 292; Day v. Milford, 5 Allen, 98; Bohen v. Waseca, 32 Minn. 176; Hume v. New York, 74 N. Y. 264; Billing v. Brooklyn, 120 N. Y. 98. See Taylor v. Peckham, 8 R. I. 349; Pratt v. Weymouth, 147 Mass. 245, 17 N. E. 538.

[63] Grove v. Ft. Wayne, 45 Ind. 429.

[64] Jones v. New Haven, 34 Conn. 1; Chase v. Lowell, 151 Mass. 422; Embler v. Wallkill, 132 N. Y. 222.

[65] Parker v. Macon, 39 Ga. 725.

[66] Langan v. Atchison, 35 Kan. 318.

[67] Gibson v. Huntington, 38 W. Va. 177.

[68] Keith v. Easton, 2 Allen, 552; Kingsbury v. Dedham, 13 Allen, 186; Horton v. Taunton, 97 Mass. 266; Cook v. Charlestown, 98 Mass. 80.

[69] Dimock v. Suffield, 30 Conn. 120; Young v. New Haven, 39 Conn. 435; Ayer v. Norwich, 39 Conn. 376, 12 Am. Rep. 396; Morse v. Richmond, 41 Vt. 435, 98 Am. Dec. 600, where the Massachusetts cases are reviewed.

[70] Rushville v. Adams, 107 Ind. 475, 57 Am. Rep. 124; Bennett v. Fifield, 13 R. I. 139, 43 Am. Rep. 17; Fritsch v. Allegheny, 91 Pa. St. 226; North Manheim v. Arnold, 119 Pa. St. 380, 13 Atl. 444; Agnew v. Corunna, 55 Mich. 428, 54 Am. Rep. 383; Maxwell v. Clarke Tp., 4 Ont. App. 460. Boys coasting are not a defect and a town is not liable for the consequences of a horse taking fright thereat. Roy v. Manchester, 46 N. H. 59; Hutchinson v. Concord, 41 Vt. 271. So where a horse was frightened by an evergreen tree on a wagon. Davis v. Bangor, 42 Me. 522.

[71] Chicago v. McGiven, 78 Ill. 347; Broburg v. Des Moines, 63 Ia. 523, 19 N. W. 340; Smyth v. Bangor, 72 Me. 249; Stanton v. Springfield, 12 Allen, 566; Stone v. Hubbardston, 100 Mass. 49; Gilbert v. Roxbury, 100 Mass. 185; Kannenberg v. Alpena, 96 Mich. 53;

and remain in hillocks or ridges or rough, uneven surfaces, or if the street or walks are defective in construction in view of the liability to snow and ice, as if a walk has too much inclination, or if the formation of ice is due to water negligently allowed to escape upon the street, then the municipality may be liable.[72] In Connecticut a municipality was held liable for an accident due solely to the icy condition of a sidewalk, where the walk was on one of the principal business streets and the ice had been allowed to remain for a long time and the walk could have been made safe by the use of sand at slight expense.[73] The court says: "We hold that if ice is found on the sidewalks to a limited extent, in a dangerous condition, whether smooth or otherwise, and the city has ample notice of the fact and can with reasonable expenditure make the passage safe for travel, it ought to do it, and is responsible for the consequences if the duty is neglected. But if a sudden ice storm covers all the territory of a town it would be impracticable to apply the remedy, and it would be considered and treated as would an extraordinary inundation of its streets by a flood."

The statutes rendering towns liable for defects in highways are generally held to include defects in sidewalks also.[74] And

Hankes v. Minneapolis, 42 Minn. 530, 44 N. W. 1026; Chase v. Cleveland, 44 Ohio St. 505, 9 N. E. 225; Mauch Chunk v. Kline, 100 Pa. St. 119; Garland v. Wilkesbarre, 212 Pa. St. 151; Calder v. Walla Walla, 6 Wash. 377, 33 Pac. 1054; Cook v. Milwaukee, 27 Wis. 191; Schroth v. Prescott, 63 Wis. 652, Beaton v. Milwaukee, 97 Wis. 416, 73 N. W. 53; Dapper v. Milwaukee, 107 Wis. 88, 82 N. W. 725.

[72] Collins v. Council Bluffs, 32 Ia. 324; Stanton v. Springfield, 12 Allen, 566; Luther v. Worcester, 97 Mass. 269; Stone v. Hubbardston, 100 Mass. 49; McLaughlin v. Corry, 77 Pa. St. 109, 18 Am. Rep. 432; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; Piper v. Spokane, 22 Wash. 147, 60 Pac. 138; Hill v. Fond du Lac, 56 Wis. 242; Providence v. Clapp, 17 How. 161, and cases cited in last note.

[73] Cloughessey v. Waterbury, 51 Conn. 405.

[74] Bacon v. Boston, 3 Cush. 174; Brady v. Lowell, 3 Cush. 121; Raymond v. Lowell, 6 Cush. 524; Lowell v. Spaulding, 4 Cush. 277, 50 Am. Dec. 775; Kirby v. Market Ass'n, 14 Gray, 249; Manchester v. Hartford, 30 Conn. 118; Hubbard v. Concord, 35 N. H. 52, 69 Am. Dec. 520; Coombs v. Purrington, 42 Me. 332; Stewart v. Ripon, 38 Wis. 584; Smith v. Wendell, 7 Cush. 498; Winn v. Lowell, 1 Allen, 177; Loan v. Boston, 106 Mass. 450; Weare v. Fitchburg, 110 Mass. 334; Harriman v. Boston, 114 Mass. 241; McAuley v.

so where the liability of the municipality is worked out upon common-law principles.[75]

The municipality is not an insurer against accidents but its liability depends upon negligence, or a failure to exercise ordinary care under the circumstances.[76] The mere existence of the defect is not sufficient to show liability but it must also be shown that the municipality had notice of the defect in time to have repaired it or taken precautions against accident, or that it had existed for such a length of time that the municipality, by the exercise of reasonable diligence, might have ascertained its existence.[77]

It is generally held to be no defense that the injury was due in part to an accidental circumstance, or the act or neglect of

Boston, 113 Mass. 503; Street v. Holyoke, 105 Mass. 82, 7 Am. Rep. 500; Drake v. Lowell, 13 Met. 292; Hixon v. Lowell, 13 Gray, 59; Providence v. Clapp, 17 How. 161 (from R. I.). See Monies v. Lynn, 121 Mass. 442.

[75] Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576; Denver v. Dean, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594; Denver v. Hyatt, 28 Colo. 129, 63 Pac. 403; Larson v. Grand Forks, 3 Dak. 307, 19 N. W. 414; Columbus v. Anglin, 120 Ga. 785, 48 S. E. 315; Giffen v. Lewiston, 6 Idaho, 231, 55 Pac. 545; Scammon v. Chicago, 25 Ill. 424, 79 Am. Dec. 334; Quincy v. Barker, 81 Ill. 300, 25 Am. Rep. 278; Glantz v. South Bend, 106 Ind. 305; Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Koester v. Ottumwa, 34 Ia. 41; Atchison v. King, 9 Kan. 550; Baltimore v. Marriott, 9 Md. 160; St. Paul v. Kuby, 8 Minn. 154; Bell v. West Point, 51 Miss. 262; Lincoln v. Smith, 28 Neb. 762, 45 N. W. 41; Anderson v. Albion, 64 Neb. 280, 89 N. W. 794; Davenport v. Ruckman, 37 N. Y. 568; Russell v. Canastota, 98 N. Y. 496; Russell v. Monroe, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823; Chacey v. Fargo, 5 N. D. 173, 64 N. W. 932; Norman v. Teel, 12 Okl. 69, 69 Pac. 791; Jackson v. Pool, 91 Tenn. 448, 19 S. W. 324; Bangus v. Atlanta, 74 Tex. 629, 12 S. W. 750.

[76] Cloughessey v. Waterbury, 51 Conn. 405; Ring v. Cohoes, 77 N. Y. 83; Hunt v. New York, 109 N. Y. 134; Lane v. Hancock, 142 N. Y. 510; Leipsic v. Gerdeman, 68 Ohio St. 1, 67 N. E. 87; Burns v. Bradford, 137 Pa. St. 361; Lohr v. Philipsburg, 156 Pa. St. 246.

[77] Hamden v. New Haven, etc., Co., 27 Conn. 158; Cusick v. Norwich, 40 Conn. 375; Bragg v. Bangor, 51 Me. 532; Holt v. Penobscot, 56 Me. 15; Colley v. Westbrook, 57 Me. 15; Reed v. Northfield, 13 Pick. 94, 23 Am. Dec. 662; Rehberg v. New York, 91 N. Y. 137; Harrington v. Buffalo, 121 N. Y. 147; Leipsic v. Gerdeman, 68 Ohio St. 1, 67 N. E. 87; Fritsch v. Allegheny, 91 Pa. St. 226; Kibele v. Philadelphia, 105 Pa. St 41; Green v. Danby, 12 Vt. 338.

a third party, concurring with the defect, if the injury would not have been done but for the defect.[78] Contributory negligence is a defense here as in other cases, but it is not necessarily contributory negligence for the plaintiff to use a walk or street known to be defective.[79]

§ 373. Liability of maker, vendor or furnisher of an article to persons not in privity of contract. The general rule is that a contractor, manufacturer, vendor or furnisher of an article is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of such article. Thus in *Winterbottom v. Wright*,[80] the defendant contracted with the postmaster general to furnish and keep in repair a mail coach. By reason of the defendant's negligence the coach broke down and injured the driver of the coach. It was held that the latter could not maintain an action against the defendant for the injury. In *Curtin v. Somerset*,[81] the defendant contracted with a company to erect a hotel.

[78] Joliet v. Verley, 35 Ill. 58; Crawfordsville v. Smith, 79 Ind. 308, 61 Am. Rep. 612; Board of Commissioners v. Mutchler, 137 Ind. 140, 36 N. E. 534; Hazzard v. Council Bluffs, 79 Ia. 106, 44 N. W. 219; Byerly v. Anamosa, 79 Ia. 204, 44 N. W. 359; Cleveland v. Bangor, 87 Me. 259, 32 Atl. 892; Baltimore, etc., R. R. Co. v. Bateman, 68 Md. 389, 13 Atl. 54; Voglegesang v. St. Louis, 139 Mo. 127, 40 S. W. 653; Norris v. Litchfield, 35 N. H. 271, 69 Am. Dec. 546; Clark v. Barrington, 41 N. H. 44; Winship v. Enfield, 42 N. H. 197; Chacey v. Fargo, 5 N. D. 173, 64 N. W. 932; Lower Macungie v. Merkhoffer, 71 Pa. St. 276; Burrell v. Uncapher, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 664; Gonzales v. Galveston, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17; McPherson v. District of Columbia, 7 Mackey, 564; Kansas City v. Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; Kansas City v. Gilbert, 65 Kan. 469, 70 Pac. 350; Cline v. Crescent City R. R. Co., 41 La. Ann. 1031, 6 So. 851; Cline v. Crescent City R. R. Co., 43 La. Ann. 327, 9 So. 122, 26 Am. St. Rep. 187; Hinckley v. Somerset, 145 Mass. 326; Pettingill v. Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442; Hull v. Kansas City, 54 Mo. 598; Hunt v. Pownal, 9 Vt. 411; Kelsey v. Glover, 15 Vt. 708; Allen v. Hancock, 16 Vt. 230; Drehn v. Fitchburg, 22 Wis. 675, 99 Am. Dec. 91; *ante*, § 16.

[79] Corts v. District of Columbia, 7 Mackey, 277; Bailey v. Centerville, 115 Ia. 271, 88 N. W. 379; Harris v. Clinton, 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842; Maus v. Springfield, 101 Mo. 613, 14 S. W. 630; Russell v. Monroe, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823.

[80] 10 M. & W. 109.

[81] 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220, 12 L. R. A. 322.

guest in the hotel, was injured by the fall of a porch, due to inferior construction and a failure of the defendant to comply with the plans and specifications. A recovery was denied and the general rule above stated was applied. "The consequences of holding the opposite doctrine," says the court, "would be far reaching. If a contractor who erects a house, who builds a bridge, or performs any other work; a manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world, that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned." The general rule is illustrated by numerous cases briefly described in the margin.[82]

[82] In the following cases third parties, without any fault on their part, were injured by the negligence of the manufacturer, vendor, or furnisher of the articles specified, while the parties thus injured were innocently using them for the purposes for which they were made or furnished, and the court held that there could be no recovery, because the makers, vendors, or furnishers owed no duty to strangers to their contracts. A leaky lamp, Longmeid v. Holiday, 6 Exch. 764, 765; a defective chain furnished one to lead stone, Blakemore v. Railway Co., 8 El. & Bl. 1035; an improperly hung chandelier, Collis v. Selden, L. R. 3 C. P. 495, 497; an attorney's certificate of title, Savings Bank v. Ward, 100 U. S. 195, 204, 25 L. Ed. 621; a defective valve in an oil car, Goodlander v. Standard Oil Co., 63 Fed. 401, 406, 11 C. C. A. 253, 259, 27 L. R. A. 583; a defective sidesaddle, Bragdon v. Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567; a defective rim in a balance wheel, Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 513; a defective boiler, Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 623; a defective cylinder in a threshing machine, Heizer v. Kingsland & D. Mfg. Co., 110 Mo. 605, 19 S. W. 630, 33 Am. St. Rep. 481, 15 L. R. A. 821; a defective wall which fell on a pedestrian, Dougherty v. Herzog, 145 Ind. 255, 44 N. E. 457, 57 Am. St. Rep. 204, 32 L. R. A. 837; a defective shelf for a workman to stand upon in placing ice in a box, Swan v. Jackson, 55 Hun, 194, 7 N. Y. S. 821; a defective hoisting rope of an elevator, Barrett v. Manufacturing Co., 31 N. Y. Supr. Ct. 545; a runaway horse, Carter v. Harden, 78 Me. 528, 7 Atl. 392; a defective hook holding a heavy weight in a drop press, McCaffery v. Mossburg & G. Mfg. Co., 23 R. I. 381, 50 Atl. 651, 55 L. R. A.

To the general rule there are various exceptions. One is that a person who deals with an imminently dangerous article owes a public duty to all to whom it may come to exercise care in proportion to the peril involved.[83] A poisonous drug is such an article and, if one sells such a drug under a wrong name, he will be liable to any one who, without fault on his part, is injured by taking the drug for what it is represented to be.[84] So of a patent medicine, if it contains an ingredient which, taken in the doses prescribed, is calculated to produce injury and does in fact cause injury.[85] So of a hair dressing which injures the health.[86] So of unwholesome food.[87] The same principle has

822; a defective bridge, Marvin Safe Co. v. Ward, 46 N. J. L. 19; Styles v. Long Co., 67 N. J. L. 413, 51 Atl. 710; Styles v. Long Co., 70 N. J. L. 301, 57 Atl. 448; shelves in a dry goods store, whose fall injured a customer, Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767; lubricating oil which generated explosive gases, Standard Oil Co. v. Murray, 119 Fed. 572, 57 C. C. A. 1; an architect's certificate of work done, Le Lievre v. Gould, (1893) 1 Q. B. 491. A contractor for a public work or work upon real estate is not liable to third parties for negligence in construction, where the injuries occur after the work has been completed and accepted. Mayor, etc., of Albany v. Cunliff, 2 N. Y. 165, 174; Fitzmaurice v. Fabian, 147 Pa. St. 199, 23 Atl. 444; Salliolte v. King Bridge Co., 122 Fed. 378, 58 C. C. A. 466. And see further, Snyder v. Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311; Byrd v. English, 117 Ga. 191, 43 S. E. 419; Gould v. Slater Woolen Co., 147 Mass. 315, 17 N. E. 531; Eaton v. Fairbury, W. W. Co., 37 Neb. 546, 56 N. W. 201, 40 Am. St. Rep. 510, 21 L. R. A. 653; Schutte v. United Elec. Co., 68 N. J. L. 435, 53 Atl. 204; Conklin v. Staats, 70 N. J. L. 771, 59 Atl. 144. "There would be no bounds to actions and litigious intricacies, if the ill effects of the negligence of men could be followed down the chain of results to the final effect." Beasley, C. J., in Kahl v. Love, 37 N. J. L. 5, 8.

[83] McCaffrey v. Mossberg & G. Mfg. Co., 23 R. I. 381, 50 Atl. 651, 91 Am. St. Rep. 637, 55 L. R. A. 822.

[84] Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Fisher v. Golladay, 38 Mo. App. 531; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Davidson v. Nichols, 11 Allen, 519; McDonald v. Snelling, 14 Allen, 290.

[85] Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118, 20 Am. St. Rep. 324, 5 L. R. A. 612.

[86] George v. Skivington, L. R. 5 Exch. 1.

[87] Bishop v. Weber, 139 Mass. 411, 1 N. E. 154; Craft v. Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139.

nently dangerous to human life.[88] Crude petroleum and petroleum oil have been held not to be within the exception.[89] In one of the cases referred to it is said: "The duty owing to the public, for breach of which one injured may recover, has respect to and is limited to instruments and articles in their nature calculated to do injury, such as are essentially and in their elements instruments of danger, and to acts that are ordinarily dangerous to life and property. If the wrongful act be not imminently dangerous to life and property, the negligent vendor is liable only to the party with whom he contracted."[90] An elevator in a building, negligently left in an unsafe condition by the manufacturer or person employed to put it in thorough repair, has been held to be within the exception by the supreme court of New York,[91] but according to other authorities an elevator comes under the general rule, and the maker is not liable to third parties for defects or insufficiencies of construction.[92]

Another exception is that a person who knowingly sells or furnishes an article which, by reason of defective construction or otherwise, is imminently dangerous to life or property, without notice or warning of the defect or danger, is liable to third parties who suffer thereform. This principle has been applied in case of a folding bed, represented as safe but known to be otherwise and which caused injury to a guest of the purchaser.[93] Also in case of champagne cider which exploded and injured a servant of the purchaser.[94] Also in case of a thresh-

[88] Faro v. Remington Arms Co., 67 App. Div. 414, 73 N. Y. S. 788; Levy v. Langridge, 2 M. & W. 519; S. C. 4 M. & W. 337.

[89] Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253; Cleveland, etc., Ry. Co. v. Ballentine, 84 Fed. 935, 28 C. C. A. 572; Standard Oil Co. v. Murray, 119 Fed. 572, 57 C. C. A. 1.

[90] Standard Oil Co. v. Murray, 119 Fed. 572, 575, 57 C. C. A. 1.

[91] Kahner v. Otis El. Co., 96 App. Div. 169, 89 N. Y. S. 185. A derrick with a defective rope was held to come under the general rule in Burke v. Refining Co., 11 Hun, 354, but otherwise in Davies v. Pelham Hod El. Co., 65 Hun, 573, which overrules the former case.

[92] Field v. French, 80 Ill. App. 78; Necker v. Harvey, 49 Mich. 517, 14 N. W. 503; Zieman v. Kieckhefer El. Co., 90 Wis. 497

[93] Lewis v. Terry, 111 Cal. 39, 43 Pac. 398.

[94] Weiser v. Holzman, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932. The case was decided on de-

ing machine with a defective and insufficient covering over the cylinder, which was necessarily used by those who operated it to walk upon and which collapsed and injured an employe of the purchaser.[95] So where a refiner, knowing naphtha to be dangerous for illuminating purposes, sold it to a retailer to be used for such purposes and a purchaser from the latter was injured by so using it.[96] So where kerosene oil is put on the market which is below the test required for safety in illumination, and a remote purchaser is injured.[97] Where the defendants sold hogs to a live-stock dealer, knowing that they were afflicted with a dangerous and infectious disease and the plaintiff purchased them from such dealer and put them with his own swine, whereby the disease was communicated to them, the defendants were held liable for all damages sustained.[98] The case of *Schubert v. J. R. Clark Co.*,[99] must be regarded as falling within this exception or else as in conflict with the general rule. In this case the plaintiff was injured by the breaking of a step ladder which was made of defective and poor material and the defects concealed by paint and varnish. The step ladder was manufactured by the defendant and was purchased from a retailer by the plaintiff's employer. A complaint set-

murrer. The plaintiff was injured by the explosion of a bottle of champagne cider manufactured and sold by the defendant. The declaration set forth the circumstances of the injury and alleged that the cider was made by the defendant and sold to the plaintiff's employer, that it was a dangerous explosive and known to be such by the defendant and that no warning of danger was given to the purchaser by the defendant. The declaration was held to be sufficient. But in a similar case where there was no evidence that the defendant knew of the dangerous character of the cider he was held not liable. O'Neill v. James, 138 Mich. 567.

[95] Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237. This case was a decision upon demurrer. The whole question is very elaborately considered and many authorities are cited and reviewed.

[96] Wellington v. Downer Kerosene Oil Co., 104 Mass. 64.

[97] Stowell v. Standard Oil Co., 139 Mich. 18; Elkins v. McKeon, 79 Pa. St. 493; Standard Oil Co. v. Parrish, 145 Fed. 829 (C. C. A.).

[98] Skinn v. Reutter, 135 Mich. 57, 97 N. W. 152, 106 Am. St. Rep. 384, 63 L. R. A. 743.

[99] 49 Minn. 331, 51 N. W. 1103, 32 Am. St. Rep. 559, 15 L. R. A. 818

ting forth the facts and alleging that the defendant knew or ought to have known of the defective construction was held good on demurrer. If the defendant knew of the defective construction, then the case falls within the exception last stated. But if the defendant ought to have known and did not, which is all that the complaint positively alleges, then it was a case of simple negligence and the decision would seem to be at variance with the general rule.[1]

Liability in this class of cases is sometimes put on the ground of fraud. Thus the defendant company made and sold a farm roller which came through intermediate dealers to the plaintiff. The tongue was cross-grained and had a knot and knot-hole which were plugged and the whole concealed by means of putty and paint and by attaching the tongue so that the worst side would be underneath. While the plaintiff was using the roller the tongue broke and he was severely injured. The defendant was held liable on the ground of fraud in putting the roller on the market with knowledge of its insufficiencies.[2] The court says: "The cases establish the legal principle that one who sells an article knowing it to be dangerous by reason of concealed defects is guilty of a wrong, without regard to the contract, and is liable in damages to any person, including one not in privity of contract with him, who suffers an injury by reason of his willful and fraudulent deceit and concealment."

Another exception to the general rule which the authorities seem to establish is that where one undertakes with another to construct a place for the doing of certain work, such as a scaffold or staging, he will be liable to any who, while using the place in the performance of such work, are injured by reason of negligent or defective construction.[3] There is some differ-

[1] It is so regarded in Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237.

[2] Knelling v. Lean Mfg. Co., 183 N. Y. 78, reversing S. C. 88 App. Div. 309, 84 N. Y. S. 622.

[3] Mulchey v. Methodist R. Soc., 125 Mass. 487; Coughtrey v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387; Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311; Bright v. Barnett & R. Co., 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524; Heaven v. Pender, L. R. 11 Q. B. D. 503. To same effect: Hayes v. Philadelphia, etc., Co., 150 Mass. 457, 23 N. E. 225.

ence of opinion as to the grounds of liability in these cases but implied invitation is the prevailing one.

In a New Jersey case the general rule is laid down that in all cases in which a person undertakes the performance of an act, which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, *ipso facto,* imposes as a public duty the obligation to exercise such care and skill.[4]

Two additional cases may be noticed. The Standard Oil Company shipped to the city of Richmond a tank car of naphtha for use in making gas. In unloading the car, owing to a defective valve the flow could not be regulated, the naphtha escaped, ran into a sewer near the gas works, was ignited and killed an employe of the city who was helping to unload the car. In a suit against the Standard Oil Company for negligently causing the death of this employe, the supreme court of Virginia held that the company was liable on the ground "that a person who negligently uses a dangerous instrument, or article, or causes or authorizes its use by another in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured who is not himself at fault."[5] Naphtha is thus classed among those articles that are imminently dangerous to life and property, and the reason of the case brings it under the first exception to the general rule above stated. In a very similar case in the federal courts crude petroleum was held not to be such an article. The case arose out of the following facts: The same company shipped to the Ft. Scott Gas Company a tank car of crude petroleum. The car had no valve to control the outflow, and in an attempt to unload the car near the plaintiff's mill the oil discharged so rapidly that it overflowed, ran into the plaintiff's engine room, exploded and destroyed the mill. The company was held not liable. Assuming that it was negligent to use a car without a valve, it was held that crude petroleum was not

[4] Van Winkle v. Am. Steam Boiler Ins. Co., 52 N. J. L. 240, 19 Atl. 472.

[5] Standard Oil Co. v. Wakefield, 102 Va. 824, 47 S. E. 830.

so dangerous to life or property as to impose upon the company a public duty in dealing with it.[6]

[6] Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253. The decision was also put upon other grounds. The following additional cases upon the general subject are referred to. Bickford v. Richards, 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 224; Boston Woven Hose & R. Co. v. Kendall, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781; Roddy v. Missouri Pac. R. R. Co., 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746; Godley v. Hagerty, 20 Pa. St. 387, 59 Am. Dec. 731; Carson v. Godley, 26 Pa. St. 111, 67 Am. Dec. 404; Slattery v. Colgate, 25 R. I. 220, 55 Atl. 639; Parry v. Smith, L. R. 4 C. P. D. 325.

INDEX.

[REFERENCES ARE TO PAGES.]

A.

ABATEMENT,
of nuisance by act of party, 108.
See NUISANCE.
ABDUCTION,
of child, 259.
of wife, 252, 253.
ABUTTING OWNERS,
trespass upon, 332.
rights of 332, 370.
ACCESSION,
property by, 117–119.
ACCIDENT,
what is, 18, 19.
injuries from, not actionable, 18.
ACTION. See REMEDY.
novelty of, no bar to its maintenance, 8.
when it accrues, 140–142.
none for acts merely intended, 17.
redress by, ordinarily the only remedy, 121–123.
ACT OF GOD,
innkeepers do not warrant against, 642.
common carriers not responsible for, 64
ACTS INTENDED,
are not torts, 17.
ADMIRALTY,
remedy in for torts, 122.
rule in, as to contributory negligence, 703.
ADOPTION,
of wrong, what constitutes, 87.
ADVICE OF COUNSEL,
defense of, in malicious prosecution, 173.
AFFIRMING CONTRACT,
when obtained by fraud, 469.
AGENTS,
are servants, 473.
AIR,
common-law easement of, 369.

AMUSEMENT, PLACES OF,
right of all to visit, 305.
ANARCHIST,
when actionable to charge one with being an, 202, 203.
ANIMALS,
distress of, damage feasant, 119.
common-law rule as to trespasses by, 338.
modification of common law by statute, 341.
trespasses by, when being driven on highway, 342.
vicious, liability for injuries by, 343.
whether negligence essential, 345.
the scienter, 346.
who liable, 347.
effect of contributary negligence, 348.
vicious, right to kill, 349.
wild, liability for injuries by, 350.
wild, when property, 413.
ANNOYANCE WITHOUT FAULT,
not a nuisance, 566.
APPLIANCES,
master's duty and liability, as to, 503.
See MASTER AND SERVANT.
APPROVAL,
of a wrong, does not make one a wrong-doer, 32.
ARREST. See FALSE IMPRISONMENT.
what constitutes, 158.
by virtue of legal process, 161.
requisites of valid process, 161.
without warrant, when justifiable, 163.
for ulterior purpose, 189.
by abuse of process, 188–192.
ART,
privilege to criticise works of, 245.
ASSAULT,
what is, 149.
words do not constitute an, 18.
ASSAULT AND BATTERY,
what constitutes, 149, 150.
effect of consent, 151.
intent in, 153.
in self defense, 153.
in defense of family, 155.
of possessions, 155.
in case of teacher and pupil, 157.
of parent and child, 157.

ASSENT,
of plaintiff, effect of, 137.
to a battery, effect, 151.
ASSUMPSIT,
when may be brought on waiver of a tort, 129.
ASSUMPTION OF RISK. See MASTER AND SERVANT.
doctrine of, 501, 528.
ATTACHMENT,
joint liability of different attaching creditors, 84.
action for maliciously suing out, 183.
ATTORNEYS,
when liable for torts of officer, 90.
advice of, as a defense, 173.
privilege of, 227.
liability of, for negligence or unskilfulness, 670.
AUTHORS,
protection of, by copyright, 352.
rights of, in unpublished works, 353.
of letters, protection of, 354.
privilege to criticise works of, 245.

B.

BAGGAGE,
liability of carrier for, 659.
what is, 659.
BAILEE. See BAILMENTS.
whether infants liable upon, 57–59.
kinds of, 631.
for the benefit of bailor, 631.
care required in case of, 631.
for benefit of bailee, 634.
care required in case of, 634.
for mutual benefit, 635.
care required in case of, 635.
of customer's property laid aside to try on new garment, 638.
to safe deposit companies, 639.
to innkeepers, 640.
to common carriers, 646.
BANK,
liability of, for refusal to honor check, 210.
liability for special deposit, 633–635.
BANKRUPTCY,
action lies for maliciously instituting proceedings in, 183.
BARBER,
liability of, for property of customer, 638.

BEES,
liability for injuries by, 350.

BENEFICIARIES,
under statutes giving action for wrongful death, 277.

BILLIARD ROOM,
whether a nuisance, 604.

BOARDING HOUSE KEEPERS,
are not innkeepers, 640.

BOILERS,
care required in use of, 749.
liability for explosion of, 749.

BOOKS AND WRITINGS,
fair criticism of, privileged, 245.

BOYCOTT,
defined, 297.
is illegal, 297.

BREWERY,
when a nuisance, 603.

BRICK BURNING,
whether a nuisance, 602.

BURDEN OF PROOF,
to show want of probable cause for criminal suit, 177
to show malice in such suits, 179.
to show fraud, 466.
in suit by servant against master, 561.
in suit for loss of bailed property, 639.
to show negligence, 689.
to show contributory negligence, 703.

BURIAL RIGHTS,
and rights in dead bodies, 266.

BUSINESS,
right to form relations in, 289.
slanders in respect to, 207.
combinations to injure, 296.
words tending to injure one in, actionable, 208.

C.

CALAMITY,
nuisances which threaten, 606.

CANDIDATES,
privileged discussion of, 240, 241.

CARRIERS. See COMMON CARRIERS.

CATTLE. See ANIMALS.
distress of, damage feasant, 119.
escaping from highway, liability, 342.
owner must restrain, 338.
statutes respecting fences against, 341.
trespasses by, 338–343.
injuries by vicious, 343.
CAUSE,
proximate and remote, 30.
CEMETERY,
rights in, 266.
CHARITABLE CORPORATIONS,
liability of, for torts, 71.
CHECK,
when refusal to honor is actionable, 210.
CHILD,
parent's action for injury to, 258.
for seduction of, 260.
no action against parent for abusive treatment, 264.
whether servant or parent, 473.
liability of master for failure to warn and instruct, 521.
contributory negligence of, 713.
liability to, for dangerous premises, 736.
CIVIL RIGHTS,
right to enter into business relation, 289.
action for preventing one from obtaining employment, 289.
for procuring discharge of employee, 291.
for inducing breach of contract, 292.
combinations to prevent or interfere with the employment of labor, 293.
action for injury to trade or business, 296.
right to the service of common carriers, 302.
to other *quasi*-public services, 302.
right to the privileges and accommodations of inns, theaters, restaurants and the like, 305.
civil rights acts, 306.
right to instruction in the public schools, 307.
violating the right of suffrage, 309.
CIVIL RIGHTS ACTS,
decisions under, 306.
CIVIL SUITS,
malicious, action for instituting, 133.
CLASSIFICATION,
of rights, 3.
of officers, 374.

CLASSIFICATION—continued.
of official duties, 374.
of property as real and personal, 405.
of nuisances, 567.

CLERKS OF COURTS,
liability of, to private suit, 401.

COLLOQUIUM,
province of, in slander and libel, 219.

COMBINATIONS,
to prevent or interfere with the employment of labor, 293.
to injure trade or business, 296.

COMMON CARRIERS,
who are, 646.
telegraph and telephone companies are, 303.
right to the service of, 302.
may not discriminate, 303.
may make rules and regulations, 303.
must carry without partiality, 647.
liability of, 648–652.
of persons, duty and liability of, 653.
liability for baggage, 659.
street railways, 661.
passenger elevators, 663.
sleeping car companies, 664.
contracts by, against liability for negligence, 721.
in case of freight, 721–725.
in case of passengers, 725–728.

COMMON COUNCIL,
whether proceedings of, privileged, 230, 243.

COMMON LAW,
development of, 3–9.

COMPARATIVE NEGLIGENCE,
doctrine of, 711.

COMPENSATORY DAMAGES, 126.

COMPETITION,
right of, and its limitation, 296–302.
unfair, what is, 361.
remedy for, 361.

CONFIDENTIAL COMMUNICATION. See SLANDER AND LIBEL.

CONFLICT OF LAWS,
in case of tort actions, 133.
in case of statutory action for wrongful death, 274.

CONFUSION OF GOODS,
rights of parties in case of, 115.

CONSPIRACY,
joint liability for, 85.
conspiracy alone not actionable, 85.
to prevent or interfere with employment, 293.
to injure trade or business, 296.
CONSTRUCTION,
of words in slander and libel, 216.
of statutes giving action for wrongful death, 272.
CONTRACTORS. See INDEPENDENT CONTRACTORS.
are not servants, 477.
CONTRACTS,
torts in connection with, 3.
breach of, distinguished from tort, 12.
action for inducing breach of, 292.
rescinding, for fraud, 467.
affirming, in case of fraud, 469.
against liability for negligence, 721.
by common carriers, 721.
by telegraph companies, 728.
other cases, 730.
CONTRIBUTION,
between joint tort feasors, 104.
CONTRIBUTORY NEGLIGENCE,
in actions for wrongful death, 281.
in case of injuries by animals, 348.
in case of master and servant, 559.
defeats recovery, 48, 700.
rule in admiralty, 703.
burden of proof to show, 703.
must be proximate to injury, 704.
effect of, when defendant's conduct is reckless or willful, 706
in case of taking risks to save life or property, 709.
in case of mistake in sudden peril, 710.
of children and other incompetents, 712.
subsequent to injury, effect of, 715.
CONVERSION. See TROVER.
what is, 417.
the plaintiff's right or title, 419.
what may be converted, 421.
what constitutes, 423.
demand and refusal in, 430.
by tenant in common, 432.
effect of return of property, 434.
damages for, 435.
effect of judgment on title to the property, 437.
justification under process, 438.
when action ex *contractu* may be brought for, 129.

COPYRIGHTS,
infringement of, 351.
CORPORATIONS. See CHARITABLE CORPORATIONS; MUNICIPAL CORPORATIONS.
liability of, for torts, 67.
may be liable for malicious prosecution, 182.
charitable, whether liable for torts of officers and agents, 71.
COST OF PROPERTY,
false representations as to, whether actionable, 446.
COUNSEL. See ATTORNEYS.
COURTS,
proceedings of, privileged, 225.
CRIMES,
distinguished from torts, 10.
words imputing, when actionable *per se*, 201.
CROPS,
growing, when personalty, 411.
CROSSINGS,
accidents at, 759.

D.

DAMAGES,
whether recoverable for mental anguish alone, 24.
for mental anguish when followed by sickness or other physical effects, 26.
when must be shown to make out right of action, 22.
as affected by motive, 47.
general and special, 123.
nominal, 124.
compensatory, 126.
punitive, 126.
avoidable, no recovery for, 127.
interest as an element of, 128.
question of interest in tort actions, 128.
waiving tort and suing in contract, 129.
when suit must be brought—conflict of laws, 128.
defenses generally, 136.
assent of plaintiff, 137.
release or agreement after injury, 139.
statute of limitations, 140.
parties in tort actions, 142.
for violation of statutory duties, 144.
in slander and libel, 248.
measure and elements of in actions for wrongful death, 283.
in trover, 435.

DAMNUM ABSQUE INJURIA,
illustrations of, 21.
no action lies for, 21, 567.
DAMS,
injuries from bursting, 580, 581.
from setting water back, 595.
DANGEROUS PREMISES,
liability for, to persons invited, 731.
to licensees and trespassers, 734.
to trepassing children, 736.
landlord's liability for, 739.
DAUGHTER,
action for seduction of, 260.
DEAD BODIES,
rights in and in respect to burial of, 266.
DEATH BY WRONGFUL ACT,
no action for at common law, 271.
statutes giving action for, 271.
construction of same, 272.
whether remedy local, 274.
who liable, 276.
the plaintiff, 276.
the beneficiaries, 277.
what is wrongful act, neglect or default, 279.
defenses, 280.
damages recoverable, 283.
DECEASED PERSONS,
slander of, 249.
DECEIT. See FRAUD.
DE FACTO OFFICERS,
liability of, to private suits, 403.
DEFAMATION. See SLANDER AND LIBEL.
DEFENSES. See REMEDY.
generally, 136.
that plaintiff a wrong-doer, 48.
leave and license, 137.
volenti non fit injuria, 138.
release or settlement, 139.
statute of limitations, 140.
truth as a, in slander and libel, 221.
in actions for wrongful death, 280.
DEFINITION,
of tort, 1–3.
of rights, 3.
of accident, 18, 19.
of proximate cause, 33.

DEFINITION—continued.
of slander, 196.
of libel, 196, 212.
of defamation, 196.
of privileged communication, 231.
of trespass upon land, 311.
of waste, 335.
of personal property, 405.
of fraud, 441.
of nuisance. 565.
of public nuisance, 568.
of private nuisance, 568.
of purpresture, 568.
of bailment, 631.
of innkeeper, 640.
of common carrier, 646.
of negligence, 681.
DEFENSE OF PROPERTY,
right to use force in, 155.
DEFENSE OF FAMILY,
right to use force in, 155.
DEGREES OF NEGLIGENCE,
doctrine of in some states, 688.
DEMAND AND REFUSAL,
importance of in trover, 430.
DEPUTIES,
responsibility of sheriff for acts of, 90, 398.
personal liability of, 90.
liable with sheriff for their own wrongs, 90.
DISCOMFORT, PERSONAL,
things causing, when a nuisance, 571–576.
DISCRETIONARY DUTIES,
action will not lie for neglect of, 383–386.
See JUDICIAL OFFICERS; OFFICERS.
DISCRIMINATION,
by common carrier, 303.
by telegraph companies, 303.
by public service corporations, 304.
DISEASE,
when actionable to charge one with having, 205.
DISTILLERY,
when a nuisance, 603.
DISTRESS,
of cattle damage feasant, 119.
of goods to compel performance of duty, 120.

DOG. See ANIMALS.
when a nuisance, 604.
DROVERS' PASSES,
stipulations in for exemption from liability for negligence, 726.
DRUGGIST,
negligently selling poisons, 750.
DRUNKARD,
liability for torts, 63.
DUST,
nuisance of, 601.
DUTY. See RIGHTS.
and right correlative, 2.
created by common law or statute, 684.
is public or personal, 685.
neglect of, is negligence, 683.

E.

EASEMENTS,
what are, 362.
right of way, 362.
of support, 364.
in party walls, 367.
of light and air, 369.
of abutting owners, 370.
of riparian owners, 370.
action for interfering with, 371.
EDUCATION,
right to, in public schools, 307.
ELECTION OFFICERS,
liability of to private suits, 387.
ELECTORS,
violation of rights of, 309.
actions by, against election officers, 387.
ELECTRICITY,
liability for escape of, 582.
duty and liability of those generating and selling or using, 750.
liability for broken, defective or uninsulated wires, 750.
ELECTRIC WIRES,
liability for injuries by contact with, 750.
ELEVATORS,
in buildings, liability of owner of, for injury to passenger, 663.
EMPLOYE. See MASTER AND SERVANT.
no right on his discharge to clearance card or certificate, 289.
action for procuring discharge of, 291.
combinations to injure, 293.

EMPLOYERS,
conspiracy to control, 293.
EMPLOYMENT,
right to engage in, 289.
action for preventing, 289.
for procuring discharge of employee, 291.
combinations to prevent or interfere with, 293.
ENTICING,
the wife from the husband, 252, 253.
the child from the parent, 259
ENTRY,
to repossess lands, 119.
to retake goods, 112.
to take goods purchased, 113.
EQUITY,
remedy in, for torts, 123.
ESCAPE,
of cattle from highway, 342.
liability of officer for, 394.
ESTOPPEL,
to revoke license, 326.
EXECUTIVE OFFICERS,
liability of, for official acts and neglects, 3
EXPLOSION,
of gas, liability for, 756
EXPLOSIVES,
negligent use of, 746.
sending by carrier without notice, 748.
keeping of, when a nuisance, 607.
EXPRESS COMPANIES,
are common carriers, 646.

F.

FACT. See LAW AND FACT.
FAIR ON ITS FACE,
what process is, 438.
FALSE IMPRISONMENT,
nature of the wrong, 158.
what constitutes, 158.
distinction between, and malicious prosecution, 166.
lawful restraint in certain relations, 159.
in case of parent and child, 160.
in case of teacher and pupil, 160.
justification by virtue of legal process, 161, 167-169.
requisites of valid process, 161.

FALSE IMPPRISONMENT—continued.
arrest without warrant, 163.
restraint of the insane, 165.
illustrations, 166.
what renders one liable for, 167.
all who aid, assist or advise are liable, 169.
FAMILY,
battery in defense of, 155.
FAMILY RIGHTS,
family, as such, has no rights, 251.
injuries to the husband, 251.
husband's remedy for injuries to the wife, 253.
injuries to the wife, 254.
action by wife for alienation of husband's affections, 257.
action by parent for injuries to child, 258.
parent's action for seduction, 260.
injuries to children, 264.
action for fraudulent marriage, 265.
burial rights and rights in dead bodies, 266.
master's action for injuries to servant, 270.
FELLOW SERVANTS. See MASTER AND SERVANT.
duty of master in employing and retaining, 515.
negligence of, assumed by servant, 541.
who are,—servants of superior grade or rank, 544.
servants in different departments, 546.
servants in distinct business, 550.
test of who are, 551.
FENCES,
erected in spite, liability for, 44.
common law as to, 338.
statutes as to, 341.
FILTHY PERCOLATION,
nuisance of, 578.
FIRE ARMS,
negligence in use of, 746.
FIREMEN,
not servants of municipality, 474.
entering building to put out fires, are licensees, 735.
FIRES,
proximate cause in case of spread of, 35.
negligence in setting, 741.
set by engines, 743.
presumption of negligence, 744.
FISHING,
trespass in, 313.

FIXTURES,
what are, 405–409.
removal of, 410.
FOREMEN,
are fellow servants with subordinates, 544.
FOULING WATER COURSE,
liability for, 596.
FRAUD,
definition of, 441.
what constitutes, 441.
how representations may be made, 442.
when silence is fraudulent, 442.
expressions of opinion, whether fraud, 446.
representations as to value, cost, condition, quality, etc., 246.
as to matters of law, 452.
as to title, 453.
fraudulent promises, 452.
materiality of representations, 454.
duty of self protection, 455.
who may rely upon representations, 457.
representations to the public, 457.
whether representations must be knowingly false, 460.
representations must have been acted upon, 463.
burden of proof in actions for, 466.
rescinding contract for, 467.
affirming contract, 469.
remedy for, 469.
FRAUDULENT MARRIAGE,
action for, 265.
what is, 265, 266.
FRIGHT,
mental suffering from, whether actionable, 24, 25.
when miscarriage or sickness results, 26–29.

G.

GAME,
property in, 413.
trespasses in taking, 313.
GARNISHMENT,
action for malicious, 184.
GAS,
liability for escape of, 755.
for negligence in supply of, 757.
manufacture of, when a nuisance, 603.
GASES,
offensive, are a nuisance, 601.

GENERAL DAMAGES, 123.
GOVERNMENT,
torts by, 82.
not suable except by consent, 82.
GROWING CROPS,
property in, 411.
GUARDIAN,
action by, for injury to ward, 264.

H.

HIGHWAY OFFICERS,
liability of, to private suits, 400.
HIGHWAYS,
rights and remedies of abutting owners, 174, 870.
liability for defects in, 766.
what are defects, 769.
HOUSE OF ILL-FAME,
is nuisance *per se*, 566.
HUNTING,
trespass in, 313.
HUSBAND,
liability of, for wife's torts, 63.
injuries to, 251.
remedy of, for injury to wife, 253.
for alienation of wife, 252.

I.

ICE AND SNOW,
when actionable defect in street, 770.
IMPARTIALITY,
required of innkeepers, 641.
of common carriers, 303, 647.
IMPLIED LICENSE. See LICENSE.
IMPRISONMENT. See FALSE IMPRISONMENT.
IMPUTED NEGLIGENCE,
in case of parent and child, 715.
in other cases, 717.
INCORPOREAL RIGHTS,
nature of, 351.
copyrights and patents, 351.
inventions not patented, 352.
literary and artistic productions not copyrighted, 353.
private letters, 354.
wrongs in respect to trade marks, 354.
what may be a trade mark, 356.

INCORPOREAL RIGHTS—continued.
what is an infringement, 360.
unfair competition, 361.
easements in general, 362.
of way, 362.
of support, 364.
in party walls, 367.
of light and air, 369.
of abutting owners, 370.
of riparian owners, 370.
action for interfering with easement, 372.
INDEMNITY,
between joint tort feasors, 104.
INDEPENDENT CONTRACTORS,
who are, 477, 483.
not servants of employer, 477.
exceptions, 478.
INFANTS,
liability for contracts and crimes, 54.
for torts, 57.
INFRINGEMENT,
of rights in literary property, 351-354.
of rights in trade marks, 354-360.
of patent, 351.
INJUNCTION,
action for maliciously suing out, 185.
to restrain libel, when it lies, 250.
INNKEEPERS,
who are, 640.
duty and liability of, 640-646.
distinguished from boarding-house keeper, 641.
may not refuse accommodations, 305.
must receive guests impartially, 641.
whom he may refuse to receive, 641.
may expel disorderly persons, 641.
not liable for goods lost by negligence of guest, 644.
limitation of liability by statute, 645, 646.
cannot limit his liability by notice, 645.
responsibility of, for luggage, 643-645.
liability for injury to guest, 645.
INNUENDO,
province of in slander and libel, 219.
INSANE PERSONS,
liable for torts, 54.
reasons for this, 55.
only actual damages recoverable, 56.

INSANE PERSONS—continued.
not liable where evil intent is an element, 56.
right to restrain, and its limitations, 165.
contributory negligence of, 714.
INSPECTORS,
liability of, for neglects or violations of duty, 391.
INTENT. See MALICE; MOTIVE.
bad intent, when important, 43.
importance of in batteries, 153.
INTENTION,
to commit a wrong is not actionable, 17.
INTEREST,
of judge, is disqualification to act, 382.
allowance of, in tort actions, 128.
INVENTIONS,
not patented, rights in, 352.

J.

JAIL,
whether a nuisance, 576.
JARRING,
nuisance of, 604.
JOINDER,
of plaintiffs, in tort actions, 142.
JOINT TORTS,
what constitutes a joint wrong generally, 83.
conspiracy, 85.
by adoption or ratification, 87.
joint liability of officer and party, 88.
participation by attorneys, 90.
joint liability of officer and deputy, 90.
joint liability for slander, 91.
for negligence, 92.
for nuisance, 95, 623.
joint liability of master and servant, 96.
of partners, 97.
of landlord and tenant, 97.
in other cases, 97.
general consequences of joint liability, 98.
each wrongdoer liable for all the damage, 98.
each, any or all may be sued, 99.
effect of judgment against less than all, 100.
effect of release or other settlement with one joint wrongdoer, 102.
contribution and indemnity as between wrongdoers, 104.
JUDGES OF ELECTION,
liability of, to private suits, 387.

JUDGMENT,
effect of, against one joint tort feasor. 100.
effect of, in trover, 437.
JUDICIAL OFFICERS,
liability of, for official acts, 377–382.
for ministerial acts, 382.
liability of *quasi*-judicial officers, 383.
cannot act where interested, 382.
JUDICIAL PROCEEDINGS,
publication of, when privileged, 225, 242.
JURISDICTION,
want of, renders process void, 162.
obtained by abuse of process, 188–191.
what it consists in, 379.
necessity for, in case of judicial action, 379.
inferior courts must show, 380–382.
can be none where judge interested, 382.
JURORS,
not liable to private suits, 384.
privilege of, 226.
JUSTICE OF THE PEACE,
not liable for judicial action, 377.
liable for neglect of ministerial duty, 382.
JUSTIFICATION,
under process, rules of, 161, 438.

L.

LABOR,
right to, 289.
injuries to the right of, 289–293.
preventing employment, 289.
procuring discharge of employe, 291.
employe no right on discharge to clearance card or certificate, 289.
LANDLORD AND TENANT,
joint liability of, 97.
trespass by landlord, 320.
waste by tenant, 335.
tenants right to remove fixtures, 410.
liability of each for nuisance, 617–619.
liability of landlord for defects and dangers in premises leased, 739.
LANDS,
entry on to obtain goods, 112.
entry on to re-possess, 119.
See NUISANCE; REAL PROPERTY; TRESPASS.

LATERAL SUPPORT,
right of, 364.
action for removal of, 364–367.
LAST CLEAR CHANCE,
doctrine of, 706.
LAW AND FACT,
question of, in probable cause, 170.
in determining whether words are libelous, 218.
in case of privileged communications, 235.
in negligence cases, 696.
LEGISLATIVE OFFICERS,
liability of, for official acts, 376.
privilege of, 229, 243.
LEGISLATURE,
proceedings of, privileged, 229, 243.
power of, to legalize a nuisance, 611.
LETTERS,
private, right to publish, 353.
LIABILITY,
generally, for torts, 54–82.
joint, 83–107.
of publisher of newspaper for libel, 199.
of general manager, 199.
for injuries by vicious animals, 343–347.
for nuisance, 617.
of maker, vendor or furnisher of an article to persons not in privity of contract, 773.
LIBEL. See SLANDER AND LIBEL, 34.
LIBERTY OF THE PRESS,
its extent and limitations, 240.
LICENSE,
to enter lands, in general, 322.
implied, 322.
express, 324.
given by law, 328.
when license may be revoked, 326.
abuse of, when it makes one trespasser *ab initio*, 331.
LICENSEES,
on dangerous premises, liability to, 734.
LIFE,
no common-law action for taking, 271.
statutory action for taking, 271.
LIGHT AND AIR,
easements of, 369.

LIMITATIONS,
statute of as a defense, 140.
in action for wrongful death, 332.
LITERARY PROPERTY, 353, 354.
LIVERY STABLE.
whether a nuisance, 602.
not a nuisance *per se*, 566.
LUGGAGE,
responsibility of innkeeper for, 643-645.
liability of common carrier for, 659.
LUNATICS,
liability of, for torts, 54.

M.

MACHINERY,
communicating fires by, 743.
jar of, when a nuisance, 604.
liability of master for injuries from, 508.
MAKER,
liability of, for defects in work or article to persons not in privity of contract, 773.
MALICE,
effect of, to make person liable, 42.
place of, in the law of torts, 43.
aggravates damages, 47.
in malicious prosecution, 179.
meaning of, in slander and libel, 223.
MALICIOUS CIVIL SUITS. See MALICIOUS PROSECUTION.
MALICIOUS PROSECUTION,
nature of the wrong, 170.
probable cause, 170.
advice of counsel, 173.
proof of probable cause or the want of it, 176.
malice, 179.
what is an end of the prosecution, 182.
who liable, 182.
lies for civil suits when an interference with person or property, 183.
whether it lies when no interference with person or property, 185.
same rules apply when action based on civil suit as on criminal, 187.
MANUFACTURER,
liability of, for defects in article, to persons not in privity of contract, 773.
MARINE TORTS. See ADMIRALTY.
MARRIAGE,
action for fraudulent, 265.

[REFERENCES ARE TO PAGES.

MARRIED WOMEN,
torts of, husband may be sued for, 63.
are liable for torts, 63.
husband's coercion presumed, 63.
but may be disproved, 63.
not liable where tort grows out of contract, 64.
how liability affected by recent statutory changes, 65.
MASTER AND SERVANT,
when jointly liable, 96.
action by master for injury to servant, 270.
who is a servant, 471.
volunteers, 471.
children, 473.
officers of private corporations, 473.
of public corporations, 474.
firemen, 474.
policemen, 474.
servant of one master, loaned or hired to another, 475.
illustrations, 476.
independent contractors, 477.
master's liability to third persons—general rule, 485.
for the willful, malicious or intentional acts of his servant, 486.
for the unintentional or negligent wrongs of servant, 490.
disobedience of orders immaterial, 492.
acts must be within scope of employment, what is within, 493
master's liability to servant—general principles, 499.
duty and liability as to place, 502.
as to tools, appliances, materials, etc., 508.
as to employing and retaining fellow servants, 515.
as to latent and unnecessary dangers, 518.
as to supervision and regulation, 519.
as to warning and instructing the young and inexperienced, 521.
degree of care required of master in performance of duties, 524.
master cannot delegate his duties, 527.
assumption of risk by servant, 528.
effect of master's orders upon, 539.
fellow servant doctrine, 541.
general rule, 541.
servants of superior grade or rank, 544.
servants in different departments, 546.
servants in distinct business, 550.
test of who are fellow servants, 551.
when question of fact and when of law, 555.
effect upon liability, of master's promise to remove defect or danger, 555.
negligence of master and fellow servant combined, 558.

MASTER AND SERVANT—continued.
contributory negligence of servant defeats recovery, 559.
burden of proof in action by servant, 561.
servant liable for his own negligence, 562.
misfeasance and nonfeasance, 563.
liable over to master, 563.
statutes relating to, 564.
contracts relieving master from liability to servant for negligence are void, 730.
MATERIALS,
master's duty as to, 508.
MENTAL ANGUISH,
whether legal damage, 24.
when followed by sickness or other physical effects, 26.
MENTAL DISQUIETUDE,
no action for causing, 575.
MERCHANT,
words affecting credit of, actionable, 207.
liability for property of customer, laid aside to try on garment, 632
MINISTERIAL OFFICERS,
who are, 386.
liability of, for official acts and neglects, 386.
MORAL,
wrong, no remedy for, 9.
MOTIVE. See MALICE; INTENT.
effect of, upon liability, 486.
MUNICIPAL CORPORATIONS. See HIGHWAYS.
kinds of, 72.
liability of, generally, for torts, 72.
complex nature of, 73.
not liable for governmental action, 74.
nor for failure to abate a nuisance, 75.
or to enforce police regulations, 75.
nor for misbehaviors of firemen, 76.
or of policemen, 76.
or of health officers, 77.
liable for defects in sewers, 77.
for negligent management of property, 80.
liability of, for defective ways, 78, 766.

N.

NAME,
of person as a trade mark, 358.
of place as a trade mark, 359.
NECESSITY,
right of way by, 362.

[REFERENCES ARE TO PAGES.]

NEGLIGENCE,
joint liability for, 92.
in case of injuries by animals, 345.
master's liability for the negligence of his servant, 490.
of telegraph companies, 665.
of skilled workmen, 668.
of attorneys, 670.
of physicians, 671.
in respect to statutory duties, 675.
of bailees, 631–639.
of safe deposit companies, 639.
of innkeepers, 640.
of common carriers, 646–663.
in case of passenger elevators, 663.
of sleeping-car companies, 664.
nature and definition of, 681.
involves breach of duty, 683.
legal duties, how created, 684.
duties public and private, 685.
standard of care, 687.
as dependent upon ability to foresee harm, 688.
degrees of, 688.
proof of, 689.
res ipsa loquitur, 689.
presumption of, 692.
when a question of law and when of fact, 696.
contributory, 700.
rule as to in admiralty, 703.
burden of proof in case of, 703.
must be proximate to injury, 704.
when defendant's conduct is reckless or willful, 706.
doctrine of last clear chance, 706.
in taking risks to save life or property, 709.
in case of mistake in sudden peril, 710.
of children and other incompetents, 713.
subsequent to injury, 715.
comparative, 711.
contracts against liability for, 721.
by common carriers, 721.
by telegraph companies, 728.
other cases, 730.
dangerous premises, liability for, to persons invited, 731.
to licensees and trespassers, 734.
to trespassing children, 736.
liability of landlord for defects in leased premises, 739.
in respect to fires, 741.

NEGLIGENCE—continued.
fires set by engines and steam machinery, 743.
in use of firearms and explosives, 746.
in use of steam boilers, 749.
in use and sale of poisonous drugs and the like, 750.
in use of electricity and its appliances, 750.
in case of gas and gas works, 755.
injuries to persons on or near railroad tracks, 758.
in case of street railways, 763.
injuries to person on highway, 766.
liability of maker, vendor or furnisher of an article to persons not in privity of contract, 773.
NEWS. See SLANDER AND LIBEL.
no privilege in publishing, 243.
NEWSPAPERS. See SLANDER AND LIBEL.
liability for libels in, 240.
NITROGLYCERINE,
storage of, when a nuisance, 605.
NOISE,
nuisance of, 604.
NOMINAL DAMAGES, 124.
NOTARY PUBLIC,
liability of, for official acts and neglects, 399.
NOTICE,
innkeepers cannot restrict liability by, 645.
nor common carriers, 648.
of evil propensity of domestic animal, 346.
NUISANCE,
joint liability for, 95.
abatement of by act of party injured, 108.
definition of, 565.
nuisance *per se*, 566.
annoyances which are not, 566.
classification of, 567.
public and private, what are, 568.
distinguished from purpresture, 568.
lawful uses of property are not, 568.
what are lawful uses, 568.
degree of annoyance necessary to constitute, 571.
effect upon ordinary people the criterion, 574.
things which produce mental disquietude or offend the taste, 575.
care and intent in general immaterial, 577.
improvements upon land, when nuisances, 577.
things kept or produced upon land which escape to adjoining land, 578.

[REFERENCES ARE TO PAGES.]

NUISANCE—continued.
interfering with surface water, 582.
interference with subteranean waters, 586.
interference with watercourses. General rules, 590.
diversion, 592.
detention of the water, 593.
flooding lands by damming or obstructing the stream, 595.
pollution of stream, 596.
what is a reasonable use of stream, 597.
smoke, dust, gases, offensive odors, etc., 601.
noise, jarring, vibrations, etc., 604.
nuisances which threaten calamity, 606.
private injury from public nuisance, 609.
effect of legislative authority, 611.
continuity of the wrong, 616.
who responsible, 617.
joint liability, 623.
who may complain, 624.
remedy for, 627.

O.

OCCUPANT,
liable for continuing a nuisance, 622.

OCCUPATION,
slanders in respect to, 205, 207.
when may be a nuisance, 601–606.

ODORS, OFFENSIVE,
nuisance of, 601.

OFFICE,
words damaging in respect to, actionable, 205.

OFFICERS,
liability for acts of deputy, 90.
when jointly liable with party, 88.
justification under process, 161, 168, 169.
when may arrest without warrant, 163.
of private corporation, are servants, 473.
of public corporation, are not servants, 474.
liability of, in general, 373.
classification of, 374.
rules of liability applicable to all, 374.
liability of executive officers, 375.
of legislative, 376.
of judicial, 377.
jurisdiction essential, 379.

OFFICERS—continued.
judge interested, 382.
for ministerial acts, 382.
of *quasi*-judicial, 383.
of ministerial, 386.
of election, 387.
of recorders of deeds, 389.
of inspectors, 391.
of postmasters, 392.
of sheriffs, 393.
of notaries public, 399.
of taxing officers, 400.
of highway officers, 400.
of clerks of court, 401.
of other officers, 401.
of de facto officers, 403.
effect of want of means to perform duty, 402.
OPINION,
expressions of, when ground of fraud, 446.
ORDINANCE,
whether a protection, when invalid, 167, 168.

P.

PARENT,
liability for tort of child, 62.
right to discipline child, 157, 160.
criminal liability for assault upon child, 157.
action by, for injury to child, 258
for seduction of daughter, 260
PARTIES,
when liable for acts of officer, 88.
in case of joint wrongs, 98.
in tort actions, 142.
joinder of plaintiffs, 142.
in action for wrongful death, 276, 277.
PARTNERS,
joint liability of, for torts, 97.
when liable for each others wrongs, 97.
when are liable for malicious prosecution by another partner 183
PARTY WALLS,
what are, 367.
rights in, 367.
right to repair and rebuild, 368.
injuries in respect to, 368.
PASSENGERS. See COMMON CARRIERS.

[REFERENCES ARE TO PAGES.]

PASSENGER ELEVATORS,
whether common carriers, 663.
liability of, 663.
PASS ON RAILROAD,
contracts in, to exempt from liability, 726.
PATENT,
infringement of, 351.
PERCOLATIONS,
of filth are nuisances, 578.
of water, 579.
PERSONAL PROPERTY,
distress of, to compel performance of duty, 120.
right of recaption in case of, 112–117.
right to retake by force, 112.
title to, not lost by transformation of property by wrongdoer, 117.
definition of, 405.
when a fixture, 405.
growing crops are, when, 411.
standing trees are, when, 413.
wild animals are, when, 413.
trespass to, 414.
indirect injuries to, 417.
conversion of, 417.
action for, 418.
plaintiff's right or title, 419.
what may be converted, 421.
what constitutes conversion, 423.
necessity of demand, 430.
by tenant in common, 434.
effect of return of property, 434.
damages in, 435.
effect of judgment on title to property, 437.
when interference with may be justified under process, 438.
PERSONAL RIGHTS. See RIGHTS.
PERSONAL SECURITY,
injury to, by assault and battery, 149.
by false imprisonment, 158–169.
by malicious prosecution, 170–188.
by malicious abuse of process, 188.
by arrests for ulterior purpose, 189.
by officer serving his own process, 191.
by arrest of privileged persons, 192.
by violating right of privacy, 192.
PETITIONS,
are privileged when, 236.

PHYSICIANS,
duty and liability of, in treatment of patients, 671.
PIGEONS,
whether a nuisance, 582.
PILOT,
not the servant of master of vessel, 477.
PIRACY,
literary, 351–354.
of trade marks, 354–360.
PLEADINGS,
to what extent privileged, 228, 242.
POISON,
liability of persons dealing in, 750.
POLICEMEN,
not servants of municipality, 474.
POSSESSION,
of personal property, right to retake by force, 112.
of land, what constitutes, 312, 316.
right of, 316.
right to take by force, 317–319.
POSTMASTERS.
liability of, to private suit, 392.
POWDER,
storage of, when a nuisance, 607.
PRESCRIPTION,
none against state, 625.
to maintain public nuisance as against private parties, 626.
PRESS,
what is meant by liberty of, 240.
privilege and responsibility of, 240.
PRESUMPTION,
of negligence, 692.
PRISON,
not a nuisance *per se*, 576.
PRIVATE LETTERS,
rights in respect to publication of, 354.
PRIVACY,
whether a right of, 192.
action for violation of, 192.
PRIVATE,
rights, distinguished from public, 10.
PRIVILEGE,
doctrine of, in slander and libel, 224.
absolute privilege, judicial proceedings, 225.
of witness, 225.
of party to suit, 226.

[REFERENCES ARE TO PAGES.]

PRIVILEGE—continued.
of jurors, 226.
of counsel, 227.
legislative acts and proceedings, 229.
executive acts, 230.
conditional privilege in general, 231.
examples of, 236–239.
of the press, 240.
whether should be specially pleaded, 235.
PRIVILEGED PERSONS,
arrest of, 192.
PRIVILEGE OF THE PRESS. See PRIVILEGE.
PROBABLE CAUSE,
what constitutes, 170.
proof of, 176.
PROCESS,
requisites of valid, 161.
whether officer bound by knowledge of extraneous facts, 168, 169.
malicious abuse of, 188.
abuse of, by arrests for ulterior purpose, 189.
by officer serving his own process, 191.
by arrest of privileged persons, 192.
breaking open doors to serve, 329, 330.
justification under, 438.
when fair on its face, 440.
PROFESSION,
words damaging in respect to, actionable, 205.
PROOF. See BURDEN OF PROOF.
of probable cause, 176.
of negligence, 689.
burden of, to show contributory negligence, 703.
PROPERTY,
slander of, 247.
real, injuries to, 311–337.
personal, defined, 405.
wrongs to, 405–440.
conversion of, 417.
PROXIMATE CAUSE,
doctrine of, in torts, 30.
what is, 30–35.
generally a question of fact, 32.
a question of law when facts not disputed, 33.
illustrations of, 35.
in case of contributory negligence, 704.
PUBLICATION,
what constitutes, in slander and libel, 196.
of literary or artistic productions, what is, 352.

PUBLIC CORPORATIONS,
liability of, for torts, 72.
PUBLIC NUISANCE. See NUISANCE.
PUBLIC SERVICE COMPANIES,
must serve all alike, 304.
PUNITIVE DAMAGES, 126.
PURPRESTURE,
what is, 568.
when a nuisance, 568.

R.

RAILROADS. SEE MASTER AND SERVANT. NEGLIGENCE. STREET RAILWAYS.
liability as carriers of freight, 646.
as carriers of persons, 653.
as carriers of baggage, 659.
liability for fires set by locomotives, 743.
liability for injury to persons on or near tracks, 758.
at highway crossings, 759.
for injuries to children by turntables, 736.
limitation of liability by, 721.
RATIFICATION,
of wrong, what constitutes, 87.
as between officer and party, 88.
REAL PROPERTY,
entry upon to retake goods, when lawful, 112–115.
when owner may enter upon and oust wrongdoer, 113.
estates in, 311.
trespass upon, what is, 311.
trespasses in hunting, 313.
in fishing, 313.
trespass by means of inanimate objects, 315.
possession and right of possession, 316.
justifiable entries upon, 322.
license to enter, kinds of, 322.
implied license, 322.
express license, 324.
right to revoke license after expense incurred, 326.
license given by law, 328.
abuse of license, when makes one trespasser, *ab initio*, 331.
trespass upon abutting owners, 332.
rights of tenants in common, 334.
injuries to land other than trespass, 335.
waste, 335.
distinguished from personal property, 405.
what is lawful use of, 568.

[REFERENCES ARE TO PAGES.]

REAL PROPERTY—continued.
liability for dangerous condition of, to persons invited, 731.
to licensees and trespassers, 734.
to trespassing children, 736.
liability of landlord for defects in premises leased, 739.
RECAPTION,
of personal property, when permissible, 112.
in case of confusion of goods, 115.
in case of transformation of property, 117.
RECORDER OF DEEDS,
liability of, for errors and neglects, 389.
RELATION,
torts by, 52.
RELEASE,
of one joint tort feasor, effect of, 102.
as a defense, 139.
impeachment of, 139.
REMEDY,
no right without a, 8.
none for mere moral wrong, 9.
for tort which is also a crime, 11, 12.
when plaintiff has option of contract or tort, 12.
when plaintiff may sue in tort, though breach of contract involved, 12–16.
for acts merely malicious, 43.
when plaintiff's wrongdoing a bar, 48.
redress by party's own act, 108.
abatement of nuisance, 108.
recaption or reprisal, 112.
recaption in case of confusion of goods, 115.
recaption in case of transformation of property, 117.
by entry upon lands to repossess them, 119.
by distress of cattle damage feasant, 119.
by distress of goods to compel performance of duty, 120.
redress by action generally, 121.
remedy in equity, 121.
remedy in admiralty, 122.
action for damages, 123.
general and special damages, 123.
nominal damages, 124.
compensatory damages, 126.
punitive damages, 126.
no recovery for avoidable consequences, 127.
whether interest recoverable, 128.
waiving tort and suing in contract, 129.
venue—conflict of laws, 133.

REMEDY—continued.
defenses in general, 136.
assent of plaintiff, 137.
volenti non fit injuria, 138.
release or agreement after injury, 139.
statute of limitations, 140.
parties to tort actions, 142.
for violation of statutory duties, 144.
statutory, when cumulative, 144.
when exclusive, 146.
truth as a defense in slander and libel, 221.
for wrongful death, 271–288.
none at common law, 271.
under statutes, 271.
whether action local or transitory, 274.
who liable, 276.
the plaintiff, 276.
the beneficiaries, 277.
defenses, 280.
damages, 283.
for injury to reversion, 321.
for fraud, 469.
for nuisance, 627.

REMOTE CAUSE. See PROXIMATE CAUSE.

REPEATING SLANDERS,
liability for, 246.

REPLEVIN,
action for maliciously suing out writ of, 185.

REPRESENTATIONS,
to constitute frauds must have been material, 454.
must relate to facts, 446.
must not be mere promises, 452.
must have been acted on, 463.

REPUTATION. See SLANDER AND LIBEL.
right to, 196.

RESERVOIR,
liability for bursting of, 580.

RES IPSA LOQUITUR,
doctrine of, 689.

RESTAURANT,
liability for property of customer, 638.

RIGHT OF WAY,
easement of, 362.
by necessity, 362, 363.

[REFERENCES ARE TO PAGES.]

RIGHTS,
definition of, 3.
classification of, 3.
growth of, 3.
right and duty correlative, 2.
private and public distinguished, 10.
violation of, presumes damage, 22.
of privacy, 192.
of the family and its members, 251–270.
in respect to labor, trade and business, 289–302.
to the service of common carriers, 302.
to other *quasi*-public services, 304.
to the privileges and accommodations of inns, theaters, restaurants and the like, 305.
to instruction in the public schools, 307.
under civil rights acts, 306.
of suffrage, 309.
incorporeal, 351–372.
of abutting owners, 370.
of riparian owners, 370.
in inventions not patented, 352.
in literary and artistic productions, not copyrighted, 353.
in private letters, 354.
in use of property, 568.
in streams, 590.
RIPARIAN OWNERS,
rights of, 370.

S.

SAFE DEPOSIT COMPANIES,
are bailees for hire, 639.
liability for property of boxholders, 639.
SALOON,
whether a nuisance, 576.
SCHOOLS,
right to instruction in, 307.
SCOPE OF EMPLOYMENT. See MASTER AND SERVANT.
SEDUCTION,
of daughter, parents' action for, 260.
of wife, husband's action for, 252.
SELF DEFENSE,
batteries in, are excused, 153.
SERVANT. See MASTER AND SERVANT.
SETTLEMENT.
with one joint tort feasor, effect of, 102.

SHERIFFS,
liability of, to private suits, for acts and neglects, 394.
for acts of deputies, 398.
when jointly liable with party, 88.
jointly liable with deputy, 90.
cannot serve his own process, 191.

SIDEWALKS,
liability for defects in, 771.

SILENCE,
when fraudulent, 442.

SKILLED WORKMEN,
duty and liability of, 668.

SLANDER AND LIBEL,
joint liability for, 91.
general nature of the wrong, 196.
publication in, what constitutes, 196.
words actionable *per se*, 200.
classification of slanderous words, 200.
words which impute an indictable offense, 201.
words which impute a contageous or infectious disease, 205.
words damaging as respects office or profession, 205.
words which tend to injure one in his business or trade, 207.
words not actionable *per se*, but requiring special damage, 210.
libel and slander compared, 211.
what constitutes libel, 212.
meaning and construction of words used, 216.
questions for court and jury, 216.
the colloquium and innuendo, 219.
truth as a defense, 221.
malice, 223.
privilege in general, 224.
cases of absolute privilege. Judicial proceedings, 225.
legislative proceedings, 229.
executive acts, 230.
conditional privilege in general, 231.
examples of conditional privilege, 236.
cases privileged on individual reasons, 238.
privilege and responsibility of the press, 240.
liability for repeating slanders and libels, 246.
slander of property, 247.
of title, 247.
damages, 248.
slander of the dead, 195, 249.
action for, transitory, 250.
injunction against, 250.

[REFERENCES ARE TO PAGES.]

SLEEPING CAR COMPANIES,
liability of for property of passengers, 664.
SMELLS,
nuisance of, 601.
SMOKE,
nuisance of, 601.
SOAP FACTORY,
when a nuisance, 603.
SPECIAL DAMAGES,
in general, 123.
when necessary to make out slander or libel, 210.
SPECIAL DEPOSIT,
liability of bank for, 633–635.
SPEECH, PRIVILEGE OF. See PRIVILEGE.
STATE,
liability of, for torts, 82.
STATUTE OF LIMITATIONS,
as a defense, 140.
STATUTES,
giving action for wrongful death, 271–283.
in relation to master and servant, 564.
STATUTORY DUTIES,
action for neglect or violation of, 144, 675.
STREAM. See WATERCOURSE.
STREET RAILWAYS,
liability of, as carriers, 661.
liability for injuries to persons on street, 763.
STREETS. See HIGHWAYS.
STRIKES. See COMBINATIONS.
SUBTERRANEAN WATERS,
what interference with, a nuisance, 536.
SUFFRAGE,
action for violating right of, 309.
SUNDAY LAW,
violation of by plaintiff as a defense, 48.
SUPERINTENDENTS,
whether fellow servants, 544.
SUPERVISORS,
liability of, to private suits, 402.
SUPPORT,
right of, and its violation, 364.
SURFACE WATER,
rights in respect to, 582.
what interference with, a nuisance, 582.

T.

TANNERY,
whether a nuisance, 602.
TAXING OFFICERS,
liability to private suits for official acts and neglects, 400.
TEACHER,
right to restrain and discipline pupil, 160.
right to administer corporal punishment, 157.
when guilty of assault, 157.
when liable for refusing instruction, 308.
TELEGRAPH COMPANIES,
liability of, for slander and libel, 198.
for mental anguish, 24.
whether common carriers, 303, 665.
liability of, for negligence in regard to messages, 665.
rules and regulations of, 667.
contracts by, against liability for negligence, 728.
TENANTS IN COMMON,
rights and liabilities of, as respects each other, 333.
conversion by one, of other's interest, 432.
THEATERS,
right to attend, 305.
ticket to, is a license, 305 note.
THISTLES,
whether a nuisance, 582.
THREATS,
not an actionable wrong, 18.
TITLE,
slander of, 247.
false representations as to, whether actionable, 453.
TOOLS,
master's duty as to, 503.
TORTS,
general principles of, 1.
definition of, 1.
characteristics of, 2.
contract and tort, 3.
things merely immoral are not, 9.
distinguished from crimes, 10.
distinguished from breach of contracts, 12.
when and how may arise out of contract, 12–17.
acts merely intended are not, 17.
threats are not, 18.
accidental injuries are not, 18.

[REFERENCES ARE TO PAGES.]

TORTS—continued.
damage for the lawful exercise of rights, not actionable, 21.
whether there must be both wrong and damage to constitute, 22.
when damage presumed, 22–24.
when damage must be shown, 24.
whether mental anguish sufficient, 24.
fright or mental anguish producing sickness or other physical effects, 26.
proximate cause in, 30.
malicious acts not necessarily tortious, 43.
place of malice or bad motive in torts, 43–48.
effect of plaintiff being a wrongdoer, 48.
by relation, 52.
parties who may be held responsible for, 54–82.
liability of lunatics and persons of unsound mind for, 54.
liability of infants for, 57.
of parent for tort of child, 62.
of drunkards, 63.
of married women, 63.
of private corporations, 67.
of charitable corporations, 71.
of public corporations, 72.
of the state, 82.
joint torts and joint liability for torts, 83–107.
remedies for, 108–148.
affecting personal security, 149–195.
assault and battery, 149.
false imprisonment, 158.
malicious prosecution, 170.
malicious civil suits, 183.
malicious abuse of process, 188, 189, 191.
arrest of privileged persons, 192.
violating right of privacy, 192.
of slander and libel, 196–250.
injuries to family rights, 251–270.
action for wrongful death, 271–288.
injuries to civil and political rights, 289–310.
injuries to real property, 311–337.
trespasses by animals, 338–343.
injuries by vicious animals, 343.
by wild beasts, 350.
violation of incorporeal rights, 351–372.
infringement of copyrights and patents, 351.
injury to rights in works and inventions not copyrighted or patented, 352–354.
wrongs in respect to trade marks, 354–360.

TORTS—continued.
unfair competition, 361.
interference with easements, 362–372.
violations of official duty, 373–404.
wrongs in respect to personal property, 405–440.
conversion, 417.
fraud, 441–470.
in case of master and servant, 471–564.
nuisances, 565–630.
arising from neglect of conventional duties, 631–675.
bailments, 631–639.
safe deposit companies, 639, 640.
innkeepers, 640–646.
common carriers, 646–663.
passenger elevators, 663.
sleeping car companies, 664.
telegraph companies, 665.
professional services, 669.
attorneys, 670.
physicians, 671.
arising from neglect of statutory duty, 675.
of negligence, 681–780.

TRADE,
combinations to injure, 296.

TRADE MARKS,
what are, 354.
wrongs in respect to, 354.
what may be, 356.
what is an infringement of, 360.
unfair competition, 361.

TRADE UNIONS. See COMBINATIONS.

TREES,
standing, when personalty, 413.

TRESPASS,
action of, who must bring, 312.
upon lands, what is, 311.
in hunting, 313.
in fishing, 313.
by means of inanimate objects, 315.
the question of possession in trespass, 316.
remedy of reversioner for, 321.
by animals, 338–343.
to personal property, 414.

TRESPASSER AB INITIO, 331.

[REFERENCES ARE TO PAGES.]

TRESPASSER,
acquires no right to personal property by work and labor expended thereon, 117.
ab initio, when one becomes, 331.
on dangerous premises, liability to, 734.
in case of children, 736.
TROVER. See CONVERSION.
TURNTABLE,
liability to children playing about, 736.

U.

UNDERTAKER'S ESTABLISHMENT,
whether a nuisance, 576.
UNFAIR COMPETITION,
in trade, action for, 361.

V.

VALUE,
false representation as to, whether actionable, 446.
VENDOR. See FRAUD.
liability of, to persons not in privity of contract, 773.
VENUE,
in tort actions, 133.
VIBRATION,
nuisance of, 604.
VICIOUS ANIMALS,
injuries by, 343–348.
right to kill, 349.
VOLUNTARY SERVICES,
duty and liability in rendering, 674.
VOLUNTEER,
whether a servant, 471.

W.

WAIVER,
of tort and suing in contract, 129.
WASTE,
what is, 335.
voluntary waste, 335.
permissive waste, 337.
remedy for, 337.
WATERCOURSE,
rights in, generally, 590.
rights of bank proprietors, 370.

WATERCOURSE—continued.
action for diversion of, 592.
for detention of water, 593.
for damming or obstructing, 595.
for pollution of, 596.
what is reasonable use of, 597.
WATERS,
right to fish in, 313, 314.
rights of riparian owners, 370.
WAY,
easement of, 362.
WEEDS,
noxious, whether a nuisance, 582.
WIFE,
injuries to, 254.
action by, for alienation of husband's affection, 257.
WILD ANIMALS,
property in, 413.
liability of keeper for injuries by, 350.
WITNESS,
privilege of, 225.
WORDS,
do not constitute an assault, 18.
do not justify a battery, 154.
WRONG-DOERS,
joint liability of, 83–98.
contribution between, 104.
indemnity between, 104.
WRONGFUL DEATH,
action for, 271–288.
WRONGS. See TORTS.
moral and legal distinguished, 9.
public and private distinguished, 13.